12–10–04 Friday
Vol. 69 No. 237 Dec. 10, 2004

Pages 71691–73008

Federal Register

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.archives.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge as one of the databases on GPO Access, a service of the U.S. Government Printing Office.

The online edition of the **Federal Register** *www.gpoaccess.gov/nara,* available through GPO Access, is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 59, Number 1 (January 2, 1994) forward.

For more information about GPO Access, contact the GPO Access User Support Team, call toll free 1-888-293-6498; DC area 202-512-1530; fax at 202-512-1262; or via e-mail at *gpoaccess@gpo.gov.* The Support Team is available between 7:00 a.m. and 9:00 p.m. Eastern Time, Monday–Friday, except official holidays.

The annual subscription price for the **Federal Register** paper edition is $749 plus postage, or $808, plus postage, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $165, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: New Orders, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 69 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Printing Office, Washington DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**

Single copies/back copies:

Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**

FEDERAL AGENCIES

Subscriptions:

Paper or fiche	**202–741–6005**
Assistance with Federal agency subscriptions	**202–741–6005**

What's NEW!

Federal Register Table of Contents via e-mail

Subscribe to FEDREGTOC, to receive the **Federal Register** Table of Contents in your e-mail every day.

If you get the HTML version, you can click directly to any document in the issue.

To subscribe, go to **http://listserv.access.gpo.gov** and select:

Online mailing list archives
FEDREGTOC-L
Join or leave the list

Then follow the instructions.

What's NEW!

Regulations.gov, the award-winning Federal eRulemaking Portal

Regulations.gov is the one-stop U.S. Government web site that makes it easy to participate in the regulatory process.

Try this fast and reliable resource to find all rules published in the *Federal Register* that are currently open for public comment. Submit comments to agencies by filling out a simple web form, or use available e-mail addresses and web sites.

The Regulations.gov e-democracy initiative is brought to you by NARA, GPO, EPA and their eRulemaking partners.

Visit the web site at: **http://www.regulations.gov**

Printed on recycled paper.

Contents

Federal Register

Vol. 69, No. 237

Friday, December 10, 2004

Agricultural Marketing Service
RULES
Milk marketing orders:
Appalachian, Florida, and Southeast, 71697–71701
PROPOSED RULES
Cherries (tart) grown in—
Michigan et al., 71744–71749
Pistachios grown in—
California, 71749–71753
Raisins produced from grapes grown in—
California, 71753–71756

Agriculture Department
See Agricultural Marketing Service
See Animal and Plant Health Inspection Service
See Forest Service

Air Force Department
NOTICES
Privacy Act:
Systems of records, 71804–71806

Alcohol and Tobacco Tax and Trade Bureau
NOTICES
Meetings:
Imported wine; new certification requirements, 71873–71874

Animal and Plant Health Inspection Service
RULES
Plant-related quarantine, foreign:
Clementines, mandarins, and tangerines from Chile, 71691–71697
PROPOSED RULES
Plant-related quarantine, foreign:
Nursury stock, 71736–71744

Antitrust Division
NOTICES
National cooperative research notifications:
American Institute of Steel Construction, Inc., 71848
American Society for Nondestructive Testing, 71849
ANSI Accredited Standards Committee C37, 71849
ANSI Accredited Standards Committee C78, 71849
ANSI Accredited Standards Committee C80, 71850
ANSI Accredited Standards Committee C84, 71849
ASIS International, 71850
Business Process Management Initiative, 71850
Carbon Nanotechnologies, Inc., et al., 71850
National Committee for Clinical Laboratory Standards, 71851
North American Security Products Organization, 71851
RapidIO Trade Association, 71851
Wisconsin Certification Board, Inc., 71851–71852
Workflow Management Coalition, 71852

Blind or Severely Disabled, Committee for Purchase From People Who Are
See Committee for Purchase From People Who Are Blind or Severely Disabled

Centers for Medicare & Medicaid Services
See Inspector General Office, Health and Human Services Department
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 71816–71817
Medicaid:
State plan amendments, reconsideration; hearings—
Oklahoma, 71817–71818

Citizenship and Immigration Services Bureau
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 71826–71827

Coast Guard
RULES
Drawbridge operations:
Connecticut, 71704–71706
Minnesota and Wisconsin, 71706–71708
Ports and waterways safety:
Lake Michigan—
Chicago Captain of Port Zone, IL; security zone, 71708–71709
Puget Sound, WA, Captain of Port Zone; security zones, 71709–71711
PROPOSED RULES
Anchorage regulations and ports and waterways safety:
St. Johns River, Jacksonville, FL; regulated navigation areas, security zones, temporary anchorage areas, 71758–71764

Commerce Department
See Foreign-Trade Zones Board
See National Oceanic and Atmospheric Administration

Committee for Purchase From People Who Are Blind or Severely Disabled
NOTICES
Procurement list; additions and deletions, 71777–71779

Committee for the Implementation of Textile Agreements
NOTICES
Textile and apparel categories:
Chinese imports; safeguard actions, 71781–71782

Corporation for National and Community Service
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 71783–71785

Defense Department
See Air Force Department
NOTICES
Arms sales notification; transmittal letter, etc., 71785–71801
Meetings:
Science Board task forces, 71801–71803
Privacy Act:
Systems of records, 71803–71804

Education Department
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 71806–71807
Correction, 71879

Election Assistance Commission
NOTICES
Meetings; Sunshine Act, 71807

Employment Standards Administration
NOTICES
Minimum wages for Federal and federally-assisted construction; general wage determination decisions, 71852–71853

Energy Department
See Federal Energy Regulatory Commission
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 71807–71808

Environmental Protection Agency
RULES
Air quality implementation plans; approval and promulgation; various States:
Pennsylvania, 71712–71714
Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:
Azoxystrobin, etc., 71714–71717
PROPOSED RULES
Air programs; approval and promulgation; State plans for designated facilities and pollutants:
New Jersey, 71764–71766
NOTICES
Environmental statements; availability, etc.:
Agency statements—
Comment availability, 71810–71811
Weekly receipts, 71811–71812

Federal Aviation Administration
RULES
Class D airspace; correction, 71701
Class E airspace, 71702
Correction, 71701–71702
PROPOSED RULES
Class E airspace, 71756–71757
NOTICES
Passenger facility charges; applications, etc.:
St. Petersburg-Clearwater International Airport, FL, 71867–71868

Federal Communications Commission
RULES
Common carrier services:
Domestic public fixed radio services—
Fixed and mobile broadband access, educational, and other advanced services in 2150-2162 and 2500-2690 MHz bands, 72019–72047
PROPOSED RULES
Common carrier services:
Domestic public fixed radio services—
Fixed and mobile broadband access, educational, and other advanced services in 2150-2162 and 2500-2690 MHz bands, 72047–72052
NOTICES
Common carrier services:
Federal-State Joint Board on Universal Service—
Telecommunications reporting worksheet (Form 499-A); filing revisions deadline and instructions update, 71812–71814
Meetings:
North American Numbering Council; canceled, 71814

Federal Election Commission
NOTICES
Meetings; Sunshine Act, 71814–71815

Federal Emergency Management Agency
RULES
Flood elevation determinations:
North Dakota and Washington, 71721–71723
Various States, 71718–71721
NOTICES
Disaster and emergency areas:
Alabama, 71827
Alaska, 71827
Florida, 71827–71828
Pennsylvania, 71828

Federal Energy Regulatory Commission
NOTICES
Electric rate and corporate regulation filings, 71808–71810

Federal Highway Administration
NOTICES
Environmental statements; availability, etc.:
Garfield County et al., CO, 71868–71869

Federal Railroad Administration
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 71869–71871

Federal Retirement Thrift Investment Board
NOTICES
Meetings; Sunshine Act, 71815

Financial Management Service
See Fiscal Service

Fiscal Service
NOTICES
Surety companies acceptable on Federal bonds:
ALLIED Property and Casualty Insurance Co., 71874

Fish and Wildlife Service
RULES
Endangered and threatened species:
Incidental take permit revocation regulations, 71723–71731
PROPOSED RULES
Migratory bird hunting:
2005-06 migratory bird hunting regulations; preliminary issues; meeting, 71770–71771

Food and Drug Administration
RULES
Medical devices:
General hospital and personal use devices—
Implantable radiofrequency transponder system for patient identification and health information; classification, 71702–71704

NOTICES
Agency information collection activities; proposals, submissions, and approvals, 71819–71821
Reports and guidance documents; availability, etc.:
Medical devices—
Implantable radiofrequency transponder system for patient identification and health information; Class II special controls, 71821–71822

Foreign-Trade Zones Board
NOTICES
Applications, hearings, determinations, etc.:
Minnesota
Arctic Cat, Inc.; all-terrain vehicle engine and snowmobile manufacturing facilities, 71779–71780

Forest Service
NOTICES
Environmental statements; notice of intent:
Nebraska National Forest, NE and SD; correction, 71777

Health and Human Services Department
See Centers for Medicare & Medicaid Services
See Food and Drug Administration
See Inspector General Office, Health and Human Services Department
See National Institutes of Health
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 71815
Meetings:
Chronic Fatigue Syndrome Advisory Committee, 71815–71816

Homeland Security Department
See Citizenship and Immigration Services Bureau
See Coast Guard
See Federal Emergency Management Agency
See Transportation Security Administration

Housing and Urban Development Department
NOTICES
Grants and cooperative agreements; availability, etc.:
Homeless assistance; excess and surplus Federal properties, 71837–71843
Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005—
Disaster funds allocation; waivers and alternative requirements for disaster recovery grantees; statutory program requirements, 72099–72107

Inspector General Office, Health and Human Services Department
PROPOSED RULES
Medicare and State health programs; fraud and abuse:
Safe harbor provisions and special fraud alerts; intent to develop regulations, 71766–71767

Interior Department
See Fish and Wildlife Service
See Land Management Bureau
See Minerals Management Service

Internal Revenue Service
PROPOSED RULES
Income taxes:
Stapled foreign corporation; definition and tax treatment Public hearing canceled, 71757–71758
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 71874–71875
Correction, 71876

International Boundary and Water Commission, United States and Mexico
NOTICES
Environmental statements; notice of intent:
Dona Ana County, NM, and San Diego County, CA; Rio Grande and Tijuana River basins flood control projects, 71853–71854

Justice Department
See Antitrust Division
NOTICES
Pollution control; consent judgments:
AK Steel Corp., 71847
Global Companies, LLC, et al., 71847–71848
Motiva Enterprises LLC et al., 71848

Labor Department
See Employment Standards Administration

Land Management Bureau
NOTICES
Meetings:
Canyons of the Ancients National Monument Advisory Committee, 71843
Pinedale Anticline Working Group task groups, 71843–71845

Maritime Administration
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 71871

Mexico and United States, International Boundary and Water Commission
See International Boundary and Water Commission, United States and Mexico

Minerals Management Service
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 71845–71847

National Aeronautics and Space Administration
NOTICES
Committees; establishment, renewal, termination, etc.:
Summit Industry Panel 2005, 71854

National Highway Traffic Safety Administration
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 71871–71873

National Institutes of Health
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 71822–71823
Meetings:
National Institute of Arthritis and Musculoskeletal and Skin Diseases, 71824–71826
National Institute of Diabetes and Digestive and Kidney Diseases, 71825
National Institute of Environmental Health Sciences, 71824

National Institute of Neurological Disorders and Stroke, 71823–71824
National Institute on Deafness and Other Communication Disorders, 71824–71825
Scientific Review Center, 71826

National Oceanic and Atmospheric Administration
RULES
Fishery conservation and management:
Atlantic highly migratory species—
Atlantic bluefin tuna, 71732–71735
Large and small coastal sharks; correction, 71735
International fisheries regulations:
Pacific tuna—
Bigeye tuna; purse seine and longline fisheries restrictions, 71731–71732
PROPOSED RULES
Endangered and threatened species:
Critical habitat designations—
Pacific salmon and steelhead; California evolutionary significant units, 71879–72017
Fishery conservation and management:
Atlantic highly migratory species—
Atlantic bluefin tuna, 71771–71776
NOTICES
Marine mammals:
Incidental taking; authorization letters, etc.—
BP Exploration (Alaska); Beaufort Sea, AK; offshore oil and gas facilities; ringed seal, bowhead whale, etc., 71780–71781
Permits:
Scientific research, 71781

Nuclear Regulatory Commission
NOTICES
Environmental statements; availability, etc.:
Dominion Nuclear North Anna, LLC, 71854–71855
Tennessee Valley Authority, 71855–71856

Public Debt Bureau
See Fiscal Service

Securities and Exchange Commission
RULES
Investment advisors:
Hedge fund advisors; registration, 72053–72098
NOTICES
Meetings; Sunshine Act, 71856–71857
Self-regulatory organizations; proposed rule changes:
National Stock Exchange, 71857–71860
Philadelphia Stock Exchange, Inc., 71860–71863

Social Security Administration
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 71863–71867

Textile Agreements Implementation Committee
See Committee for the Implementation of Textile Agreements

Transportation Department
See Federal Aviation Administration
See Federal Highway Administration
See Federal Railroad Administration
See Maritime Administration
See National Highway Traffic Safety Administration

Transportation Security Administration
PROPOSED RULES
Privacy Act; implementation, 71767–71770
NOTICES
Privacy Act:
Systems of records, 71828–71837

Treasury Department
See Alcohol and Tobacco Tax and Trade Bureau
See Fiscal Service
See Internal Revenue Service
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 71873

Separate Parts In This Issue

Part II
Commerce Department, National Oceanic and Atmospheric Administration, 71879–72017

Part III
Federal Communications Commission, 72019–72052

Part IV
Securities and Exchange Commission, 72053–72098

Part V
Housing and Urban Development Department, 72099–72107

Reader Aids

Consult the Reader Aids section at the end of this issue 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
319.....71691
1005.....71697
1006.....71697
1007.....71697
Proposed Rules:
319.....71736
930.....71744
983.....71749
989.....71753

14 CFR
71 (4 documents) 71701, 71702
Proposed Rules:
71.....71756

17 CFR
275.....72054
279.....72054

21 CFR
880.....70702

26 CFR
Proposed Rules:
1.....71757
301.....71757

33 CFR
117 (2 documents) 71704, 71706
165 (2 documents) 71708, 71709
Proposed Rules:
110.....71758
165.....71758

40 CFR
52.....71712
180.....71714
Proposed Rules:
52.....71764

42 CFR
Proposed Rules:
1001.....71766

44 CFR
65.....71718
67.....71721

47 CFR
1.....72020
2.....72020
11.....72020
15.....72020
21.....72020
27.....72020
73.....72020
74.....72020
76.....72020
78.....72020
79.....72020
101.....72020
Proposed Rules:
1.....72046
27.....72046

49 CFR
Proposed Rules:
1507.....71767

50 CFR
17.....71723
300.....71731
635 (2 documents) 71732, 71735
Proposed Rules:
20.....71770
226.....71880
635.....71771

Rules and Regulations

Federal Register
Vol. 69, No. 237
Friday, December 10, 2004

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

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. 02–081–3]

RIN 0579–AB77

Importation of Clementines, Mandarins, and Tangerines From Chile

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the regulations to allow the importation, under certain conditions, of clementines, mandarins, and tangerines from Chile into the United States. Based on the evidence in a recent pest risk assessment and an accompanying risk management document, we believe these articles can be safely imported from all provinces of Chile, provided certain conditions are met. This action provides for the importation of clementines, mandarins, and tangerines from Chile into the United States while continuing to protect the United States against the introduction of plant pests.

EFFECTIVE DATE: January 10, 2005.

FOR FURTHER INFORMATION CONTACT: Ms. Jeanne VanDersal, Import Specialist, Phytosanitary Issues Management Staff, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737–1236; (301) 734–6799.

SUPPLEMENTARY INFORMATION:

Background

The regulations in ''Subpart—Fruits and Vegetables'' (7 CFR 319.56 through 319.56–8, referred to below as the regulations), prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests. The Government of the Republic of Chile has requested that the Animal and Plant Health Inspection Service (APHIS) amend the regulations to allow the importation into the United States of clementines, mandarins, and tangerines from Chile under certain conditions without methyl bromide fumigation. Chile also requested that we allow methyl bromide fumigation to remain an option for clementines, mandarins, and tangerines that do not meet the requirements of the systems approach or in case pests are found during routine inspections.

On October 22, 2002, we published a notice in the **Federal Register** (67 FR 64862–64863, Docket No. 02–081–1) in which we advised the public of the availability of a draft pest risk assessment and an accompanying risk management document that evaluated the risks associated with importing citrus from Chile. We solicited comments concerning those documents for 60 days ending December 23, 2002, and received no comments by that date. We subsequently amended the pest risk assessment in March 2004 to include information related to a Mediterranean fruit fly (Medfly) trapping in Chile in April 2003.

On March 22, 2004, we published in the **Federal Register** (69 FR 13262–13269, Docket No. 02–081–2) a proposal to amend the regulations to allow the importation, under certain conditions, of clementines, mandarins, and tangerines from Chile into the United States.

We solicited comments concerning our proposal for 60 days ending May 21, 2004. We received five comments by that date. They were from exporters, researchers, and representatives of State, local, and foreign governments. One commenter supported the proposed rule as written. The remaining commenters raised specific issues regarding the proposed rule. Those issues are discussed below by topic.

We proposed to allow the importation of clementines, mandarins, and tangerines from Chile subject either to the systems approach described in proposed § 319.56–2ll(d) or to fumigation with methyl bromide in Chile in accordance with proposed § 319.56–2ll(e). We also proposed to allow the importation of clementines, mandarins, and tangerines originating from areas in Chile where Medfly is known to occur provided they are subject to the cold treatment schedules prescribed in the Plant Protection and Quarantine (PPQ) Treatment Manual which is incorporated by reference at 7 CFR 300.1, ''Plant Protection and Quarantine Treatment Manual.''

The national plant protection organization of Chile and the Chilean Exporters Association stated that the fumigation option should provide for the treatment to take place either in Chile or at the port of first arrival in the United States, noting that we allow this choice of treatment locations for other commodities being imported into the United States from Chile.

In response to this comment, § 319.56–2mm(e) of this final rule allows fruit requiring methyl bromide fumigation as a condition of entry to be fumigated in either Chile or the United States.

In our proposed rule, § 319.56–2ll(e) stated that fumigated fruit must be inspected in Chile at an APHIS-approved inspection site under the direction of APHIS inspectors in coordination with the national plant protection organization of Chile. Two commenters stated that an inspection following methyl bromide fumigation is unnecessary because the treatment's efficacy against target pests (*Brevipalpus chilensis, Proeulia auraria,* and *Proeulia chrysopteris*) has already been scientifically established.

We agree with the commenters that methyl bromide fumigation does address the risk of all three of the targeted pests and that post-fumigation inspection is not necessary to ensure phytosanitary security. Therefore, we have removed the proposed post-fumigation inspection requirement from paragraph (e) in this final rule. With respect to *Proeulia auraria* and *Proeulia chrysopteris*, we note that we incorrectly referred to these pests in the background information of the proposed rule as fruit leaf folders, whereas they are more correctly identified as tortricid leafrollers.

Two commenters stated that we referred to treatment schedule T104–a–1 in the proposed rule, but published T101–n–2–1. The commenters did not take issue with the prescribed treatment schedule itself, but simply questioned whether we published the right treatment schedule.

We did not publish T104–a–1 in its entirety in the proposed rule, which is

what led to the confusion surrounding the treatment schedules. Schedule T104–a–1 includes a note that all citrus must be fumigated at a minimum of 50 °F, which is why we omitted the lower temperature options in the treatment schedule that was published in the proposed rule. Without the lower temperature options, the treatment appears to be the same as T101–n–2–1.

One commenter stated that, in the supplementary information of the proposed rule, Chile's Metropolitan Region is incorrectly listed as an area where Medfly is known to exist. The commenter added that Medfly was completely eradicated from this area and verified by the United States Department of Agriculture (USDA) officials in December 2003.

The Arica Province is the only area in Chile where Medfly is known to occur; the commenter is correct that the Medfly outbreak in the Metropolitan Region has been eradicated.

One commenter stated that a production site's ''low prevalence'' status should only be changed as a result of an inspection of the site itself by USDA officials. The commenter objected to the provisions of proposed § 319.56–211(d)(4) under which a production site's low prevalence status would be suspended for the remainder of the shipping season if a single *Brevipalpus chilensis* mite is found during the required pre-export phytosanitary inspection and contended that the term ''low prevalence'' in itself allows for the existence of some pests. The commenter also stated that the established procedure with other commodities and countries allows for such a shipment to continue to its destination provided that it undergoes an approved quarantine treatment. Further, the commenter claimed that suspending a production site's certification is unnecessary as long as a treatment that is efficacious against the targeted pest can be applied to a specific shipment before it is released for entry into U.S. commerce.

The systems approach requires certain actions to be taken by fruit producers to control *Brevipalpus chilensis* in the field in addition to packinghouses. The commenter is correct that production sites can be certified as ''low prevalence'' with the understanding that some *Brevipalpus chilensis* may be present. However, no single *Brevipalpus chilensis* mite should be present on the fruit after the fruit has been through the post-harvest processing procedures, which include washing, rinsing in a chlorine bath with brushing using bristle rollers, and waxing. If, after undergoing these procedures, a *Brevipalpus chilensis* mite is found, it would indicate a greater problem with the implementation of the systems approach and the production site and/or the packinghouse would need to be investigated. Suspending the site's certification allows for us to conduct such an investigation and for the site to correct any errors in its implementation of the systems approach. The commenter is correct that a site should be allowed to continue shipping to the United States because an efficacious treatment against *Brevipalpus chilensis* exists. That is why this rule provides that a site that has lost its eligibility to ship under the systems approach may continue shipping to the United States using methyl bromide fumigation for the remainder of the shipping season.

One commenter questioned the appropriateness of using a pest risk assessment developed for Medfly in Peru for Chile.

In the pest risk assessment and risk management document developed for the proposed rule, we stated that a recent assessment examining Medfly in Peru was applicable to Chile because the pest and hosts from the two countries are the same and the climatic conditions and environments are similar. The only portion of the pest risk assessment for Peru that was adapted for the pest risk assessment for Chile was the section pertaining to the risk ratings for Medfly, which are considered high for both Peru and Chile and would have been no different if the section was redone for Chile.

One commenter stated that our proposal failed to address the risk posed by fruit flies and that interceptions of Medfly in Chile in both 2003 and 2004 should be cause to stop shipments of citrus from Chile.

We do not agree with this commenter's statement that we failed to address fruit fly concerns in our proposed rule. While the proposed rule dealt largely with describing a systems approach for *Brevipalpus chilensis,* it also included provisions requiring that eligible citrus from regions in Chile where Medfly is known to occur be cold treated in accordance with the PPQ Treatment Manual. We acknowledge that Medfly was intercepted in Chile in both 2003 and 2004 and we will consider any region in Chile where Medfly is captured to be subject to these provisions until it has been eradicated. We believe that cold treatment will prevent the introduction of Medfly into the United States.

One commenter stated that his company had developed a new fumigation treatment using pure phosphine at low temperatures that would not damage fruit as methyl bromide fumigation can. The commenter requested that we add this new treatment to the regulations as an alternative to methyl bromide fumigation.

APHIS would need to evaluate a treatment's effectiveness before listing it as an approved treatment. The commenter is welcome to send information pertaining to the treatment and its efficacy against targeted pests to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the treatment is found to be efficacious against a specific pest or pests, we may propose to add it to the regulations as an approved treatment and present the proposal for public comment.

Miscellaneous

In our March 2004 proposed rule, we proposed to add the conditions governing the importation of clementines, mandarins, and tangerines from Chile as § 319.56–211. In this final rule, those conditions are added as § 319.56–2mm.

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

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The 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.

For this rule, we have prepared an economic analysis. The economic analysis provides a cost-benefit analysis as required by Executive Order 12866, as well as an analysis of the potential economic effects of this rule on small entities, as required under the Regulatory Flexibility Act. The economic analysis is summarized below. See the full analysis for the complete list of references used in this document. Copies of the full analysis are available on the APHIS Web site at *http://www.aphis.usda.gov/ppd/rad/clementinesecon.pdf* or by calling or writing the person listed under **FOR FURTHER INFORMATION CONTACT**. Copies of the economic analysis are also available for viewing in our reading room, located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you,

please call (202) 690–2817 before coming.

Summary of Economic Analysis

Our analysis estimates expected benefits and costs associated with allowing the importation of clementines, mandarins, and tangerines from Chile into the United States. The analysis assumes that this change in the regulations will not lead to an increased risk of pest outbreaks in the United States. Currently, no clementines, mandarins, or tangerines are being imported into the United States from Chile. According to the Chilean Exporters' Association, 1,300 hectares are planted with clementines, mandarins, and tangerines in Chile, and Chile would like to export approximately 1,600 metric tons of clementines, mandarins, and tangerines to the United States. This amount is a little more than 15 percent of Chile's total exports of these commodities in 2001 (table 1).

TABLE 1.—WORLD EXPORTS OF CLEMENTINES, MANDARINS, AND CITRUS HYBRIDS FROM CHILE

Year	Value (1,000 $)	Quantity (1,000 kg)
1993	$4.29	3
1994	61.78	81
1995	636.64	780
1996	1,408.64	1,951
1997	1,675.17	1,579
1998	4,177.41	4,918
1999	4,063.65	4,819
2000	4,743.93	6,896
2001	7,441.46	10,398

Source: The U.S. Department of Agriculture's (USDA's) Foreign Agricultural Service, as reported by U.N. Trade Statistics. Values are in 2002 dollars and were deflated using the Consumer Price Index (All Urban Consumers) for fresh fruits, not seasonally adjusted, as reported by the U.S. Department of Labor's Bureau of Labor Statistics.

Clementines and mandarins are not produced in the United States in commercially significant quantities. Tangerines are produced domestically. Most imports from Chile are expected to be clementines, not tangerines. An earlier economic analysis by APHIS examined the relationship between imports of Spanish clementines and domestically produced tangerines but did not find evidence of substitution. That analysis did not look at the relationship between Spanish clementines and other citrus. However, U.S. producers of other kinds of citrus—especially California navel oranges—have expressed concerns that imports of Spanish clementines have taken market share and depressed prices for navel oranges, reflecting that the imports are marketed in the United States during the same season as navels.

An increase in supply of clementines could potentially increase competition in the United States for domestically produced citrus, such as oranges and tangerines. If imports from Chile increase, U.S. producer prices could decline during the time when a larger supply is on the market. However, Chilean clementines are expected to enter the United States primarily between April and September, which is the off-season for domestic tangerines. Most of the fresh early tangerines from Florida, which is the largest producer of tangerines, are shipped from October to January, while most of the fresh Honey tangerines are shipped from February to May (Brown 2000).[1] California navel oranges are marketed primarily from November to May, while California Valencia oranges are primarily marketed from April to October.

Table 2 shows the monthly orange shipments for fresh uses of three major citrus producing States. Oranges include Valencia, navel, and early/midseason varieties. Domestic orange shipments between April and September comprise about 25 percent of total shipments annually. Although the data represent only a proportion of the production dedicated for fresh utilization, they provide an indication of the domestic orange marketing seasons for comparative purposes. The April–September marketing period for Chilean clementines matches the California and Florida Valencia marketing seasons, so the clementines could displace some fresh market Valencia orange sales. However, the expected amount of 1,600 metric tons represents a small share (less than 2 percent) of the domestic shipments between April and September (99,712 metric tons). The competition with various summer fruits is likely to have a far greater impact. Given the small number of expected imports from Chile and the different marketing seasons, any potential impacts on U.S. citrus producers would be minimal.

TABLE 2.—MONTHLY ORANGE SHIPMENTS FOR FRESH UTILIZATION, AVERAGE 2000–2002

Month	Average shipments by State (metric tons)			Total
	California	Florida	Texas	
January	7,818	25,106	8,818	41,742
February	7,076	19,182	7,652	33,910
March	9,394	18,742	5,333	33,470
April	8,091	20,545	2,485	31,121
May	8,394	19,030	1,182	28,606
June	7,136	13,242	0	20,379
July	5,409	545	0	5,955
August	5,652	45	0	5,697
September	4,773	2,652	530	7,955
October	4,242	23,848	5,015	33,106
November	5,288	37,348	5,576	48,212

[1] Florida is the largest producer of tangerines, accounting for 68 percent of total domestic production annually, followed by California (26 percent), and Arizona (6 percent).

TABLE 2.—MONTHLY ORANGE SHIPMENTS FOR FRESH UTILIZATION, AVERAGE 2000–2002—Continued

Month	Average shipments by State (metric tons)			Total
	California	Florida	Texas	
December	7,561	53,500	8,848	69,909

Note: Orange shipment data for California and Arizona include only rail and piggyback (trailer-on-flat-car and container-on-flat-car). Truck shipment data are not available. Average California orange shipments for 2000–2002 represent about 5 percent of California's production for fresh utilization over the same time period. Arizona data are excluded (available shipment data were small in 2000–2001 and zero in 2002). Average Florida and Texas shipments for 2000–2002 represent about 60 percent and 93 percent, respectively, of fresh production for those States. Source: USDA/AMS Fruits and Vegetable Market News.

Most U.S. imports of clementines, mandarins, and tangerines (table 3) currently come from Spain, which ships the commodities from mid-September to mid-March. Chile would export these commodities to the United States between April and September each year. These imports would increase the availability of these fruits during the Spanish off-season, which would lead to benefits for U.S. importers and consumers.

TABLE 3.—U.S. WORLD IMPORTS OF CLEMENTINES, MANDARINS, AND CITRUS HYBRIDS

Year	Value (1,000 $)	Quantity (1,000 kg)
1991	$23,306	19,480
1992	26,219	18,112
1993	27,019	17,519
1994	30,404	20,850
1995	26,010	19,062
1996	39,976	27,404
1997	63,279	42,110
1998	60,356	43,168
1999	128,104	90,454
2000	113,953	96,296
2001	131,711	75,365

Source: Import data are from the USDA's Foreign Agricultural Service, as reported by U.N. Trade Statistics. Values are in 2002 dollars and were deflated using the Consumer Price Index (All Urban Consumers) for fresh fruits, not seasonally adjusted, as reported by the U.S. Department of Labor's Bureau of Labor Statistics.

To capture the impact on U.S. importers, an inverse demand curve characterizing the U.S. demand for imported clementines, tangerines, and mandarin oranges was estimated. The demand for the imported commodities can be related to the export prices and quantities for Spanish fruits exported to all markets except the United States. Spanish export data were used because over 83 percent of U.S. imports of these fruits was from Spain during 1997–2001. Data on imports for 1991–2001 were used to analyze the expected impacts for the 10-year period (2004–2013) subsequent to the entry of the imports from Chile.

Imports from Chile were assumed to grow 13.55 percent each year, which was the average annual growth during 1999–2001 in Chile's exports to Japan, its best export market, and that imports for 2004 will be 1,595 metric tons (table 4). It was assumed that U.S. imports from sources other than Chile will grow 6.46 percent per year, which was the import growth during 1999–2000, starting from an estimate of 87,372 metric tons imported for 2002, which was the average import quantity during 1999–2001 (table 3).

TABLE 4.—ESTIMATED U.S. IMPORTS OF CLEMENTINE, MANDARIN, AND TANGERINE WITH AND WITHOUT CHILE

Year	Clementine, mandarin, and tangerine imports (1,000 kg)	
	Without Chile	With Chile
2004	99,020	100,620
2005	105,420	107,230
2006	112,230	114,280
2007	119,470	121,810
2008	127,190	129,840
2009	135,400	138,420

TABLE 4.—ESTIMATED U.S. IMPORTS OF CLEMENTINE, MANDARIN, AND TANGERINE WITH AND WITHOUT CHILE—Continued

Year	Clementine, mandarin, and tangerine imports (1,000 kg)	
	Without Chile	With Chile
2010	144,150	147,570
2011	153,460	157,340
2012	163,370	167,780
2013	173,920	178,930

Expected future gross revenues (table 5) were discounted by using real interest rates of 3 percent and 7 percent as recommended by the Office of Management and Budget. For further sensitivity analysis, a rate of 5.34 percent, which was estimated using annual income and rate of return data for U.S. farmers during 1966–1994, is also provided.[2] The annualized increase in gross revenues received by U.S. importers of clementines, mandarins, and tangerines under this rule was an estimated $0.60 million per year during 2004–2013, depending on the interest rate chosen. This suggests that the rule will yield economic benefits to U.S. importers during the period in which it remains in force. Consumers also benefit from the greater availability of clementines during the off-season for domestic production and other imports. The rule will result in net benefits to society given that the new imports are not expected to significantly compete with domestic citrus production and will not lead to pest introductions.

TABLE 5.—IMPACT ON GROSS REVENUES OF U.S. IMPORTERS

[$ millions]

Year	With Chile	Without Chile	Gains
2004	$7.48	$7.24	$0.24
2005	8.50	8.21	0.28
2006	9.65	9.31	0.34
2007	10.96	10.55	0.42

[2] Lence, S.H. ''Using Consumption and Asset Return Data to Estimate Farmers' Time Preferences and Risk Attitudes.''

TABLE 5.—IMPACT ON GROSS REVENUES OF U.S. IMPORTERS—Continued

[$ millions]

Year	With Chile	Without Chile	Gains
2008	12.46	11.95	0.50
2009	14.16	13.55	0.61
2010	16.09	15.35	0.74
2011	18.29	17.40	0.89
2012	20.80	19.72	1.08
2013	23.66	22.35	1.31
Annualized discounted sum of gross revenues:			
3%	$13.78	$13.16	$0.61
5.34%	$13.46	$12.86	$0.59
7%	$13.24	$12.66	$0.58

Impacts on Small Entities

According to the 1997 Census of Agriculture, there were 17,000 citrus producers (excluding grapefruit, lemon, and lime producers) in the United States. The U.S. Small Business Administration defines a small citrus producer as one with annual gross revenues no greater than $0.75 million. The USDA's National Agricultural Statistics Service reported that 3.8 percent of U.S. fruit and tree nut producers accounted for 95.1 percent of sales in 1982, 4.2 percent of fruit and tree nut producers accounted for 96.2 percent of sales in 1987, and 4.6 percent of fruit and tree nut producers accounted for 96.7 percent of sales in 1992. These data indicate that the majority of U.S. citrus producers are small entities. Our economic analysis suggests that Chilean imports will not significantly compete with domestic citrus production such as tangerines and navel oranges because the imports will be shipped largely during the off-season for U.S. production of these fruits. Although the Chilean imports are expected to overlap with some domestic orange shipments such as Valencia oranges, the amount to be imported is expected to be a small percentage of the total U.S. orange shipments during the importing months. As a result, the importation of clementines, mandarins, and tangerines from Chile will likely have minimal adverse impact on domestic citrus producers, large or small.

Importers of clementines, mandarins, and tangerines will likely benefit under this rule. The number of importers that can be classified as small is not known. However, the rule will not lead to an adverse economic impact on small entities in these industries (fresh fruit and vegetable wholesalers with no more than 100 employees, NAICS 422480; wholesalers and other grocery stores with annual gross revenues no greater than $23 million, NAICS 445110; warehouse clubs and superstores with annual gross revenues no greater than $23 million, NAICS 452910; and fruit and vegetable markets with gross revenues no greater than $6 million, NAICS 445230).

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

Executive Order 12988

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

Use of Methyl Bromide

The United States is fully committed to the objectives of the Montreal Protocol, including the reduction and ultimately the elimination of reliance on methyl bromide for quarantine and pre-shipment uses in a manner that is consistent with the safeguarding of U.S. agriculture and ecosystems. APHIS reviews its methyl bromide policies and their effect on the environment in accordance with the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*) and Decision XI/13 (paragraph 5) of the 11th Meeting of the Parties to the Montreal Protocol, which calls on the Parties to review their ''national plant, animal, environmental, health, and stored product regulations with a view to removing the requirement for the use of methyl bromide for quarantine and pre-shipment where technically and economically feasible alternatives exist.''

The United States Government encourages methods that do not use methyl bromide to meet phytosanitary standards where alternatives are deemed to be technically and economically feasible. In some circumstances, however, methyl bromide continues to be the only technically and economically feasible treatment against specific quarantine pests. In addition, in accordance with Montreal Protocol Decision XI/13 (paragraph 7), APHIS is committed to promoting and employing gas recapture technology and other methods whenever possible to minimize harm to the environment caused by methyl bromide emissions. As noted above, we welcome data or other information regarding other treatments that may be efficacious and technically and economically feasible that we may consider as alternatives to methyl bromide.

National Environmental Policy Act

An environmental assessment and finding of no significant impact (FONSI) have been prepared for this rule. The assessment provides a basis for the conclusion that the importation of clementines, mandarins, and tangerines under the conditions specified in this rule will not have a significant impact on the quality of the human environment. Based on the finding of no significant impact, the Administrator of the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

The environmental assessment and FONSI were prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended

(42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

The environmental assessment and FONSI may be viewed on the Internet at *http://www.aphis.usda.gov/ppq/enviro_docs/chil.html.* Copies of the environmental assessment and FONSI are also available for public inspection in our reading room, located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming. In addition, copies may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT.**

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this rule have been approved by the Office of Management and Budget (OMB) under OMB control number 0579–0242.

Government Paperwork Elimination Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. For information pertinent to GPEA compliance related to this rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

List of Subjects in 7 CFR Part 319

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

■ Accordingly, 7 CFR part 319 is amended as follows:

PART 319—FOREIGN QUARANTINE NOTICES

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

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

■ 2. A new § 319.56–2mm is added to read as follows:

§ 319.56–2mm Conditions governing the importation of clementines, mandarins, and tangerines from Chile.

Clementines (*Citrus reticulata* Blanco var. Clementine), mandarins (*Citrus reticulata* Blanco), and tangerines (*Citrus reticulata* Blanco) may be imported into the United States from Chile only under the following conditions:

(a) The fruit must be accompanied by a specific written permit issued in accordance with § 319.56–3.

(b) If the fruit is produced in an area of Chile where Mediterranean fruit fly (*Ceratatis capitata*) is known to occur, the fruit must be cold treated in accordance with the Plant Protection and Quarantine (PPQ) Treatment Manual, which is incorporated by reference at § 300.1 of this chapter. Fruit for which cold treatment is required must be accompanied by documentation indicating that the cold treatment was initiated in Chile (a PPQ Form 203 or its equivalent may be used for this purpose).

(c) The fruit must either be produced and shipped under the systems approach described in paragraph (d) of this section or fumigated in accordance with paragraph (e) of this section.

(d) *Systems approach.* The fruit may be imported without fumigation for *Brevipalpus chilensis* if it meets the following conditions:

(1) *Production site registration.* The production site where the fruit is grown must be registered with the national plant protection organization (NPPO) of Chile. To register, the production site must provide Chile's NPPO with the following information: Production site name, grower, municipality, province, region, area planted to each species, number of plants/hectares/species, and approximate date of harvest. Registration must be renewed annually.

(2) *Low prevalence production site certification.* Between 1 and 30 days prior to harvest, random samples of fruit must be collected from each registered production site under the direction of Chile's NPPO. These samples must undergo a pest detection and evaluation method as follows: The fruit and pedicels must be washed using a flushing method, placed in a 20 mesh sieve on top of a 200 mesh sieve, sprinkled with a liquid soap and water solution, washed with water at high pressure, and washed with water at low pressure. The process must then be repeated. The contents of the sieves must then be placed on a petri dish and analyzed for the presence of live *B. chilensis* mites. If a single live *B. chilensis* mite is found, the production site will not qualify for certification as a low prevalence production site and will be eligible to export fruit to the United States only if the fruit is fumigated in accordance with paragraph (e) of this section. Each production site may have only one opportunity per harvest season to qualify as a low prevalence production site, and certification of low prevalence will be valid for one harvest season only. The NPPO of Chile will present a list of certified production sites to APHIS.

(3) *Post-harvest processing.* After harvest and before packing, the fruit must be washed, rinsed in a chlorine bath, washed with detergent with brushing using bristle rollers, rinsed with a hot water shower with brushing using bristle rollers, predried at room temperature, waxed, and dried with hot air.

(4) *Phytosanitary inspection.* The fruit must be inspected in Chile at an APHIS-approved inspection site under the direction of APHIS inspectors in coordination with the NPPO of Chile after the post-harvest processing. A biometric sample will be drawn and examined from each consignment of fruit, which may represent multiple grower lots from different packing sheds. Clementines, mandarins, or tangerines in any consignment may be shipped to the United States only if the consignment passes inspection as follows:

(i) Fruit presented for inspection must be identified in the shipping documents accompanying each lot of fruit that identify the production site(s) where the fruit was produced and the packing shed(s) where the fruit was processed. This identity must be maintained until the fruit is released for entry into the United States.

(ii) A biometric sample of boxes from each consignment will be selected and the fruit from these boxes will be visually inspected for quarantine pests, and a portion of the fruit will be washed and the collected filtrate will be microscopically examined for *B. chilensis.*

(A) If a single live *B. chilensis* mite is found, the fruit will be eligible for importation into the United States only if it is fumigated in Chile in accordance with paragraph (e) of this section. The production site will be suspended from the low prevalence certification program and all subsequent lots of fruit from the production site of origin will be required to be fumigated as a condition

of entry to the United States for the remainder of the shipping season.

(B) If inspectors find evidence of any other quarantine pest, the fruit in the consignment will remain eligible for importation into the United States only if an authorized treatment for the pest is available in the PPQ Treatment Manual and the entire consignment is treated for the pest in Chile under APHIS supervision.

(iii) Each consignment of fruit must be accompanied by a phytosanitary certificate issued by the NPPO of Chile that contains an additional declaration stating that the fruit in the consignment meets the conditions of § 319.56–2mm(d).

(e) *Approved fumigation.* Clementines, mandarins, or tangerines that do not meet the conditions of paragraph (d) of this section may be imported into the United States if the fruit is fumigated either in Chile or at the port of first arrival in the United States with methyl bromide for *B. chilensis* in accordance with the PPQ Treatment Manual, which is incorporated by reference at § 300.1 of this chapter. An APHIS inspector will monitor the fumigation of the fruit and will prescribe such safeguards as may be necessary for unloading, handling, and transportation preparatory to fumigation. The final release of the fruit for entry into the United States will be conditioned upon compliance with prescribed safeguards and required treatment.

(f) *Trust fund agreement.* Clementines, mandarins, and tangerines may be imported into the United States under this section only if the NPPO of Chile has entered into a trust fund agreement with APHIS. This agreement requires the NPPO of Chile to pay in advance of each shipping season all costs that APHIS estimates it will incur in providing inspection and treatment monitoring services in Chile during that shipping season. These costs include administrative expenses and all salaries (including overtime and the Federal share of employee benefits), travel expenses (including per diem expenses), and other incidental expenses incurred by APHIS in performing these services. The agreement requires the NPPO of Chile to deposit a certified or cashier's check with APHIS for the amount of these costs, as estimated by APHIS. If the deposit is not sufficient to meet all costs incurred by APHIS, the agreement further requires the NPPO of Chile to deposit with APHIS a certified or cashier's check for the amount of the remaining costs, as determined by APHIS, before APHIS will provide any more services related to the inspection and treatment of clementines, mandarins, and tangerines in Chile. After a final audit at the conclusions of each shipping season, any overpayment of funds would be returned to the NPPO of Chile, or held on account until needed, at their option.

(Approved by the Office of Management and Budget under control number 0579–0242.)

Done in Washington, DC, this 23rd day of November, 2004.

Peter Fernandez,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 04–27075 Filed 12–9–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1005, 1006, and 1007

[Docket No. AO–388–A16, AO–356–A38, and AO–366–A45; DA–04–07]

Milk in the Appalachian, Florida, and Southeast Marketing Areas; Order Amending the Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final Rule.

SUMMARY: This final rule amends the Appalachian, Florida, and Southeast Federal milk marketing orders (Orders 5, 6, and 7). Specifically, the final rule implements a temporary supplemental charge on Class I milk that will be disbursed to handlers who incurred extraordinary transportation costs for bulk milk movements in and to Orders 5, 6, and 7 as a result of hurricanes Charley, Frances, Ivan and Jeanne. The amendments are based on record evidence of a public hearing held on October 7, 2004. More than the required number of dairy farmers approved the issuance of the amended orders.

DATES: *Effective Date:* December 10, 2004.

FOR FURTHER INFORMATION CONTACT: Antoinette M. Carter, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation and Enforcement Branch, STOP 0231—Room 2971, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202) 690–3465, e-mail address: *antoinette.carter@usda.gov.*

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have a retroactive effect. This rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with the rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees.

For the purposes of determining which dairy farms are ''small businesses,'' the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ''small'' dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During August 2004, the most recent representative month, the milk of 7,239 dairy farmers was pooled under the Appalachian (Order 5), Florida (Order 6), and Southeast (Order 7) milk orders (3,400 Order 5 dairy farmers, 267 Order 6 dairy farmers, and 3,572 Order 7 dairy farmers, respectively). Of the 7,239 dairy farmers, 80 percent met the definition of small business. Specifically, the number of dairy farmers considered small businesses for Order 5, Order 6, and Order 7 were 3,230 or 95 percent, 134 or 50 percent, and 3,407 or 95 percent, respectively.

During August 2004, there were 65 fully regulated plants under Orders 5, 6, and 7. Of the 65 plants, 7 were considered small businesses. Specifically, there were 25 Order 5 plants (of which 2 were small businesses), 12 Order 6 plants (of which 3 were small businesses), and 28 Order 7 plants (of which 2 were small businesses).

The amendments in this final rule will provide temporary reimbursement to handlers (cooperative associations and proprietary handlers) who incurred extraordinary transportation expenses for bulk milk movements resulting from the impact of hurricanes Charley, Frances, Ivan, and Jeanne on the Southeastern United States, particularly the State of Florida. The proposed amendments were requested by Dairy Farmers of America, Inc., Lone Star Milk Producers, Inc., Maryland & Virginia Milk Producers Cooperative Association, Inc., and Southeast Milk, Inc. The dairy farmer members of these four cooperatives supply the majority of the milk pooled under the Appalachian, Florida, and Southeast orders. The final rule will implement, for a 3-month period beginning January 1, 2005, a supplemental increase in the Class I milk price at a rate not to exceed $.04 per hundredweight of milk in the Appalachian and Southeast orders, and a rate not to exceed $.09 per hundredweight of milk in the Florida order. The amount generated through the Class I milk increase will be disbursed during February 2005 through April 2005 to qualifying handlers who incurred extraordinary transportation costs as a result of the hurricanes. The reimbursement for extraordinary transportation costs will be disbursed to qualifying handlers on an actual transportation costs basis or at a rate of $2.25 per loaded mile, whichever is less.

The aforementioned hurricanes occurred during a 7-week period of time and disrupted the orderly flow of milk movements in and to the Appalachian, Florida, and Southeast marketing areas. The four hurricanes caused handlers in the southeastern markets, particularly in the Florida marketing area, to experience disruptions in moving bulk milk to supply the Class I (fluid milk) needs of the individual marketing areas.

One of the functions of the Federal milk order program is to provide for the orderly exchange of milk between the dairy farmer and the handler (first buyer) to ensure the Class I needs of the market are met. The record evidence clearly reveals that the movements of bulk milk for Orders 5 and 7, and particularly Order 6 were disrupted due to the hurricanes. Accordingly, the amendments adopted in this final rule will provide temporary transportation cost reimbursement to handlers who incurred additional transportation expenses for bulk milk movements that were disrupted as a result of extraordinary weather conditions in Orders 5, 6, and 7.

The amendments will provide reimbursement to handlers for transportation expenses totaling over $1.6 million for movements of bulk milk due to the hurricanes. The supplemental increase in the minimum price of Class I milk at a maximum rate of $.09 per hundredweight for Order 6 is anticipated to increase the price of a gallon of milk by not more than $0.0078 (*i.e.*, less than 1-cent) during each month of the 3-month period. Likewise, a supplemental increase at a maximum rate of $.04 per hundredweight for Orders 5 and 7 is anticipated to increase the price of a gallon of milk by not more than $0.0034 (*i.e.*, less than 1-cent) during each month of the 3-month period. The estimated impact on the price per gallon of milk was calculated by converting the hundredweight value to gallons using 8.62 pounds of milk per gallon.

Handlers in Orders 5, 6, and 7 should not be placed at a competitive disadvantage because of the temporary and limited supplemental increase in the minimum Class I milk price. The amendments also are not expected to impact the blend price of dairy farmers. Accordingly, the adopted amendments should not significantly impact producers or handlers due to the limited implementation period and the minimum increase in the Class I milk price.

Paperwork Reduction Act

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). As such, the information collection requirements in this final rule do not require clearance by the Office of Management and Budget (OMB) beyond the currently approved information collections. This final rule will impose only minimal reporting requirements on handlers applying for reimbursement of additional transportation expenses incurred due to the aforementioned hurricanes.

Prior documents in this proceeding:

Notice of Hearing: Issued September 28, 2004; published September 30, 2004 (69 FR 58368).

Final Decision: Issued November 15, 2004; published November 19, 2004 (69 FR 67670).

Findings and Determinations

The following findings and determinations hereinafter set forth supplement those that were made when the Appalachian, Florida, and Southeast orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

The following findings are hereby made with respect to each of the aforesaid orders:

(a) *Findings upon the basis of the hearing record.* Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900), a public hearing was held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the specified marketing areas.

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said orders as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing areas. The minimum prices specified in the orders as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said orders as hereby amended regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, marketing agreements upon which a hearing has been held.

(b) *Additional Findings.* It is necessary and in the public interest to make these amendments to the Appalachian, Florida, and Southeast orders effective December 10, 2004. This effective date will ensure the timely implementation of the amendments.

The amendments to these orders are known to handlers. The final decision containing the proposed amendments to these orders was issued on November 15, 2004.

The changes that result from these amendments will not require extensive preparation or substantial alteration in the method of operation for handlers. In view of the foregoing, it is hereby found and determined that good cause exists for making theses amendments effective December 10, 2004. It would be contrary to the public interest to delay the effective date of these amendments for 30 days after their publication in the **Federal Register**. (Sec. 553(d), Administrative Procedure Act, 5 U.S.C 551–559.)

(c) *Determinations.* It is hereby determined that:

(1) The refusal or failure of handlers (excluding cooperative associations specified in Section 8c(9) of the Act) of more than 50 percent of the milk that is marketed within the specified marketing areas to sign a proposed marketing agreement tends to prevent the effectuation of the declared policy of the Act;

(2) The issuance of this order amending the Appalachian, Florida, and Southeast orders are the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in the orders as hereby amended;

(3) The issuance of the order amending the Appalachian, Florida, and Southeast orders are favored by at least two-thirds of the producers who were engaged in the production of milk for sale in each of the marketing areas.

List of Subjects in 7 CFR Parts 1005, 1006, and 1007

Milk marketing orders.

Order Relative to Handling

■ *It is therefore ordered,* that on and after the effective date hereof, the handling of milk in the Appalachian, Florida, and Southeast marketing areas shall be in conformity to and in compliance with the terms and conditions of the orders, as amended, and as hereby further amended, as follows:

PARTS 1005, 1006, and 1007—[AMENDED]

■ 1. The authority citation for 7 CFR parts 1005, 1006, and 1007 continues to read as follows:

Authority: 7 U.S.C. 601–674.

PART 1005—MILK IN THE APPALACHIAN MARKETING AREA

■ 2. Section 1005.60 is amended by revising paragraph (a) and adding a new paragraph (g) to read as follows:

§ 1005.60 Handler's value of milk.

* * * * *

(a) Multiply the pounds of skim milk and butterfat in producer milk that were classified in each class pursuant to § 1000.44(c) by the applicable skim milk and butterfat prices, and add the resulting amounts; except that for the months of January 2005 through March 2005, the Class I skim milk price for this purpose shall be the Class I skim milk price as determined in § 1000.50(b) plus $0.04 per hundredweight, and the Class I butterfat price for this purpose shall be the Class I butterfat price as determined in § 1000.50(c) plus $0.0004 per pound. The adjustments to the Class I skim milk and butterfat prices provided herein may be reduced by the market administrator for any month if the market administrator determines that the payments yet unpaid computed pursuant to paragraphs (g)(1) through (5) and paragraph (g)(7) of this section will be less than the amount computed pursuant to paragraph (g)(6) of this section. The adjustments to the Class I skim milk and butterfat prices provided herein during the months of January 2005 through March 2005 shall be announced along with the prices announced in § 1000.53(b);

* * * * *

(g) For the months of January 2005 through March 2005 for handlers who have submitted proof satisfactory to the market administrator to determine eligibility for reimbursement of transportation costs, subtract an amount equal to:

(1) The cost of transportation on loads of producer milk delivered or rerouted to a pool distributing plant which were delivered as a result of hurricanes Charley, Frances, Ivan, and Jeanne;

(2) The cost of transportation on loads of producer milk delivered or rerouted to a pool supply plant that was then transferred to a pool distributing plant which were delivered as a result of hurricanes Charley, Frances, Ivan, and Jeanne;

(3) The cost of transportation on loads of bulk milk delivered or rerouted to a pool distributing plant from a pool supply plant which were delivered as a result of hurricanes Charley, Frances, Ivan, and Jeanne;

(4) The cost of transportation on loads of bulk milk delivered or rerouted to a pool distributing plant from another order plant which were delivered as a result of hurricanes Charley, Frances, Ivan, and Jeanne; and

(5) The cost of transportation on loads of bulk milk transferred or diverted to a plant regulated under another Federal order or to other nonpool plants which were delivered as a result of hurricanes Charley, Frances, Ivan, and Jeanne.

(6) The total amount of payment to all handlers under this section shall be limited for each month to an amount determined by multiplying the total Class I producer milk for all handlers pursuant to § 1000.44(c) times $0.04 per hundredweight.

(7) If the cost of transportation computed pursuant to paragraphs (g)(1) through (5) of this section exceeds the amount computed pursuant to paragraph (g)(6) of this section, the market administrator shall prorate such payments to each handler based on the handler's proportion of transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section. Transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section which are not paid as a result of such a proration shall be included in each subsequent month's transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section until paid, or until the time period for such payments is concluded.

(8) The reimbursement of transportation costs pursuant to this section shall be the actual demonstrated cost of such transportation of bulk milk delivered or rerouted as described in paragraphs (g)(1) through (5) of this section, or the miles of transportation on loads of bulk milk delivered or rerouted as described in paragraphs (g)(1) through (5) of this section multiplied by $2.25 per loaded mile, whichever is less.

(9) For each handler, the reimbursement of transportation costs pursuant to paragraph (g) of this section for bulk milk delivered or rerouted as described in paragraphs (g)(1) through (5) of this section shall be reduced by the amount of payments received for such milk movements from the transportation credit balancing fund pursuant to § 1005.82.

PART 1006—MILK IN THE FLORIDA MARKETING AREA

■ 3. Section 1006.60 is amended by revising paragraph (a) and adding a new paragraph (g) to read as follows:

§ 1006.60 Handler's value of milk.

* * * * *

(a) Multiply the pounds of skim milk and butterfat in producer milk that were classified in each class pursuant to § 1000.44(c) by the applicable skim milk and butterfat prices, and add the resulting amounts; except that for the months of January 2005 through March 2005, the Class I skim milk price for this purpose shall be the Class I skim milk price as determined in § 1000.50(b) plus $0.09 per hundredweight, and the Class I butterfat price for this purpose shall be the Class I butterfat price as determined in § 1000.50(c) plus $0.0009 per pound. The adjustments to the Class I skim milk and butterfat prices provided herein may be reduced by the market administrator for any month if the market administrator determines that the payments yet unpaid computed pursuant to paragraphs (g)(1) through (5) and paragraph (g)(7) of this section will be less than the amount computed pursuant to paragraph (g)(6) of this section. The adjustments to the Class I skim milk and butterfat prices provided herein during the months of January 2005 through March 2005 shall be announced along with the prices announced in § 1000.53(b);

* * * * *

(g) For the months of January 2005 through March 2005 for handlers who have submitted proof satisfactory to the market administrator to determine eligibility for reimbursement of transportation costs subtract an amount equal to:

(1) The cost of transportation on loads of producer milk delivered or rerouted to a pool distributing plant which were delivered as a result of hurricanes Charley, Frances, Ivan, and Jeanne;

(2) The cost of transportation on loads of producer milk delivered or rerouted to a pool supply plant that was then transferred to a pool distributing plant which were delivered as a result of hurricanes Charley, Frances, Ivan, and Jeanne;

(3) The cost of transportation on loads of bulk milk delivered or rerouted to a pool distributing plant from a pool supply plant which were delivered as a result of hurricanes Charley, Frances, Ivan, and Jeanne;

(4) The cost of transportation on loads of bulk milk delivered or rerouted to a pool distributing plant from another order plant which were delivered as a result of hurricanes Charley, Frances, Ivan, and Jeanne; and

(5) The cost of transportation on loads of bulk milk transferred or diverted to a plant regulated under another Federal order or to other nonpool plants which were delivered as a result of hurricanes Charley, Frances, Ivan, and Jeanne.

(6) The total amount of payment to all handlers under this section shall be limited for each month to an amount determined by multiplying the total Class I producer milk for all handlers pursuant to § 1000.44(c) times $0.09 per hundredweight.

(7) If the cost of transportation computed pursuant to paragraphs (g)(1) through (5) of this section exceeds the amount computed pursuant to paragraph (g)(6) of this section, the market administrator shall prorate such payments to each handler based on each handler's proportion of transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section. Transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section which are not paid as a result of such a proration shall be included in each subsequent month's transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section until paid, or until the time period for such payments has concluded.

(8) The reimbursement of transportation costs pursuant to this section shall be the actual demonstrated cost of such transportation of bulk milk delivered or rerouted as described in paragraphs (g)(1) through (5) of this section, or the miles of transportation on loads of bulk milk delivered or rerouted as described in paragraphs (g)(1) through (5) of this section multiplied by $2.25 per loaded mile, whichever is less.

PART 1007—MILK IN THE SOUTHEAST MARKETING AREA

■ 4. Section 1007.60 is amended by revising paragraph (a) and adding a new paragraph (g) to read as follows:

§ 1007.60 Handler's value of milk

* * * * *

(a) Multiply the pounds of skim milk and butterfat in producer milk that were classified in each class pursuant to § 1000.44(c) by the applicable skim milk and butterfat prices, and add the resulting amounts; except that for the months of January 2005 through March 2005, the Class I skim milk price for this purpose shall be the Class I skim milk price as determined in § 1000.50(b) plus $0.04 per hundredweight, and the Class I butterfat price for this purpose shall be the Class I butterfat price as determined in § 1000.50(c) plus $0.0004 per pound. The adjustments to the Class I skim milk and butterfat prices provided herein may be reduced by the market administrator for any month if the market administrator determines that the payments yet unpaid computed pursuant to paragraphs (g)(1) through (5) and paragraph (g)(7) of this section will be less than the amount computed pursuant to paragraph (g)(6) of this section. The adjustments to the Class I skim milk and butterfat prices provided herein during the months of January 2005 through March 2005 shall be announced along with the prices announced in § 1000.53(b);

* * * * *

(g) For the months of January 2005 through March 2005 for handlers who have submitted proof satisfactory to the market administrator to determine eligibility for reimbursement of transportation costs, subtract an amount equal to:

(1) The cost of transportation on loads of producer milk delivered or rerouted to a pool distributing plant which were delivered as a result of hurricanes Charley, Frances, Ivan, and Jeanne;

(2) The cost of transportation on loads of producer milk delivered or rerouted to a pool supply plant that was then transferred to a pool distributing plant which were delivered as a result of hurricanes Charley, Frances, Ivan, and Jeanne;

(3) The cost of transportation on loads of bulk milk delivered or rerouted to a pool distributing plant from a pool supply plant which were delivered as a result of hurricanes Charley, Frances, Ivan, and Jeanne;

(4) The cost of transportation on loads of bulk milk delivered or rerouted to a pool distributing plant from another order plant which were delivered as a result of hurricanes Charley, Frances, Ivan, and Jeanne; and

(5) The cost of transportation on loads of bulk milk transferred or diverted to a plant regulated under another Federal order or to other nonpool plants which were delivered as a result of hurricanes Charley, Frances, Ivan, and Jeanne.

(6) The total amount of payment to all handlers under this section shall be limited for each month to an amount determined by multiplying the total Class I producer milk for all handlers pursuant to § 1000.44(c) times $0.04 per hundredweight.

(7) If the cost of transportation computed pursuant to paragraphs (g)(1) through (5) of this section exceeds the amount computed pursuant to paragraph (g)(6) of this section, the market administrator shall prorate such

payments to each handler based on each handler's proportion of transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section. Transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section which are not paid as a result of such a proration shall be included in each subsequent month's transportation costs submitted pursuant to paragraphs (g)(1) through (5) of this section until paid, or until the time period for such payments has concluded.

(8) The reimbursement of transportation costs pursuant to this section shall be the actual demonstrated cost of such transportation of bulk milk delivered or rerouted as described in paragraphs (g)(1) through (5) of this section, or the miles of transportation on loads of bulk milk delivered or rerouted as described in paragraphs (g)(1) through (5) of this section multiplied by $2.25 per loaded mile, whichever is less.

(9) For each handler, the reimbursement of transportation costs pursuant to paragraph (g) of this section for bulk milk delivered or rerouted as described in paragraphs (g)(1) through (5) of this section shall be reduced by the amount of payments received for such milk movements from the transportation credit balancing fund pursuant to § 1007.82.

Dated: December 7, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04–27159 Filed 12–7–04; 2:54 pm]

BILLING CODE 3410–02–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2004–17136; Airspace Docket No. 04–AGL–08]

Modification of Class D Airspace; Camp Douglas, WI; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This action corrects an error contained in a final rule that was published in the **Federal Register** on Tuesday, August 24, 2004 (69 FR 51945). The final rule modified Class D airspace at Camp Douglas, WI.

EFFECTIVE DATE: 0901 UTC, November 25, 2004.

FOR FURTHER INFORMATION CONTACT: J. Mark Reeves, Central Service Office, Airspace Branch, AGL–520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, IL 60018, telephone: (847) 294–7477.

SUPPLEMENTARY INFORMATION:

History

Federal Register document 04–19374 published on Tuesday, August 24, 2004 (69 FR 51945), modified Class D airspace at Camp Douglas, WI. A portion of the Class D airspace radius was left out of the legal description. This action corrects this error.

■ Accordingly, pursuant to the authority delegated to me, the error for the Class D airspace, Camp Douglas, WI, as published in the **Federal Register** Tuesday, August 24, 2004, (69 FR 51945). (FR Doc. 04–19374), is corrected as follows:

PART 71—[AMENDED]

§ 71.1 [Corrected]

■ 1. On page 51945, Column 3; change the legal description to read:

That airspace extending upward from the surface to and including 3,400 feet MSL within a 5.2-mile radius of Volk Field from the Volk Field 100° bearing clockwise to the Volk Field 250° bearing, and within a 5.8-mile radius of the Volk Field 250° bearing clockwise to the Volk Field 110° bearing. This Class D airspace is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

Issued in Des Plaines, Illinois on November 16, 2004.

Nancy B. Kort,

Area Director, Central Terminal Operations.

[FR Doc. 04–27090 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2004–16705; Airspace Docket No. 03–AGL–20]

Modification of Class D Airspace; Mount Clemens, MI; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This action corrects an error contained in a final rule that was published in the **Federal Register** on Tuesday, August 24, 2004 (69 FR 51943). The final rule modified Class D airspace at Mount Clemens, MI.

EFFECTIVE DATE: 0901 UTC, November 25, 2004.

FOR FURTHER INFORMATION CONTACT: J. Mark Reeves, Central Service Office, Airspace Branch, AGL–520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, IL 60018, telephone: (847) 294–7477.

SUPPLEMENTARY INFORMATION:

History

Federal Register document 04–19376 published on Tuesday, August 24, 2004 (69 FR 51943), modified Class D airspace at Mount Clemens, MI. The coordinates for the Selfridge TACAN were left out of the legal description. This action corrects this error.

■ Accordingly, pursuant to the authority delegated to me, the error for the Class D airspace, Mount Clemens, MI, as published in the **Federal Register** Tuesday, August 24, 2004, (69 FR 51943), (FR Doc. 04–19376), is corrected as follows:

PART 71—[AMENDED]

§ 71.1 [Corrected]

■ On page 51943, Column 3, in the heading of the legal description after ''(Lat. 42°36′03″ N., long. 82°50′14″ W.)'' add:

''**Selfridge TACAN**

(Lat. 42°36′46″ N., long. 82°49′54″ W.)''

Issued in Des Plaines, Illinois on November 16, 2004.

Nancy B. Kort,

Area Director, Central Terminal Operations.

[FR Doc. 04–27092 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No.FAA–2004–17094; Airspace Docket No. 04–AGL–03]

Establishment of Class E Airspace; Northwood, ND; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This action corrects an error contained in a final rule that was published in the **Federal Register** on Tuesday, August 24, 2004 (69 FR 51948). The final rule established Class E airspace at Northwood, ND.

EFFECTIVE DATE: 0901 UTC, November 25, 2004.

FOR FURTHER INFORMATION CONTACT: J. Mark Reeves, Central Service Office, Airspace Branch, AGL–520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, IL 60018, telephone: (847) 294–7477.

SUPPLEMENTARY INFORMATION:

History

Federal Register Document 04–19370 published on Tuesday, August 24, 2004 (69 FR 51948), established Class E airspace at Northwood, ND. An incorrect coordinate was used in the legal description. This action corrects this error.

■ Accordingly, pursuant to the authority delegated to me, the error for the Class E airspace, Northwood, ND, as published in the **Federal Register** Tuesday, August 24, 2004, (69 FR 51948), (FR Doc. 04–19370), is corrected as follows:

PART 71—[AMENDED]

§ 71.1 [Corrected]

■ 1. On page 51948, Column 3; in the legal description, change the coordinates to read; (Lat. 47°43′27″ N., long. 97°35′26″ W).

Issued in Des Plaines, Illinois on November 16, 2004.

Nancy B. Kort,

Area Director, Central Terminal Operations.

[FR Doc. 04–27091 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2004–17096; Airspace Docket No. 04–AGL–05]

Modification of Class E Airspace; South Haven, MI; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This action corrects errors contained in a final rule that was published in the **Federal Register** on Tuesday, August 24, 2004 (69 FR 51946). The final rule modified Class E airspace at South Haven, MI.

EFFECTIVE DATE: 0901 UTC, November 25, 2004.

FOR FURTHER INFORMATION CONTACT: J. Mark Reeves, Central Service Office, Airspace Branch, AGL–520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, IL 60018, telephone: (847) 294–7477.

SUPPLEMENTARY INFORMATION:

History

Federal Register document 04–19372 published on Tuesday, August 24, 2004 (69 FR 51946), modified Class E airspace at South Haven, MI. An incorrect coordinate was used in the legal description and it also contained an incorrect airspace exclusion. This action corrects these errors.

■ Accordingly, pursuant to the authority delegated to me, the errors for the Class E airspace, South Haven, MI, as published in the **Federal Register** Tuesday, August 24, 2004, (69 FR 51946), (FR Doc. 04–19372), is corrected as follows:

PART 71—[AMENDED]

§ 71.1 [Corrected]

■ 1. On page 51947, Column 1; in the legal description;

■ A. Change the coordinates for Watervliet, Watervliet Community Hospital, MI Point in Space to read; (Lat. 42°11′06″ N., long. 86°15′02″ W.)

■ B. Change ''excluding that airspace within the South Bend, IN, Class E airspace area'' to read; ''excluding that airspace within the Benton Harbor, MI, Class E airspace area''.

Issued in Des Plaines, Illinois on November 16, 2004.

Nancy B. Kort,

Area Director, Central Terminal Operations.

[FR Doc. 04–27094 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 880

[Docket No. 2004N–0477]

Medical Devices; General Hospital and Personal Use Devices; Classification of Implantable Radiofrequency Transponder System for Patient Identification and Health Information

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is classifying the implantable radiofrequency transponder system for patient identification and health information into class II (special controls). The special control that will apply to the device is the guidance document entitled ''Class II Special Controls Guidance Document: Implantable Radiofrequency Transponder System for Patient Identification and Health Information.'' The agency is classifying the device into class II (special controls) in order to provide a reasonable assurance of safety and effectiveness of the device. Elsewhere in this issue of the **Federal Register**, FDA is publishing a notice of availability of a guidance document that is the special control for this device.

DATES: This rule is effective January 10, 2005. The classification was effective October 12, 2004.

FOR FURTHER INFORMATION CONTACT: Gail Gantt, Center for Devices and Radiological Health (HFZ–480), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1287.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with section 513(f)(1) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360c(f)(1)), devices that were not in commercial distribution before May 28, 1976, the date of enactment of the Medical Device Amendments of 1976 (the amendments), generally referred to as postamendments devices, are classified automatically by statute into class III without any FDA rulemaking process. These devices remain in class III and require premarket approval, unless and until the device is classified or reclassified into class I or II or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the act, to a predicate device that does not require premarket approval. The agency determines whether new devices are substantially equivalent to previously marketed devices by means of premarket notification procedures in section 510(k) of the act (21 U.S.C. 360(k)) and 21 CFR part 807 of FDA's regulations.

Section 513(f)(2) of the act provides that any person who submits a premarket notification under section 510(k) of the act for a device that has not previously been classified may, within 30 days after receiving an order classifying the device in class III under section 513(f)(1) of the act, request that FDA classify the device under the criteria set forth in section 513(a)(1) of the act. FDA shall, within 60 days of receiving such a request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a document in the **Federal Register** announcing such classification (section 513(f)(2) of the act).

In accordance with section 513(f)(1) of the act, FDA issued a document on July 22, 2004, classifying the VERICHIP Health Information Microtransponder System in class III, because it was not substantially equivalent to a device that was introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976, or a device which was subsequently reclassified into class I or class II. On August 4, 2004, Digital Angel Corp. submitted a petition requesting classification of the VERICHIP Health Information Microtransponder System under section 513(f)(2) of the act. The manufacturer recommended that the device be classified into class II (Ref. 1).

In accordance with section 513(f)(2) of the act, FDA reviewed the petition in order to classify the device under the criteria for classification set forth in section 513(a)(1) of the act. Devices are to be classified into class II if general controls, by themselves, are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls to provide reasonable assurance of the safety and effectiveness of the device for its intended use. After review of the information submitted in the petition, FDA determined that the VERICHIP Health Information Microtransponder System can be classified in class II with the establishment of special controls. FDA believes these special controls, in addition to general controls, will provide reasonable assurance of safety and effectiveness of the device.

The device is assigned the generic name implantable radiofrequency transponder system for patient identification and health information and is identified as a system intended to enable access to secure patient identification and corresponding health information. This system may include a passive implanted transponder, inserter, and scanner. The implanted transponder is used only to store a unique electronic identification code that is read by the scanner. The identification code is used to access patient identity and corresponding health information stored in a database.

The potential risks to health associated with the device are adverse tissue reaction, migration of implanted transponder, compromised information security, failure of implanted transponder, failure of inserter, failure of electronic scanner, electromagnetic interference, electrical hazards, magnetic resonance imaging incompatibility, and needle stick. The special controls document aids in mitigating the risks by identifying performance and safety testing, and appropriate labeling.

Therefore, in addition to the general controls of the act, an implantable radiofrequency transponder system for patient identification and health information is subject to special controls identified as the guidance document entitled ''Class II Special Controls Guidance Document: Implantable Radiofrequency Transponder System for Patient Identification and Health Information.''

FDA believes that following the class II special controls guidance document generally addresses the risks to health identified in the previous paragraph. Therefore, on October 12, 2004, FDA issued an order to the petitioner classifying the device into class II. FDA is codifying this classification by adding 21 CFR 880.6300.

Section 510(m) of the act provides that FDA may exempt a class II device from the premarket notification requirements under section 510(k) of the act, if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. FDA has determined that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the implantable radiofrequency transponder system for patient identification and health information because the manufacturing controls, software validation science, and electrical safety standards in the special control guidance are well known. The measures needed to keep patient data secure are commonly in use. Thus, persons who intend to market this device type need not submit to FDA a premarket notification submission containing information on an implantable radiofrequency transponder system for patient identification and health information, unless they exceed the limitations on exemptions in 21 CFR 880.9 (e.g., different intended use or fundamental scientific technology).

For the convenience of the reader, FDA is also adding new 21 CFR 880.1 to inform readers of the availability of guidance documents referenced in 21 CFR part 880.

II. Environmental Impact

The agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

III. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this final rule is not a significant regulatory action under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because classification of these devices into class II will relieve manufacturers of the device of the cost of complying with the premarket approval requirements of section 515 of the act (21 U.S.C. 360e), and may permit small potential competitors to enter the marketplace by lowering their costs, the agency certifies that the final rule will not have a significant impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $110 million. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

IV. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies 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. Accordingly, the agency has concluded that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

V. Paperwork Reduction Act of 1995

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

VI. Reference

The following reference has been placed on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Petition from Digital Angel Corp., dated August 4, 2004.

List of Subjects in 21 CFR Part 880

Medical devices.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 880 is amended as follows:

PART 880—GENERAL HOSPITAL AND PERSONAL USE DEVICES

■ 1. The authority citation for 21 CFR part 880 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

■ 2. Section 880.1 is amended by adding new paragraph (e) to read as follows:

§ 880.1 Scope.

* * * * *

(e) Guidance documents referenced in this part are available on the Internet at *http://www.fda.gov/cdrh/guidance.html*.

■ 3. Section 880.6300 is added to subpart G to read as follows:

§ 880.6300 Implantable radiofrequency transponder system for patient identification and health information.

(a) *Identification.* An implantable radiofrequency transponder system for patient identification and health information is a device intended to enable access to secure patient identification and corresponding health information. This system may include a passive implanted transponder, inserter, and scanner. The implanted transponder is used only to store a unique electronic identification code that is read by the scanner. The identification code is used to access patient identity and corresponding health information stored in a database.

(b) *Classification.* Class II (special controls). The special control is FDA's guidance document entitled ''Class II Special Controls Guidance Document: Implantable Radiofrequency Transponder System for Patient Identification and Health Information.'' See § 880.1(e) for the availability of this guidance document. This device is exempt from the premarket notification procedures in subpart E of part 807 of this chapter subject to the limitations in § 880.9.

Dated: November 30, 2004.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 04–27077 Filed 12–9–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD01–04–106]

RIN 1625–AA09

Drawbridge Operation Regulations: Connecticut River, CT

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary final rule governing the operation of the Route 82 Bridge, at mile 16.8, across the Connecticut River at East Haddam, Connecticut. This temporary final rule allows the bridge to operate on a fixed opening schedule and also authorizes several bridge closures from December 1, 2004, through March 31, 2006. The purpose of this temporary final rule is to facilitate the rehabilitation construction at the Route 82 Bridge.

DATES: This temporary final rule is effective from December 1, 2004, through March 31, 2006.

ADDRESSES: Material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket (CGD01–04–106) and are available for inspection or copying at the First Coast Guard District, Bridge Branch Office, 408 Atlantic Avenue, Boston, Massachusetts, 02110, 6:30 a.m. to 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Judy Leung-Yee, Project Officer, First Coast Guard District, (212) 668–7195.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On October 19, 2004, we published a notice of proposed rulemaking (NPRM) entitled Drawbridge Operation Regulations; Connecticut River, Connecticut, in the **Federal Register** (69 FR 61455). We received no comments in response to the notice of proposed rulemaking. No public hearing was requested and none was held.

Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

The bridge rehabilitation construction has already been delayed over a year due to funding issues and as a result of those delays the rehabilitation repairs at the bridge need to be performed as soon as possible.

Any delay encountered in this regulation's effective date would be unnecessary and contrary to the public interest because the rehabilitation construction is necessary in order to assure continued safe reliable operation of the bridge.

Background and Purpose

The Route 82 Bridge has a vertical clearance of 22 feet at mean high water, and 25 feet at mean low water in the closed position. The existing drawbridge operating regulations listed at 33 CFR 117.205(c), require the bridge to open on signal at all times; except that, from May 15 to October 31, 9 a.m. to 9 p.m., the bridge is required to open for recreational vessels on the hour and half hour only. The bridge is required to open on signal at all times for commercial vessels.

The Route 82 Bridge was scheduled for major repairs in the summer of 2001, and again in 2002, but due to a project funding shortfall the work was delayed. Subsequent to that, the bridge has continued to deteriorate. Funding has now been made available and the necessary repairs need to be performed with all due speed to assure safe reliable continued operation of the bridge.

The bridge owner, Connecticut Department of Transportation, requested a temporary rule to allow the bridge to open at specific times. Commercial vessels may obtain bridge openings at any time provided they provide a two-hour advance notice to the bridge tender.

The bridge owner has also requested additional bridge closures that will restrict both recreational and commercial vessel traffic. The requested dates include: One seven day bridge closure from March 21, 2005 through March 28, 2005; three 8 hour closures on October 18, 19, and 20, 2005; and one 24 hour closure on December 14, 2005.

The exact dates and times for the above closures possibly may change due to unforeseen issues. Should the above

dates and times change, the Coast Guard will revise this temporary rule and publish the exact times and dates in the Local Notice to Mariners at least thirty-days in advance of the anticipated occurrence of each closure to assist mariners in their planning.

Under this final rule, in effect from December 1, 2004 through March 31, 2006, the Route 82 Bridge will operate as follows:

From November 1 through July 6, the draw will open on signal at 5:30 a.m., 1:30 p.m., and 8 p.m., daily.

From July 7 through October 31, the draw will open on signal Monday through Friday at 5:30 a.m., 1:30 p.m., and 8 p.m. On Friday the draw will open on signal at 5:30 a.m., 1:30 p.m., 8 p.m., and 11:30 p.m. On Saturday and Sunday the draw will open at 5:30 a.m., 8:30 a.m., 1:30 p.m., 4 p.m., 8 p.m., and 11:30 p.m.

At all times, other than during the closed periods identified above, the draw will open on signal for Commercial vessels provided at least a two-hour advance notice is given.

Discussion of Comments and Changes

We received no comments in response to the notice of proposed rulemaking. No changes have been made to this temporary final rule as a result.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3), of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

This conclusion is based on the fact vessel traffic will still be able to transit through the Route 82 Bridge under a fixed time schedule that is expected to meet the reasonable needs of navigation.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we considered whether this rule would have a significant economic impact on a substantial number of small entities. 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 less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities.

This conclusion is based on the fact that vessel traffic will still be able to transit through the Route 82 Bridge under a fixed time schedule that is expected to meet the reasonable needs of navigation.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

No small entities requested Coast Guard assistance and none was given.

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).

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

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 State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

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.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This final rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have 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.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are

technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this final rule under Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction, from further environmental documentation. It has been determined that this final rule does not significantly impact the environment.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

■ For the reasons set out in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; Department of Homeland Security Delegation No. 0170.1; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

■ 2. From December 1, 2004 through March 31, 2006, § 117.205 is temporarily amended by suspending paragraph (c) and adding a new paragraph (d) to read as follows:

§ 117.205 Connecticut River.

* * * * *

(d) The draw of the Route 82 Bridge, mile 16.8, at East Haddam shall operate as follows:

(1) From November 1 through July 6 the draw shall open on signal at 5:30 a.m., 1:30 p.m., and 8 p.m., daily.

(2) From July 7 through October 31, Monday through Thursday, the draw shall open on signal at 5:30 a.m., 1:30 p.m., and 8 p.m. On Friday the draw shall open on signal at 5:30 a.m., 1:30 p.m., 8 p.m., and 11:30 p.m. On Saturday and Sunday the draw shall open on signal at 5:30 a.m., 8:30 a.m., 1:30 p.m., 4 p.m., 8 p.m., and 11:30 p.m.

(3) The draw need not open for the passage of vessel traffic on the following dates: March 21, 2005 through March 28, 2005; October 18, 19 and 20, 2005; and December 14, 2005.

(4) At all times, other than the dates identified in paragraph (d)(3) of this section, the draw shall open on signal for commercial vessels provided at least a two-hour advance notice is given.

Dated: November 29, 2004.

David P. Pekoske,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. 04–27101 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08–04–018]

RIN 1625–AA09

Drawbridge Operation Regulation; St. Croix River, Wisconsin, MN

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is changing the regulation governing the Prescott Highway Bridge, across the St. Croix River at Mile 0.3, at Prescott, Wisconsin. Under the rule, the drawbridge need not open for river traffic and may remain in the closed-to-navigation position from November 1, 2005, to April 1, 2006. This rule allows the bridge owners to make necessary repairs to the bridge.

DATES: This rule is effective November 1, 2005, to April 1, 2006.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of the docket [CGD08–04–018] and are available for inspection or copying at room 2.107f in the Robert A. Young Federal Building at Eighth Coast Guard District, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Roger K. Wiebusch, Bridge Administrator, (314) 539–3900, extension 2378.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On September 21, 2004, we published a notice of proposed rulemaking (NPRM) entitled Drawbridge Operation Regulation; St. Croix River, Wisconsin and Minnesota in the **Federal Register** (69 FR 56379). We received no comment letters on the proposed rule. No public hearing was requested, and none was held.

Background and Purpose

On May 3, 2004, the Wisconsin Department of Transportation requested a temporary change to the operation of the Prescott Highway Bridge across the St. Croix River, Mile 0.3, at Prescott, Wisconsin, to allow the drawbridge to remain in the closed-to-navigation position for a 5-month period while the electrical and hydraulic systems are overhauled. Navigation on the waterway consists of both commercial (excursion boat) and recreational watercraft, which may be minimally impacted by the closure period. Currently, the draw opens on signal for passage of river traffic from April 1 to October 31, 8 a.m. to midnight, except that from midnight to 8 a.m. the draw shall open on signal if notification is made prior to 11 p.m. From November 1 to March 31, the draw shall open on signal if at least 24 hours notice is given. The Wisconsin Department of Transportation requested the drawbridge be permitted to remain closed to navigation from November 1, 2005, to April 1, 2006.

Discussion of Comments and Changes

The Coast Guard received no comment letters. No changes will be made to this final rule.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

The Coast Guard expects this temporary change to operation of the Prescott Highway Bridge to have minimal economic impact on commercial traffic operating on the St. Croix River such that a full regulatory evaluation under the regulatory policies and procedures of DHS is unnecessary. This temporary change will cause minimal interruption of the drawbridge's regular operation, since the change is only in effect during the winter months while the river is frozen.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities. This rule would be in effect for 5 months during the early winter months when the river is frozen over and navigation is practically at a standstill. The Coast Guard expects the impact of this action to be minimal.

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 so that they could better evaluate its effects on them and participate in the rulemaking. 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 1–800–REG–FAIR (1–800–734–3247).

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

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 or more in any one year. Though this rule will not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

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.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

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.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated a significant energy action by the Administrator of the Office of Information and Regulatory Affairs. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have considered the environmental impact of this rule and concluded that under figure 2–1, paragraph (32)(e), of Commandant Instruction M16475.1D, this rule is categorically excluded from further environmental documentation. Paragraph 32(e) excludes the promulgation of operating regulations or procedures for drawbridges from the environmental documentation requirements of the National Environmental Policy Act (NEPA). Since this regulation would alter the normal operating conditions of the drawbridge, it falls within this exclusion.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; Department of Homeland Security Delegation No. 0170.1; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

■ 2. From November 1, 2005, to April 1, 2006, in § 117.667, suspend paragraph (a) and add new paragraphs (d) and (e) to read as follows:

§ 117.667 St. Croix River.

* * * * *

(d) The draws of the Burlington Northern Santa Fe Railroad Bridge, Mile 0.2, and the Hudson Railroad Bridge, Mile 17.3, shall operate as follows:

(1) From April 1 to October 31:

(i) 8 a.m. to midnight, the draws shall open on signal;

(ii) Midnight to 8 a.m., the draws shall open on signal if notification is made prior to 11 p.m.

(2) From November 1 through March 31, the draw shall open on signal if at least 24 hours notice is given.

(e) The draw of the Prescott Highway Bridge, Mile 0.3, need not open for river traffic and may be maintained in the closed-to-navigation position from November 1, 2005, to April 1, 2006.

Dated: November 18, 2004.

R.F. Duncan,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 04–27102 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD09–04–020]

RIN 1625–AA87 (Formerly RIN 2115–AA00)

Security Zone; Captain of the Port Chicago Zone, Lake MI

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is removing the security zone around the Byron Nuclear Power Plant and adding a security zone around the Hammond Intake Crib on Lake Michigan. The Coast Guard has determined that the removal of the security zone for the Byron Nuclear Power Plant would not increase the plant's vulnerability. The Hammond Intake Crib Security Zone is necessary to protect the fresh water supply from possible sabotage or other subversive acts, accidents, or possible acts of terrorism. The zone is intended to restrict vessel traffic from a portion of Lake Michigan.

DATES: This rule is effective December 10, 2004.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket CGD09–04–020 and are available for inspection or copying at U.S. Coast Guard Marine Safety Office Chicago, 215 West 83rd Street, Suite D, Burr Ridge, IL, 60527 between 7 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: LTJG Christopher Brunclik, MSO Chicago, at (630) 986–2155.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On August 4, 2004 we published a notice of proposed rulemaking (NPRM) entitled, Security Zone; Captain of the Port Chicago Zone, Lake Michigan, in the **Federal Register** (69 FR 47047). We received no letters commenting on this proposed rule. No public meeting was requested, and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. The reason being that the Hammond Intake Crib Security Zone is necessary to protect the public, facilities, and the surrounding area from possible sabotage or other subversive acts.

Background and Purpose

On September 11, 2001, the United States was the target of coordinated attacks by international terrorists resulting in catastrophic loss of life, the destruction of the World Trade Center, and significant damage to the Pentagon. Current events indicate that significant threats still exist for this type of attack. In fact, National security and intelligence officials warn that future terrorists attacks are likely. The Coast Guard is responding by, amongst many other things, establishing security zones around critical infrastructure.

We are removing the Byron Nuclear Power Plant Security Zone and adding a security zone around the Hammond Intake Crib. It has been determined that the removal of the security zone for the Byron Nuclear Power Plant would not increase its vulnerability. The Hammond Intake Crib security zone is necessary to protect the public, facilities, and the surrounding area from possible sabotage or other subversive acts. All persons other than those approved by the Captain of the Port Chicago, or his on-scene representative, are prohibited from entering or moving within the zone. The Captain of the Port Chicago may be contacted via phone at the above contact number.

Discussion of Comments and Changes

No comments were received, no issues were identified and no changes were added.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. Since this security zone is not located near commercial vessel shipping lanes, there will be no impact on commercial vessel traffic as a result of this security zone.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This security zone will not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will not obstruct the regular flow of traffic and will allow vessel traffic to pass around the security zone.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

Federalism

A rule has implications for Federalism under Executive Order 13132, if it has a substantial direct effect on State or Local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

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 or more in any one year. Though this rule would not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule would not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

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.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

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.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation.

Under figure 2–1, paragraph (34)(g) of the Instruction, an ''Environmental Analysis Check List'' and a ''Categorical Exclusion Determination'' are not required for this rule. Comments on this section will be considered before we make the final decision on whether to categorically exclude this rule from further environmental review.

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. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 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. In § 165.910, revise paragraph (a)(5) to read as follows:

§ 165.910 Security Zones; Captain of the Port Chicago, Zone, Lake Michigan.

(a) * * *

(5) *Hammond Intake Crib.* All navigable waters bounded by the arc of a circle with a 100-yard radius with its center in approximate position 41°42′15″ N, 087°29′49″ W (NAD 83).

* * * * *

Dated: November 16, 2004.

D.S. Fish,

Commander, U.S. Coast Guard, Acting Captain of the Port.

[FR Doc. 04–27099 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD13–04–040]

RIN 1625–AA87

Security Zones; Protection of Military Cargo, Captain of the Port Zone Puget Sound, WA

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing a security zone in Budd Inlet, Olympia, WA to protect Department of Defense assets and military cargo in Puget Sound, Washington. This security zone, when enforced by the Captain of the Port Puget Sound, will regulate traffic in the vicinity of military cargo loading operations in the navigable waters of the United States.

DATES: This rule is effective December 10, 2004.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket CGD13–04–040 and are available for inspection or copying at Commanding Officer, Marine Safety Office Puget Sound, 1519 Alaskan Way South, Seattle, Washington 98134 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: LTjg T. Thayer, c/o Captain of the Port Puget Sound, Seattle, WA, (206) 217–6232. For specific information concerning enforcement of this rule, call Marine Safety Office Puget Sound at (206) 217–6200 or (800) 688–6664.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On October 12, 2004, we published a notice of proposed rulemaking (NPRM) entitled ''Security Zones; Protection of

Military Cargo, Captain of the Port Zone Puget Sound, WA'' in the **Federal Register** (69 FR 60600). No written comments were received by the Coast Guard regarding this proposed rule. A public hearing was not requested and none was held.

The Coast Guard finds good cause exists to make this rule effective less than 30 days after publication. This rule establishes security zones during military cargo loading and unloading operations. The Captain of the Port Puget Sound deems it necessary to make this rule effective upon publication in the **Federal Register** given the unpredictable schedule of these military cargo loading and unloading operations and because of the vital importance of these operations to national security. In fact, since October 12, 2004, the Captain of the Port Puget Sound has issued two additional temporary final rules establishing security zones in Budd Inlet, West Bay, Olympia, Washington (CGD13–04–41 singed November 15, 2004; CGD13–04–042 signed November 30, 2004). Moreover, the Captain of the Port Puget Sound will only enforce this final rule after issuing a notice of enforcement.

Background and Purpose

Hostile entities continue to operate with the intent to harm U.S. National Security by attacking or sabotaging national security assets. The President has continued the national emergencies he declared following the September 11, 2001 terrorist attacks. 67 FR 58317 ((Sept. 13, 2002) (continuing national emergency with respect to terrorist attacks)); 67 FR 59447 ((Sept. 20, 2002) continuing national emergency with respect to persons who commit, threaten to commit or support terrorism)); 68 FR 55189 ((Sept. 22, 2003 (continuing national emergency with respect to persons who commit, threaten to commit or support terrorism)).

The President also has found pursuant to law, including the Magnuson Act (50 U.S.C. 191 *et seq.*), that the security of the United States is and continues to be endangered following the attacks (E.O. 13,273, 67 FR 56215 (Sept. 3, 2002) (security endangered by disturbances in international relations of U.S. and such disturbances continue to endanger such relations).

Moreover, the ongoing hostilities in Afghanistan and Iraq make it prudent for U.S. ports and waterways to be on a higher state of alert because the al Qaeda organization and other similar organizations have declared an ongoing intention to conduct armed attacks on U.S. interests worldwide.

The Coast Guard, through this rule, intends to assist the Department of Defense protect vital national security assets, in the waters of Puget Sound. This rule adds Budd Inlet as a permanent security zone in 33 CFR 165.1321. The security zones permanently established in 33 CFR 165.1321 exclude persons and vessels from these zones during military cargo loading and unloading operations and set forth the procedures for obtaining permission to enter, move within or exit these security zones. Likewise, entry into the zone described in this rule will be prohibited unless authorized by the Captain of the Port or his designee. The Captain of the Port may be assisted by other federal, state, or local agencies.

Discussion of Comments and Changes

No comments were received by the Coast Guard as a result of the request for comments in our NPRM.

Regulatory Evaluation

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. Although this rule would restrict access to the regulated area, the effect of this rule would not be significant. This expectation is based on the fact that the regulated area established by the rule would encompass a limited area in Budd Inlet, Olympia, WA. In addition, temporary final rules established for past cargo loading and unloading operations have only lasted from a few days to over a week in duration. Hence, the Coast Guard expects that enforcement periods under of this rule will be of similar duration. Further, Coast Guard forces will actively monitor and enforce the Budd Inlet security zone and are authorized by the Captain of the Port to grant authorization to vessels to enter this waterway. In addition, in certain circumstances VTS may grant authorization to enter, move within or depart this waterway. In other words, those vessels or persons who may be impacted by this rule may request permission to enter, move within or depart this security zone. Finally, the Coast Guard will cause a notice of suspension of enforcement to be published when cargo loading or unloading operations have concluded. For the above reasons, the Coast Guard does not anticipate any significant economic impact.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities.

This rule would affect the following entities, some of which may be small entities: The owners or operators of vessels intending to operate near or anchor in the vicinity of Budd Inlet.

This rule would not have a significant economic impact on a substantial number of small entities for the following reasons: (i) The security zone is limited in size; (ii) designated representatives of the Captain of the Port may authorize access to the security zone; (iii) security zone for any given operation will effect the given geographical location for a limited time; (iv) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly and (v) the Coast Guard will cause a notice of suspension of enforcement to be published when cargo loading or unloading operations have concluded.

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.

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 so that they can better evaluate its effects on them and participate in the rulemaking. 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 one of the

points of contact listed under **FOR FURTHER INFORMATION CONTACT**.

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).

Collection of Information

This rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

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 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.

Taking of Private Property

This rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

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.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

The Coast Guard recognizes the rights of Native American Tribes under the Stevens Treaties. Moreover, the Coast Guard is committed to working with Tribal Governments to implement local policies to mitigate tribal concerns. We have determined that these security zones and fishing rights protection need not be incompatible. We have also determined that this Rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Nevertheless, Indian Tribes that have questions concerning the provisions of this rule or options for compliance are encouraged to contact the point of contact listed under **FOR FURTHER INFORMATION CONTACT**.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

The Coast Guard's preliminary review indicates this rule is categorically excluded from further environmental documentation under figure 2–1, paragraph 34(g) of Commandant Instruction M16475.1D. The environmental analysis and Categorical Exclusion Determination will be prepared and be available in the docket for inspection and copying where indicated under **ADDRESSES**. All standard environmental measures remain in effect.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and record keeping 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. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 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. In § 165.1321, add paragraph(c)(3) to read as follows:

§ 165.1321 Security Zone; Protection of Military Cargo, Captain of the Port Zone Puget Sound, WA.

* * * * *

(c) * * *

(3) *Budd Inlet Security Zone:* The Security Zone in Budd Inlet, West Bay, Olympia WA includes all waters enclosed by a line connecting the following points: 47°03′12″ N, 122°25′21″ W, which is approximately the northwestern end of the fence line enclosing Berth 1 at Port of Olympia; then northerly to 47°03′15″ N, 122°54′21″ W, which is the approximate 300 feet north along the shoreline; then westerly to 47°03′15″ N, 122°54′26″ W; then southerly to 47°03′06″ N, 122°54′26″ W; then southeasterly to 47°03′03″ N, 122°54′20″ W, which is approximately the end of the T-shaped pier; then north to 47°03′01″ N, 122°54′21″ W, which is approximately the southwestern corner of berth 1; then northerly along the shoreline to the point of origin. [Datum: NAD 1983].

* * * * *

Dated: December 1, 2004.

J.A. Stagliano,

Commander, U.S. Coast Guard, Acting Captain of the Port, Puget Sound.

[FR Doc. 04–27213 Filed 12–8–04; 8:54 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[PA217–4232; FRL–7845–6]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Revision to the 1-Hour Ozone Maintenance Plan for the Pittsburgh-Beaver Valley Area To Reflect the Use of MOBILE6

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the Commonwealth of Pennsylvania. The revision amends Pennsylvania's ten-year plan to maintain the 1-hour ozone national ambient air quality standard (NAAQS) in the Pittsburgh-Beaver Valley ozone maintenance area (the Pittsburgh area). The maintenance plan is being amended to revise the volatile organic compound (VOC) and nitrogen oxides (NO_X) motor vehicle emission budgets (MVEBs) to reflect the use of MOBILE6. The intended effect of this action is to approve a SIP revision that will better enable the Commonwealth of Pennsylvania to maintain attainment of the 1-hour ozone NAAQS in the Pittsburgh area. This action is being taken in accordance with the requirements of the Clean Air Act.

DATES: *Effective Date:* This final rule is effective on January 10, 2005.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 1301 Constitution Avenue, NW., Room B108, Washington, DC 20460; and Pennsylvania Department of Environmental Protection, Bureau of Air Quality, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Larry Budney, (215) 814–2184, or by e-mail at *budney.larry@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On October 19, 2001 (66 FR 53094), EPA redesignated the Pittsburgh area to attainment for the 1-hour ozone NAAQS and approved the maintenance plan submitted by the Pennsylvania Department of Environmental Protection (DEP) as a revision to the Pennsylvania SIP. The Pittsburgh area consists of Allegheny, Armstrong, Beaver, Butler, Fayette, Washington and Westmoreland Counties. The approved maintenance plan demonstrates that the area will maintain the 1-hour ozone NAAQS for ten years from the date of its approval (*i.e.*, through 2011). The maintenance plan includes VOC and NO_X emission inventories for all (point, area, highway and non-road mobile) source sectors for the years 1990, 1999, 2007 and 2011. The highway, or on-road, portion of the mobile inventories also constitute the MVEBs for each year. Those MVEBs are to be used when performing analyses of transportation plans, programs and projects to demonstrate conformity. The MVEBs in the maintenance plan approved on October 19, 2001 are based upon the MOBILE5 emissions model.

On April 22, 2004, the Pennsylvania Department of Environmental Protection (PADEP) submitted a formal revision to its SIP, amending the Pittsburgh area maintenance plan. On July 1, 2004 (69 FR 39854), EPA published a direct final rule approving that SIP revision and a companion proposed rule providing opportunity for public comment (69 FR 39892). A brief summary of Pennsylvania's April 22, 2004 SIP revision submittal is provided in Section II. A detailed description of Pennsylvania's submittal and EPA's rationale for its approval were provided in the July 1, 2004 direct final rule and will not be restated here. During the public comment period, EPA received adverse comments on its proposed approval of the SIP revision. The comments necessitated EPA's withdrawal of the direct final rule before its effective date. That withdrawal was published in the **Federal Register** on August 5, 2004 (69 FR 47366). A summary of the comments and EPA's response are provided in Section III.

II. Summary of SIP Revision

The April 22, 2004 SIP revision amends the Pittsburgh area's ten-year maintenance plan for the 1-hour ozone NAAQS. The maintenance plan is being amended to revise the highway mobile source emissions inventory and, therefore, the MVEBs to reflect the use of the MOBILE6 emissions model. The following table presents the revised MVEBs for the Pittsburgh area based upon MOBILE6. Emissions are presented in tons per Summer day:

	2004	2007	2011
VOC	74.03	60.42	45.68
NO_X	140.63	110.37	77.09

III. Summary of Comments Received and EPA Response

EPA received timely adverse comments from one commenter, a private citizen from the State of New Jersey.

Comments: The commenter states that air pollution transported east from power plants and manufacturing facilities in Pennsylvania is detrimental to the health of citizens in New Jersey, New York and other states. The commenter further states that due to the impact of its transported air pollution and, specifically, power plant emissions on other states, Pennsylvania must be held to the highest standards. The commenter also questions whether the existing standards are high enough.

EPA Response: The comments regarding transported emissions from power plants and manufacturing facilities located in Pennsylvania to New Jersey, New York and other states, are not germane to EPA's approval of a revision to the Pittsburgh area maintenance plan to amend the onroad mobile emissions inventory and MVEBs to reflect the use of the updated MOBILE6 emissions model. Nor is the question as to whether the emission standards for power plants located in Pennsylvania are stringent enough germane to the approval of this SIP revision. This SIP revision only changes the mobile source emission inventories and budgets to reflect the current updated mobile source emissions estimation model. It makes no change to the emissions estimates or control measures applicable to stationary sources, including power plants and manufacturing facilities. The SIP as a whole, taking into account both the previously existing stationary source emissions and controls and the revised mobile source emissions and controls, continues to demonstrate maintenance for the required ten year period, as explained below. Thus, EPA concludes that control levels for both stationary sources and mobile sources in the Pittsburgh area are sufficient to demonstrate maintenance of the 1-hour standard in the area. In addition, the Pittsburgh area is in compliance with all applicable SIP-approved requirements relating to controls designed to prevent adverse impacts of transported pollution on downwind areas. In addition to reasonably available control technology requirements, the Commonwealth has adopted and is implementing additional ''post RACT requirements'' to reduce

seasonal NO_X emissions in the form of a NO_X cap and trade regulation, 25 Pa Code Chapters 121 and 123, based upon a model rule developed by the States in the Ozone Transport Region. That regulation was approved as a SIP revision on June 6, 2000 (65 FR 35842). Pennsylvania has also adopted 25 Pa Code Chapter 145 to satisfy Phase I of the NO_X SIP call. That regulation was approved as a SIP revision on August 21, 2001 (66 FR 43795).

In evaluating the Commonwealth's SIP revision, EPA has confirmed that the use of the MOBILE6 model has been properly conducted by the PADEP, that the MVEBs have been clearly identified in the maintenance plan, and that the amended maintenance plan for the Pittsburgh area continues to demonstrate modeling to demonstrate maintenance of the 1-hour NAAQS for ozone through 2011. Therefore, EPA has determined that the amendments to the Pittsburgh area's maintenance plan for the 1-hour ozone NAAQS are approvable.

IV. Final Action

EPA is approving Pennsylvania's April 22, 2004 SIP revision to amend the Pittsburgh area's maintenance plan for the 1-hour ozone NAAQS to reflect the use of the updated MOBILE6 emissions model. The revised maintenance plan for the Pittsburgh-Beaver Valley area continues to demonstrate maintenance of the 1-hour NAAQS for ozone through 2011.

V. Statutory and Executive Order Reviews

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

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 February 8, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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 to approve a revision to the Pittsburgh-Beaver Valley area's maintenance plan for the 1-hour ozone NAAQS 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, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: November 24, 2004.

Donald S. Welsh,

Regional Administrator, Region III.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart NN—Pennsylvania

■ 2. Section 52.2020 is amended by adding paragraph (c)(226) to read as follows:

§ 52.2020 Identification of plan.

* * * * *

(c) * * *

(226) Revisions to Pennsylvania's 1-hour ozone maintenance plan for the Pittsburgh-Beaver Valley area to revise the highway mobile emissions and the motor vehicle emission budgets to reflect the use of MOBILE6. These revisions were submitted by the Commonwealth of Pennsylvania's Department of Environmental Protection on April 22, 2004.

(i) Incorporation by reference.

(A) Letter of April 22, 2004 from the Pennsylvania Department of Environmental Protection transmitting a revision to Pennsylvania's 1-hour ozone maintenance plan for the Pittsburgh-Beaver Valley area.

(B) Document entitled, ''Revision to the State Implementation Plan for the Pittsburgh-Beaver Valley Area—Revised Highway Vehicle Emissions Budgets'' dated April, 2004. The document revises the Pittsburgh-Beaver Valley 1-hour ozone maintenance plan, establishing revised motor vehicle emission budgets of 74.03 tons/day of volatile organic compounds (VOC) and 140.63 tons/day of nitrogen oxides (NO_X) for 2004, 60.42 tons/day of VOC and 110.37 tons/day of NO_X for 2007, and 45.68 tons/day of VOC and 77.09 tons/day of NO_X for 2011.

(ii) Additional Material. Remainder of the Commonwealth's April 22, 2004 submittal pertaining to the revision listed in paragraph (c)(226)(i) of this section.

[FR Doc. 04–27167 Filed 12–9–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2004–0392; FRL–7688–6]

Multiple Chemicals; Extension of Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation extends time-limited tolerances for the pesticides listed in Unit II. of the **SUPPLEMENTARY INFORMATION.** These actions are in response to EPA's granting of emergency exemptions under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of these pesticides. Section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA) requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA.

DATES: This regulation is effective December 10, 2004. Objections and requests for hearings must be received on or before February 8, 2005.

ADDRESSES: To submit a written objection or hearing request follow the detailed instructions as provided in Unit III. of the **SUPPLEMENTARY INFORMATION.** EPA has established a docket for this action under Docket ID number OPP–2004–0392. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* 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 EDOCKET or in hard copy at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 South Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: See the table in this unit for the name of a specific contact person. The following information applies to all contact persons: Emergency Response Team, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

Pesticide/CFR cite	Contact person
Azoxystrobin; 40 CFR 180.507; Cypermethrin; 40 CFR 180.418; Desmedipham; 180.353; Diuron; 40 CFR 180.106; Propiconazole; 40 CFR 180.434; Sodium chlorate 40 CFR 180.1020	Libby Pemberton *Sec-18-Mailbox @epamail.epa.gov* (703) 308–9364
Myclobutanil; 180.443	Barbara Madden *Sec-18-Mailbox @epamail.epa.gov* (703) 305–6463
Sulfentrazone; 180.498	Andrew Ertman *Sec-18-Mailbox @epamail.epa.gov* (703) 308–9367

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document and Other Related Information?

In addition to using EDOCKET (*http://www.epa.gov/edocket/*), you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*. A frequently updated electronic version of 40 CFR part 180 is available at E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/*.

II. Background and Statutory Findings

EPA published final rules in the **Federal Register** for each chemical/commodity listed. The initial issuance of these final rules announced that EPA, on its own initiative, under section 408 of the FFDCA, 21 U.S.C. 346a, as amended by the Food Quality Protection Act of 1996 (FQPA) (Public Law 104–170) was establishing time-limited tolerances.

EPA established the tolerances because section 408(l)(6) of the FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under FIFRA section 18 . Such tolerances can be established without providing notice or time for public comment.

EPA received requests to extend the use of these chemicals for this year's growing season. After having reviewed these submissions, EPA concurs that emergency conditions exist. EPA assessed the potential risks presented by residues for each chemical/commodity. In doing so, EPA considered the safety standard in section 408(b)(2) of the

FFDCA, and decided that the necessary tolerance under section 408(l)(6) of the FFDCA would be consistent with the safety standard and with FIFRA section 18.

The data and other relevant material have been evaluated and discussed in the final rule originally published to support these uses. Based on that data and information considered, the Agency reaffirms that extension of these time-limited tolerances will continue to meet the requirements of section 408(l)(6) of the FFDCA. Therefore, the time-limited tolerances are extended until the date listed. EPA will publish a document in the **Federal Register** to remove the revoked tolerances from the Code of Federal Regulations (CFR). Although these tolerances will expire and are revoked on the date listed, under section 408(l)(5) of the FFDCA, residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on the commodity after that date will not be unlawful, provided the residue is present as a result of an application or use of a pesticide at a time and in a manner that was lawful under FIFRA, the tolerance was in place at the time of the application, and the residue does not exceed the level that was authorized by the tolerance. EPA will take action to revoke these tolerances earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Tolerances for the use of the following pesticide chemicals on specific commodities are being extended:

Azoxystrobin. EPA has authorized under FIFRA section 18 the use of azoxystrobin on safflower for control of alternaria leaf spots caused by *Alternaria carthami* and *A. alternata* in Montana and North Dakota. This regulation extends a time-limited tolerance for combined residues of the fungicide azoxystrobin and the Z isomer of azoxystrobin in or on safflower at 1.0 ppm for an additional 3–year period. This tolerance will expire and is revoked on June 30, 2008. A time-limited tolerance was originally published in the **Federal Register** of August 28, 2002 (67 FR 55132) (FRL–7195–9).

Cypermethrin and an Isomer Zeta-cypermethrin. EPA has authorized under FIFRA section 18 the use of zeta-cypermethrin on flax for control of grasshoppers in North Dakota. This regulation extends a time-limited tolerance for combined residues of the insecticide zeta-cypermethrin and its inactive R-isomers in or on flax (seed and meal) at 0.2 ppm for an additional 3–year period. This tolerance will expire and is revoked on June 30, 2008. A time-limited tolerance was originally published in the **Federal Register** of September 4, 2002 (67 FR 56490) (FRL–7197–7).

Desmedipham. EPA has authorized under FIFRA section 18 the use of desmedipham on garden beets for control of various weed pests in New York. This regulation extends a time-limited tolerance for residues of the herbicide desmedipham in or on red beet roots at 0.2 ppm and red beet tops at 15 ppm for an additional 3–year period. These tolerances will expire and are revoked on June 30, 2008. Time-limited tolerances were originally published in the **Federal Register** of August 29, 1997 (62 FR 45741) (FRL–5738–5).

Diuron. EPA has authorized under FIFRA section 18 the use of diuron in catfish ponds for control of blue green algae in Alabama, Arkansas, Mississippi and Texas. This regulation extends a time-limited tolerance for combined residues of the herbicide, diuron (3-(3,4dichlorophenyl)-1,1-dimethylurea) and its metabolites convertible to 3,4 -dichloroaniline in or on catfish fillets at 2.0 ppm for an additional 3–year period. This tolerance will expire and is revoked on June 30, 2008. A time-limited tolerance was originally published in the **Federal Register** of July 30, 1999 (64 FR 41297) (FRL–6087 –2).

Myclobutanil. EPA has authorized under FIFRA section 18 the use of myclobutanil on sugar beets for control of powdery mildew in Idaho and Oregon. This regulation extends a time-limited tolerance for combined residues of the fungicide myclobutanil alpha-butyl-alpha-(4-chlorophenyl)-1H-1,2,4-triazole-1-propanenitrile and its alcohol metabolite (alpha-(3-hydroxybutyl)-alpha-(4-chlorophenyl)-1H-1,2,4-triazole-1-propanenitrile (free and bound) in or on sugar beet tops at 1.0 ppm for an additional 3–year period. This tolerance will expire and is revoked on December 31, 2007. A time-limited tolerance was originally published in the **Federal Register** of January 2, 2001 (66 FR 298 (FRL–6757–9).

Propiconazole. EPA has authorized under FIFRA section 18 the use of propiconazole on grain sorghum for control of sorghum ergot in Kansas, New Mexico and Texas. This regulation extends a time-limited tolerance for combined residues of the fungicide propiconazole, 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl] methyl]-1H-1,2,4-triazole and its metabolites determined as 2,4-dichlorobenzoic acid and expressed as parent compound in or on grain sorghum, grain at 0.2 ppm; grain sorghum, stover at 1.5 ppm; and sorghum aspirated grain fractions at 20 ppm for an additional 3-year period. These tolerances will expire and are revoked on June 30, 2008. Time-limited tolerances were originally published in the **Federal Register** of August 13, 1997 (62 FR 43284) (FRL– 5735–2).

EPA has received objections to tolerances it established for propiconazole on different food commodities. The objections were filed by the Natural Resources Defense Council (NRDC) and raised several issues regarding aggregate exposure estimates and the additional safety factor for the protection of infants and children. Although these objections concern separate rulemaking proceedings under the FFDCA, EPA has considered whether it is appropriate to extend the emergency exemption tolerances for propiconazole while the objections are still pending.

Factors taken into account by EPA included how close the Agency is to concluding the proceedings on the objections, the nature of the current action, whether NRDC's objections raised frivolous issues, and extent to which the issues raised by NRDC had already been considered by EPA. Although NRDC's objections are not frivolous, the other factors all support extending these tolerances at this time. First, the objections proceeding is unlikely to conclude prior to when action is necessary on this petition. NRDC's objections raise complex legal, scientific, policy, and factual matters and EPA initiated a 60 day public comment period on them in the **Federal Register** on June 19, 2002 (67 FR 41628) (FRL–7167–7). That comment period was extended until October 16, 2002 [September 17, 2002 (67 FR 58536) (FRL–7275–3)], and EPA is now examining the extensive comments received. Second, the nature of the current actions are extremely time-sensitive as they address emergency situations. Third, the issues raised by NRDC are not new matters but questions that have been the subject of considerable study by EPA and comment by stakeholders. Accordingly, EPA is proceeding with extending the tolerances for propiconazole.

Sodium chlorate. The states of Arkansas and Missouri availed themselves of the authority to declare the existence of crisis situations, thereby authorizing use under FIFRA section 18 of sodium chlorate on wheat as a defoliant or desiccant to aid in the harvest of wheat. This regulation extends a time-limited exemption from

the requirement of a tolerance for residues of the defoliant/desiccant sodium chlorate in or on wheat for an additional 2–year period. This exemption from the requirement of a tolerance will expire and is revoked on December 31, 2006. A time-limited exemption from the requirement of a tolerance was originally published in the **Federal Register** of December 3, 1997 (62 FR 63858) (FRL–5754–1).

Sulfentrazone. EPA has authorized under FIFRA section 18 the use of sulfentrazone on lima beans and cowpeas for control of hophornbeam copperleaf in Tennessee. This regulation extends a time-limited tolerance for combined residues of the herbicide sulfentrazone and the metabolites 3-hydroxymethyl sulfentrazone and 3-desmethyl sulfentrazone in or on succulent bean seed without pod at 0.1 ppm for an additional 3–year period. This tolerance will expire and is revoked on December 31, 2007. A time-limited tolerance was originally published in the **Federal Register** of September 21, 1999 (64 FR 51060) (FRL–6097–8).

III. Objections and Hearing Requests

Under section 408(g) of the FFDCA, as amended by the FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to the FFDCA by the FQPA, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) of the FFDCA provides essentially the same process for persons to ''object'' to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d) of the FFDCA, as was provided in the old sections 408 and 409 of the FFDCA. However, the period for filing objections is now 60 days, rather than 30 days.

A. What Do I Need to Do to File an Objection or Request a Hearing?

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2004–0392 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before January 10, 2005.

1. *Filing the request*. Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

Mail your written request to: Office of the Hearing Clerk (1900L), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. You may also deliver your request to the Office of the Hearing Clerk in Suite 350, 1099 14th St., NW., Washington, DC 20005. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (202) 564–6255.

2. *Tolerance fee payment*. If you file an objection or request a hearing, you must also pay the fee prescribed by 40 CFR 180.33(i) or request a waiver of that fee pursuant to 40 CFR 180.33(m). You must mail the fee to: EPA Headquarters Accounting Operations Branch, Office of Pesticide Programs, P.O. Box 360277M, Pittsburgh, PA 15251. Please identify the fee submission by labeling it ''Tolerance Petition Fees.''

EPA is authorized to waive any fee requirement ''when in the judgement of the Administrator such a waiver or refund is equitable and not contrary to the purpose of this subsection.'' For additional information regarding the waiver of these fees, you may contact James Tompkins by phone at (703) 305–5697, by e-mail at *tompkins.jim@epa.gov*, or by mailing a request for information to Mr. Tompkins at Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

If you would like to request a waiver of the tolerance objection fees, you must mail your request for such a waiver to: James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

3. *Copies for the Docket*. In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit III.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in **ADDRESSES**. Mail your copies, identified by docket ID number OPP–2004–0392, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in **ADDRESSES**. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 file format or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

B. When Will the Agency Grant a Request for a Hearing?

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

IV. Statutory and Executive Order Reviews

This final rule establishes time-limited tolerances under section 408 of the FFDCA. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866 due to its lack of significance, this rule is not subject to Executive Order 13211,

Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355, May 22, 2001). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established under section 408(l)(6) of the FFDCA in response to an exemption under FIFRA section 18, such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of the FFDCA. For these same reasons, the Agency has determined that this rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' This rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

V. Congressional Review Act

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

Dated: November 30, 2004.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

§ 180.106 [Amended]

■ 2. In § 180.106, in the table to paragraph (b), amend the entry for ''catfish fillets'' by revising the expiration date ''6/30/05'' to read ''6/30/08.''

§ 180.353 [Amended]

■ 3. In § 180.353, in the table to paragraph (b), amend the entry for ''red beet roots'' and ''red beet tops'' by revising the expiration ''6/30/05'' to read ''6/30/08.''

§ 180.418 [Amended]

■ 4. In § 180.418, in the table to paragraph (b), amend the entries for ''flax, meal'' and ''flax, seed'' by revising the expiration date ''6/30/2005'' to read ''6/30/2008.''

§ 180.434 [Amended]

■ 5. In § 180.434, in the table to paragraph (b), amend the entries for ''grain, aspirated fractions;'' ''sorghum, grain, grain;'' and ''sorghum, grain, stover'' by revising the expiration date ''6/30/05''; to read ''6/30/08.''

§ 180.443 [Amended]

■ 6. In § 180.443, in the table to paragraph (b), amend the entry for ''beet, sugar, tops'' by revising the expiration date ''12/31/04'' to read ''12/31/07''.

§ 180.498 [Amended]

■ 7. In § 180.498, in the table to paragraph (b), amend the entry for ''bean, succulent seed without pod (lima beans, cowpeas)'' by revising the expiration date ''12/31/04'' to read ''12/31/07.''

§ 180.507 [Amended]

■ 8. In § 180.507. in the table to paragraph (b), amend the entry for ''safflower, seed'' by revising the expiration date ''6/30/05'' to read ''6/30/08.''

§ 180.1020 [Amended]

■ 9. In subpart D, in § 180.1020, in the table to paragraph (b), amend the entry for ''wheat'' by revising the expiration date ''12/31/04'' to read ''12/31/06.''

[FR Doc. 04–27031 Filed 12–9–04; 8:45 am]

BILLING CODE 6560–50–S

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 65

[Docket No. FEMA –B–7450]

Changes in Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Interim rule.

SUMMARY: This interim rule lists communities where modification of the Base (1 % annual-chance) Flood Elevations (BFEs) is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified BFEs for new buildings and their contents.

DATES: These modified BFEs are currently in effect on the dates listed in the table below and revise the Flood Insurance Rate Maps in effect prior to this determination for the listed communities.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Mitigation Division Director for the Emergency Preparedness and Response Directorate reconsider the changes. The modified BFEs may be changed during the 90-day period.

ADDRESSES: The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E., Hazard Identification Section, Mitigation Division, Emergency Preparedness and Response Directorate, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: The modified BFEs are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection is provided.

Any request for reconsideration must be based on knowledge of changed conditions or new scientific or technical data.

The modifications are made pursuant to Section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by the other Federal, State, or regional entities.

The changes BFEs are in accordance with 44 CFR 65.4.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Mitigation Division Director for the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

Regulatory Classification. This interim rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism. This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform. This rule meets the applicable standards of Section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR Part 65 is amended to read as follows:

PART 65—[AMENDED]

■ 1. The authority citation for Part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Arizona:					
Maricopa	City of Glendale (03–09–1653P).	Sept. 23, 2004, Sept. 30, 2004, *Arizona Business Gazette*.	The Honorable Elaine M. Scruggs, Mayor, City of Glendale, 5850 West Glendale Avenue, Glendale, Arizona 85301.	Dec. 30, 2004	040045
Maricopa	City of Glendale (04–09–0318P).	Sept. 23, 2004, Sept. 30, 2004, *Arizona Business Gazette*.	The Honorable Elaine M. Scruggs, Mayor, City of Glendale, 5850 West Glendale Avenue, Glendale, Arizona 85301.	Dec. 30, 2004	040045
Maricopa	City of Goodyear (03–09–1653P).	Sept. 23, 2004, Sept. 30, 2004, *Arizona Business Gazette*.	The Honorable James M. Cavanaugh, Mayor, City of Goodyear, 190 North Litchfield Road, Goodyear, Arizona 85338.	Dec. 30, 2004	040046

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Maricopa	City of Goodyear (04–09–0318P).	Sept. 23, 2004, Sept. 30, 2004, *Arizona Business Gazette*.	The Honorable James M. Cavanaugh, Mayor, City of Goodyear, 190 North Litchfield Road, Goodyear, Arizona 85338.	Dec. 30, 2004	040046
Maricopa	City of Litchfield Park (03–09–1653P).	Sept. 23, 2004, Sept. 30, 2004, *Arizona Business Gazette*.	The Honorable J. Woodfin "Woody" Thomas, Mayor, City of Litchfield Park, 214 West Wigwam Boulevard, Litchfield Park, Arizona 85340.	Dec. 30, 2004	040128
Maricopa	City of Peoria (04–09–0960P).	Aug. 12, 2004, Aug. 19, 2004, *Arizona Business Gazette*.	The Honorable John Keegan, Mayor, City of Peoria, Municipal Complex, 8401 West Monroe Street, Peoria, Arizona 85345.	Nov. 18, 2004	040050
Maricopa	City of Phoenix (04–09–0716P).	July 1, 2004, July 8, 2004, *Arizona Business Gazette*.	The Honorable Phil Gordon, Mayor, City of Phoenix, 200 West Washington Street, 11th Floor, Phoenix, Arizona 85003–1611.	June 22, 2004	040051
Maricopa	Unincorporated Areas (03–09–1653P).	Sept. 23, 2004, Sept. 30, 2004, *Arizona Business Gazette*.	The Honorable Andrew W. Kunasek, Chairman, Maricopa County Board of Supervisors, 301 West Jefferson Street, 10th Floor, Phoenix, Arizona 85003.	Dec. 30, 2004	040037
Maricopa	Unincorporated Areas (04–09–0318P).	Sept. 23, 2004, Sept. 30, 2004, *Arizona Business Gazette*.	The Honorable Andrew W. Kunasek, Chairman, Maricopa County Board of Supervisors, 301 West Jefferson Street, 10th Floor, Phoenix, Arizona 85003.	Dec. 30, 2004	040037
Pima	City of Tucson (04–09–0621P).	July 29, 2004, Aug. 5, 2004, *Daily Territorial*.	The Honorable Bob Walkup, Mayor, City of Tucson, 255 West Alameda Street, Tucson, Arizona 85701.	Nov. 4, 2004	040076
Pima	Unincorporated Areas (04–09–0621P).	July 29, 2004, Aug. 5, 2004, *Daily Territorial*.	The Honorable Sharon Bronson, Chair, Pima County Board of Supervisors, 130 West Congress Street, 11th Floor, Tucson, Arizona 85701.	Nov. 4, 2004	040073
Yavapai	Town of Prescott Valley (03–09–1663P).	July 8, 2004, July 15, 2004, *Prescott Daily Courier*.	The Honorable Richard Killingsworth, Mayor, Town of Prescott Valley, 7501 East Civic Circle, Prescott Valley, Arizona 86314.	Oct. 14, 2004	040121
Yavapai	Unincorporated Areas (04–09–0725P).	July 22, 2004, July 29, 2004, *Prescott Daily Courier*.	The Honorable Lorna Street, Chairman, Yavapai County Board of Supervisors, 1015 Fair Street, Room 310, Prescott, Arizona 86301.	Oct. 28, 2004	040093
California:					
Contra Costa	City of Clayton (04–09–0463P).	Aug. 26, 2004, Sept. 2, 2004, *Contra Costa Times*.	The Honorable Peter Laurence, Mayor, City of Clayton, 6000 Heritage Trail, Clayton, California 94517–0280.	Dec. 2, 2004	060027
Contra Costa	City of Concord (04–09–0463P).	Aug. 26, 2004, Sept. 2, 2004, *Contra Costa Times*.	The Honorable Mark Peterson, Mayor, City of Concord, Concord City Hall, 1950 Parkside Drive, Concord, California 94519.	Dec. 2, 2004	065022
Kern	Unincorporated Areas (04–09–0755P).	Aug. 26, 2004, Sept. 2, 2004, *Bakersfield Californian*.	Mr. John McQuiston, Chairman, Kern County Board of Supervisors, 1115 Truxtun Avenue, Fifth Floor, Bakersfield, California 93301.	July 23, 2004	060075
Riverside	City of Corona (04–09–0832P).	July 22, 2004, July 29, 2004, *Press Enterprise*.	The Honorable Jeff Miller, Mayor, City of Corona, 815 West Sixth Street, Corona, California 92882.	Oct. 28, 2004	060250
Sacramento ...	Unincorporated Areas (04–09–0420P).	Oct. 7, 2004, Oct. 14, 2004, *Daily Recorder*.	The Honorable Muriel Johnson, Chair, Sacramento County Board of Supervisors, 700 H Street, Suite 2450, Sacramento, California 95814.	Jan. 13, 2005	060262
San Diego	City of National City (04–09–0905P).	July 29, 2004, Aug. 5, 2004, *San Diego Union—Tribune*.	The Honorable Nick Inzunza, Mayor, City of National City, National City Civic Center, 1243 National City Boulevard, National City, California 91950.	Nov. 4, 2004	060293
San Diego	San City of Vista (03–09–1498P).	Aug. 19, 2004, Aug. 26, 2004, *North County Times*.	The Honorable Morris Vance, Mayor, City of Vista, P.O. Box 1988, Vista, California 92085.	Nov. 26, 2004	060297

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Santa Barbara	Unincorporated Areas (03–09–1650P).	Sept. 2, 2004, Sept. 9, 2004, *Santa Barbara News-Press*.	The Honorable Joseph Centeno, Chair, Santa Barbara County Board of Supervisors, 511 East Lakeside Parkway, Suite 141, Santa Maria, California 93455.	Dec. 9, 2004	060331
Santa Clara	City of San Jose (04–09–0959P).	Aug. 5, 2004, Aug. 12, 2004, *San Jose Mercury News*.	The Honorable Ron Gonzales, Mayor, City of San Jose, 801 North First Street, San Jose, California 95110.	Nov. 12, 2004	060349
Ventura	City of Simi Valley (04–09–0054P).	Oct. 14, 2004, Oct. 21, 2004, *Ventura County Star*.	The Honorable William Davis, Mayor, City of Simi Valley, 2929 Tapo Canyon Road, Simi Valley, California 93063–2199.	Jan. 20, 2005	060421
Colorado:					
Boulder	City of Longmont (03–08–0580P).	July 1, 2004, July 8, 2004, *Daily Times Call*.	The Honorable Julia Pirmack, Mayor, City of Longmont, 350 Kimbark Street, Longmont, Colorado 80501.	Oct. 7, 2004	080027
Boulder	City of Longmont (04–08–0463P).	Sept. 23, 2004, Sept. 30, 2004, *Longmont Daily Times Call*.	The Honorable Julia Pirmack, Mayor, City of Longmont, 350 Kimbark Street, Longmont, Colorado 80501.	Dec. 16, 2004	080027
Boulder	Unincorporated Areas (03–08–0580P).	July 1, 2004, July 8, 2004, *Daily Times Call*.	The Honorable Paul Danish, Chairman, Boulder County Board of Commissioners, P.O. Box 471, Boulder, Colorado 80306.	Oct. 7, 2004	080023
El Paso	City of Colorado Springs (03–08–0689P).	July 1, 2004, July 8, 2004, *The Gazette*.	The Honorable Lionel Rivera, Mayor, City of Colorado Springs, P.O. Box 1575, Colorado Springs, Colorado 80901.	Oct. 7, 2004	080060
El Paso	City of Colorado Springs (04–08–0434P).	Aug. 26, 2004, Sept. 2, 2004, *The Gazette*.	The Honorable Lionel Rivera, Mayor, City of Colorado Springs, P.O. Box 1575, Colorado Springs, Colorado 80901.	Dec. 2, 2004	080060
El Paso	City of Colorado Springs (04–08–0314P).	Sept. 23, 2004, Sept. 30, 2004, *The Gazette*.	The Honorable Lionel Rivera, Mayor, City of Colorado Springs, P.O. Box 1575, Colorado Springs, Colorado 80901.	Dec. 30, 2004	080060
El Paso	Unincorporated Areas (03–08–0689P).	July 1, 2004, July 8, 2004, *The Gazette*.	The Honorable Chuck Brown, Chair, El Paso County Board of Commissioners, 27 East Vermijo Avenue, Colorado Springs, Colorado 80903–2203.	Oct. 7, 2004	080059
El Paso	Unincorporated Areas (03–08–0062P).	Aug. 11, 2004, Aug. 18, 2004, *El Paso County News*.	The Honorable Chuck Brown, Chair, El Paso County Board of Commissioners, 27 East Vermijo Avenue, Colorado Springs, Colorado 80903–2203.	Nov. 18, 2004	080059
El Paso	Unincorporated Areas (04–08–0114P).	Sept. 22, 2004, Sept. 29, 2004, *El Paso County News*.	The Honorable Chuck Brown, Chair, El Paso County Board of Commissioners, 27 East Vermijo Avenue, Colorado Springs, Colorado 80903–2203.	Dec. 29, 2004	080059
Summit	Town of Breckenridge (04–08–0049P).	July 9, 2004, July 16, 2004, *Summit County Journal*.	The Honorable Ernie Blake, Mayor, Town of Breckenridge, 150 Ski Hill Road, Breckenridge, Colorado 80424.	Oct. 15, 2004	080172
Summit	Unincorporated Areas (02–08–0102P).	July 16, 2004, July 23, 2004, *Summit County Journal*.	The Honorable Bill Wallace, Chairman, Summit County Board of Commissioners, County Courthouse, P.O. Box 68, Breckenridge, Colorado 80424.	Oct. 22, 2004	080290
Weld	Town of Firestone (04–08–0410P).	Oct. 6, 2004, Oct. 13, 2004, *Farmer and Miner*.	The Honorable Michael Simone, Mayor, Town of Firestone, 151 Grant Avenue, Firestone, Colorado 80520.	Jan. 12, 2005	080241
Weld	Town of Frederick (04–08–0410P).	Oct. 6, 2004, Oct. 13, 2004, *Farmer and Miner*.	The Honorable Eric Doering, Mayor, Town of Frederick, 401 Locust Street, Frederick, Colorado 80530.	Jan. 12, 2005	080244
Weld	Unincorporated Areas (04–08–0410P).	Oct. 6, 2004, Oct. 13, 2004, *Farmer and Miner*.	The Honorable Robert D. Masden, Chair, Weld County Board of Commissioners, P.O. Box 758, Greeley, Colorado 80632.	Jan. 12, 2005	080266

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Florida: Sarasota ..	City of Sarasota (04–04–A194P).	July 15, 2004, July 22, 2004, *Sarasota Herald-Tribune*.	Mr. Michael A. McNees, City Manager, City of Sarasota, 1565 First Street, Sarasota, Florida 34236.	June 24, 2004	125150
Idaho:					
Ada	Unincorporated Areas (04–10–0213P).	Aug. 19, 2004, Aug. 26, 2004, *Idaho Statesman*.	The Honorable Judy Peavey-Derr, Chairman, Ada County Board of Commissioners, County Courthouse, 200 West Front Street, Boise, Idaho 83702.	Nov. 26, 2004	160001
Ada	Unincorporated Areas (04–10–0379P).	Sept. 2, 2004, Sept. 9, 2004, *Idaho Statesman*.	The Honorable Judy Peavey-Derr, Chairman, Ada County Board of Commissioners, County Courthouse, 200 West Front Street, Boise, Idaho 83702.	Dec. 9, 2004	160001
Montana:					
Missoula	City of Missoula (04–08–0371P).	Aug. 26, 2004, Sept. 2, 2004, *The Missoulian*.	The Honorable Mike Kadas, Mayor, City of Missoula, 435 Ryman Street, Missoula, Montana 59802.	July 23, 2004	300049
Missoula	Unincorporated Areas (04–08–0371P).	August 26, 2004, September 2, 2004, *The Missoulian*.	The Honorable Barbara Evans, Chairman, Missoula County Board of Commissioners, 200 West Broadway, Missoula, Montana 59802.	July 23, 2004	300048
Nevada: Elko	City of Elko (02–09–1203P).	July 22, 2004, July 29, 2004, *Elko Daily Free Press*.	The Honorable Michael J. Franzoia, Mayor, City of Elko, 1751 College Avenue, Elko, Nevada 89801.	Oct. 28, 2004	320010
Utah: Salt Lake	City of South Jordan *(04–08–0379P)*.	Sept. 2, 2004, Sept. 9, 2004, *Salt Lake Tribune*.	The Honorable W. Kent Money, Mayor, City of South Jordan, 1600 West Towne Center Drive, South Jordan, Utah 84095.	Dec. 9, 2004	490107

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance'')

Dated: December 1, 2004.

David I. Maurstad,

Acting Director, Mitigation Division, Emergency Preparedness and Response Directorate.

[FR Doc. 04–27132 Filed 12–9–04; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

Final Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: Base (1% annual-chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: *Effective Date:* The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the FIRM is available for inspection as indicated in the table below.

ADDRESSES: The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: FEMA makes the final determinations listed below of BFEs and modified BFEs for each community listed. The proposed BFEs and proposed modified BFEs were published in newspapers of local circulation and an opportunity for the community or individuals to appeal the proposed determinations to or through the community was provided for a period of ninety (90) days. The proposed BFEs and proposed modified BFEs were also published in the **Federal Register**.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67.

FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community.

The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because final or modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and are required to establish and maintain community

eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism. This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform. This proposed rule meets the applicable standards of Section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 67 is amended to read as follows:

PART 67—[AMENDED]

■ 1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.11 [Amended]

■ 2. The tables published under the authority of § 67.11 are amended as follows:

Source of flooding and location	*Elevation in feet (NGVD)	Communities affected
NORTH DAKOTA **Morton County (FEMA Docket No. B–7439)**		
Missouri River:		City of Mandan.
Approximately 1.1 miles downstream of Bismarck Expressway bridge	*1,635	
Approximately 2.8 miles upstream of Interstate Highway 94	*1,639	
At confluence of Apple Creek	*1,628	Morton County (Uninc. Areas).
Approximately 5.7 miles upstream of confluence of Square Butte Creek	*1,644	
ADDRESSES: **Unincorporated Areas Morton County** Maps are available for inspection at the County Courthouse, 210 Second Avenue, Northwest, Mandan, North Dakota. **City of Mandan** Maps are available for inspection at City Hall, 205 Second Avenue, Northwest, Mandan, North Dakota.		
WASHINGTON **King County (FEMA Docket No. B–7435)**		
Issaquah Creek:		King County (Uninc. Areas) and City of Issaquah.
Approximately 1,700 feet downstream of Southeast 56th Street	*45	
Approximately 3,200 feet upstream of Sycamore Drive	*140	
East Fork Issaquah Creek:		City of Issaquah.
At confluence with Issaquah Creek	*75	
Just downstream of Interstate Highway 90	*153	
Gilman Boulevard Overflow Issaquah Creek:		City of Issaquah.
Approximately 640 feet downstream of 10th Avenue Northwest	*56	
Approximately 1,000 feet upstream of 7th Avenue Northwest	*64	
ADDRESSES: **Unincorporated Areas King County** Maps are available for inspection at the Water and Land Department Flood Hazard Division, 201 South Jackson Street, Suite 600, Seattle, Washington. **City of Issaquah** Maps are available for inspection at the City Hall Department of Public Works, 1775 12th Avenue NW., Issaquah, Washington.		
King County (FEMA Docket No. B–7439)		
Snoqualmie River:		King County (Uninc. Areas) and City of Snoqualmie.
Approximately 2,000 feet downstream of confluence of Middle Fork and South Fork Snoqualmie River.	*424	
South Fork Snoqualmie River:		King County (Uninc. Areas) City of Snoqualmie, and City of North Bend.
At confluence with Middle Fork Snoqualmie River	*425	
Approximately 700 feet upstream of Eastbound I–90 bridge	*475	
Middle Fork Snoqualmie River:		King County (Uninc. Areas) and City of Snoqualmie.
At confluence of North Fork Snoqualmie River	*426	
Approximately 260 feet downstream of Southeast Mount SI Road	*478	
Lower Overflow:		King County (Uninc. Areas) and City of North Bend.
At Southeast 100th Street	*428	
Approximately 1,400 feet upstream of North Pickett Avenue	*449	
Middle Overflow:		King County (Uninc. Areas) and City of North Bend.

Source of flooding and location	*Elevation in feet (NGVD)	Communities affected
Just upstream of Northeast 420th Avenue	*432	
At Borst Avenue Northeast	*441	
Upper South Overflow:		King County (Uninc. Areas) and City of North Bend.
Approximately 400 feet downstream of Ballarat Avenue North	*437	
At divergence from Middle Fork Snoqualmie River	*467	
Upper North Overflow:		King County (Uninc. Areas) and City of North Bend.
Approximately 150 feet downstream of Ogle Avenue Northeast	*441	
Approximately 400 feet downstream of 120th Street	*457	
Gardiner Creek:		King County (Uninc. Areas) and City of North Bend.
At Bolch Avenue Northwest	*429	
Upstream of Northwest Eighth Street	*435	

ADDRESSES

Unincorporated Areas King County

Maps are available for inspection at the King DDES, Black River Corp. Park, 900 Oaksdale Avenue Southwest, Suite 100, Renton, Washington.

City of North Bend

Maps are available for inspection at 1155 East North Bend Way, North Bend, Washington.

City of Snoqualmie

Maps are available for inspection at the Planning Directors Office, 8020 Railroad Avenue Southeast, Snoqualmie, Washington.

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance'')

Dated: December 1, 2004.

David I. Maurstad,

Acting Director, Mitigation Division, Emergency Preparedness and Response Directorate.

[FR Doc. 04–27133 Filed 12–9–04; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AT64

Endangered Species Act Incidental Take Permit Revocation Regulations

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: This rule describes circumstances in which the U.S. Fish and Wildlife Service may revoke incidental take permits issued under section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended. On December 11, 2003, the U.S. District Court for the District of Columbia in *Spirit of the Sage Council* v. *Norton,* Civil Action No. 98–1873 (D. D.C.), invalidated 50 CFR 17.22(b)(8) and 17.32(b)(8), the regulations addressing Service authority to revoke incidental take permits under certain circumstances. The court ruled that we had adopted those regulations without adequately complying with the public notice and comment procedures required by the Administrative Procedure Act (APA) and remanded the regulations to us for further proceedings consistent with the APA. On May 25, 2004, we published in the **Federal Register** a final rule withdrawing the permit revocation regulations vacated by the court's order (69 FR 29669). On that same date we requested public comment on our proposal to reestablish the permit revocation regulations (69 FR 29681).

DATES: This rule is effective January 10, 2005.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the Division of Consultation, Habitat Conservation Planning, Recovery and State Grants, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Rick Sayers, Chief, Branch of Consultation and Habitat Conservation Planning, at the above address (Telephone 703/358–2106, Facsimile 703/358–1735).

SUPPLEMENTARY INFORMATION: This notice of rulemaking applies to the U.S. Fish and Wildlife Service only. Therefore, the use of the terms ''Service'' and ''we'' in this notice refers exclusively to the U.S. Fish and Wildlife Service.

This rule applies only to 50 CFR 17.22(b) and 17.32(b), which pertain to incidental take permits. Regulations in 50 CFR 17.22(c) and 17.32(c), which pertain to Safe Harbor Agreements (SHAs), and in 50 CFR 17.22(d) and 17.32(d), which pertain to Candidate Conservation Agreements with Assurances (CCAAs), are not affected by this rule.

Background

Promulgation of the ''Permit Revocation Rule''

The Service administers a variety of conservation laws that authorize the issuance of permits for otherwise prohibited activities. In 1974, we published 50 CFR part 13 to consolidate the administration of various permitting programs. Part 13 established a uniform framework of general administrative conditions and procedures that would govern the application, processing, and issuance of all Service permits. We intended the general part 13 permitting provisions to be in addition to, and not in lieu of, other more specific permitting requirements of Federal wildlife laws.

We subsequently added many wildlife regulatory programs to title 50 of the CFR. For example, we added part 18 in 1974 to implement the Marine Mammal Protection Act; modified and expanded part 17 in 1975 to implement the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*); and added part 23 in 1977 to implement the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The regulations in these parts contain their own specific permitting requirements that supplement the general permitting provisions of part 13.

With respect to the ESA, the combination of the general permitting

provisions in part 13 and the specific permitting provisions in part 17 has worked well in most instances. However, the Service has found that, in some areas of permitting policy under the Act, the ''one size fits all'' approach of part 13 has been inappropriately constraining and narrow. Incidental take permitting under section 10(a)(1)(B) of the ESA is one such area.

On June 12, 1997 (62 FR 32189), we published proposed revisions to our general permitting regulations in 50 CFR part 13 to identify, among other things, the situations in which the permit provisions in part 13 would not apply to individual incidental take permits. On June 17, 1999 (64 FR 32706), we published a final set of regulations that included two provisions that relate to revocation of incidental take permits. The first provides that the general revocation standard in 50 CFR 13.28(a)(5) will not apply to several types of ESA permits, including incidental take permits. The second provision, hereafter referred to as the Permit Revocation Rule, described circumstances under which incidental take permits could be revoked.

The Permit Revocation Rule, which was codified at 50 CFR 17.22(b)(8) (endangered species) and 17.32(b)(8) (threatened species), clarified that an incidental take permit ''may not be revoked . . . unless continuation of the permitted activity would be inconsistent with the criterion set forth in 16 U.S.C. 1539(a)(2)(B)(iv) and the inconsistency has not been remedied in a timely fashion.'' The criterion in section 10(a)(2)(B)(iv) of the ESA (16 U.S.C. 1539(a)(2)(B)(iv)) that ''the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild'' is one of the statutory criteria that incidental take permit applicants must meet in order to obtain a permit. The criterion is substantially identical to the definition of ''jeopardize the continued existence of'' in the joint Department of the Interior/Department of Commerce regulations implementing section 7 of the ESA (50 CFR 402.02).

On February 11, 2000 (65 FR 6916), we published a request for additional public comment on several specific regulatory changes included in the June 17, 1999, final rule (64 FR 32706), including the Permit Revocation Rule. Based on our review of the comments we received in response to the February 11, 2000, request for comments, we published a notice on January 22, 2001 (66 FR 6483), that affirmed the provisions of the June 17, 1999 (64 FR 32706), final rule, including the Permit Revocation Rule.

The ''No Surprises'' Rule Litigation and the Order To Vacate the Permit Revocation Rule

On February 23, 1998 (63 FR 8859), the Service and the National Marine Fisheries Service, which also issues ESA incidental take permits, jointly promulgated the No Surprises Rule. The No Surprises Rule provides certainty to holders of incidental take permits by placing limits on the agencies' ability to require additional mitigation after an incidental take permit has been issued. The No Surprises Rule is codified by the Service at 50 CFR 17.22(b)(5) (endangered species) and 17.32(b)(5) (threatened species) and by the National Marine Fisheries Service at 50 CFR 222.307(g). For both agencies, the No Surprises Rule was added to pre-existing regulations pertaining to incidental take permits.

In July 1998, a group of environmental plaintiffs challenged the No Surprises Rule in *Spirit of the Sage Council* v. *Norton,* Civil Action No. 98–1873 (D. D.C.). The Service promulgated the Permit Revocation Rule on June 17, 1999 (64 FR 32706). The plaintiffs subsequently amended their complaint to challenge the Permit Revocation Rule. The government explained in its briefs that the ESA itself authorizes the Service to revoke incidental take permits, and that the Rule simply confirmed that the Service would employ its statutory authority if the need arose.

On December 11, 2003, the court ruled that the Service had violated the public notice and comment procedures of the APA when promulgating the Permit Revocation Rule. The court did not rule on the substantive validity of the Permit Revocation Rule. The court vacated and remanded the Permit Revocation Rule to the Service for further consideration consistent with section 553 of the APA. The court did not rule on the validity of the No Surprises Rule, but found that the Permit Revocation Rule is relevant to the court's review of the No Surprises Rule. The court, therefore, ordered the Service to consider the No Surprises Rule together with the Permit Revocation Rule in any new rulemaking proceedings concerning revocation of incidental take permits containing No Surprises assurances. On May 25, 2004, we published in the **Federal Register** a final rule (69 FR 29669) withdrawing the permit revocation regulations vacated by the court's order. On that date, we also published a proposal to issue new permit revocation regulations (69 FR 29681). On June 10, 2004, the court further ordered the Service to complete the rulemaking on the new revocation rule no later than December 10, 2004, and to refrain from approving new incidental take permits or related documents containing ''No Surprises'' assurances until we have completed all proceedings remanded by the court's December 11, 2003, order.

The government complied with the court's orders with this rulemaking action. The Service published a notice in the **Federal Register** on May 25, 2004, requesting public comment on proposed new permit revocation regulations (69 FR 29681). We requested comments on the proposed rule and its interrelationship with the No Surprises Rule (63 FR 8859). With this rule, we establish revocation regulations for incidental take permits at 50 CFR 17.22(b)(8) and 17.32(b)(8). In addition, the National Marine Fisheries Service has determined that the court's orders require no further action by the National Marine Fisheries Service.

Summary of Previously Received Comments

As stated in the proposed rule, we previously received comments on the Permit Revocation Rule in response to our **Federal Register** notice of February 11, 2000 (65 FR 6916). We addressed these comments in our affirmation of the final rule published in the **Federal Register** on January 22, 2001 (66 FR 6483). Because we received some of the same or similar comments in response to our request for public comment on our proposal of this rule, our response to comments below encompasses both the current and previous comments regarding incidental take permit revocation.

Summary of Comments Received

On May 25, 2004, we proposed to reestablish the Permit Revocation Rule as originally promulgated on June 17, 1999 (64 FR 32706). In our request for public comment on the proposed regulations, we specifically invited public comment on the following issues:

1. The proposal to reestablish the Permit Revocation Rule. This rule would allow the Service to revoke an incidental take permit as a last resort in the unexpected and unlikely situation in which continuation of the permitted activities would likely jeopardize the continued existence of the species covered by the permit and the Service is not able to remedy the situation through other means in a timely fashion.

2. The interrelationship of the Permit Revocation Rule and the No Surprises Rule, including whether the revocation standard in the Permit Revocation Rule is appropriate in light of the regulatory

assurances contained in the No Surprises Rule.

3. Whether the revocation standard in 50 CFR 13.28(a)(5) or some other revocation standard would be more appropriate for incidental take permits with No Surprises assurances.

The comment period closed on July 26, 2004. We received approximately 250 comments on our proposed rule from a variety of entities, including the National Marine Fisheries Service, two States, one Tribe, several county and other local agencies, conservation groups, industry and trade associations, and private individuals. Among the comments were several that questioned the Service's compliance with the APA and one that described difficulty understanding the proposal. We address these two issues under General Issues below. The remainder of the comments raised specific issues that are summarized below and discussed in detail, along with the Service's responses, under Specific Issues below.

Because most of the comments we received covered similar issues and many of them were form letters, we grouped the comments according to issues. The comments ranged widely, but generally fell into three categories: (1) the permit revocation regulations are appropriate as proposed; (2) the permit revocation regulations inappropriately limit when the Service can revoke incidental take permits; and (3) the permit revocation regulations are overly protective of listed resources and undermine the regulatory certainty provided by the No Surprises Rule. In addition to comments on the proposed regulations and the interrelationship of the proposed regulations and the No Surprises Rule, we also received numerous comments on the No Surprises Rule, habitat conservation planning, and specific Habitat Conservation Plans that are beyond the narrow scope of this particular rulemaking on the permit revocation regulations. While these comments are beyond the scope of this particular rulemaking and are not addressed here, we will retain this information for consideration in any future revisions of guidance, policy, or rules governing Habitat Conservation Planning and No Surprises assurances.

Most commenters who responded during this comment period supported the permit revocation regulations as proposed. Many of these commenters stated they thought it appropriate for the permit revocation standard to be the same as for permit issuance (*i.e.*, based on the criterion in section 10(a)(2)(B)(iv) of the ESA (16 U.S.C. 1539(a)(2)(B)(iv)) that ''the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild''). Many stated the proposed regulations allow for meaningful implementation of the No Surprises Rule in the context of Habitat Conservation Plans and associated incidental take permits. Many of these commenters stated that applying the general permit revocation standard at 50 CFR 13.28(a)(5) is inappropriate in the context of the No Surprises Rule and undercuts the very notion of regulatory certainty by expanding the conditions under which permits may be revoked. Additionally, some of these commenters stated they found it appropriate for the Service to step in with additional funding, lands, or other resources in the event a species was jeopardized as a result of any ''unforeseen circumstance.'' These commenters did not view such a situation as burdensome for the Service or taxpayers, citing a number of potential funding sources and other opportunities.

Numerous commenters expressed concern that the permit revocation regulations inappropriately limit when permits may be revoked (*i.e.*, the regulations are not adequately protective of listed resources). Some of these commenters recommended revision of: (1) The No Surprises Rule; (2) the proposed permit revocation regulations; (3) the general permitting regulations at 50 CFR 13; or (4) some combination of these regulations. Some of these commenters objected to ''boilerplate'' language included in incidental take permits that provided the same No Surprises assurances to all permittees. Some of these commenters were concerned that the Service would be unable to revoke a permit if the permittee was unwilling to make monitoring, management, or other changes under an adaptive management plan or was otherwise out of compliance with the permit. These commenters: (1) Questioned why the old provision at 50 CFR 13.28(a)(5) should be replaced with a standard they viewed as less protective; (2) requested the word ''shall'' rather than ''may'' be used to indicate that revocation is not discretionary; (3) questioned why the Service should have to step in at public expense to remedy jeopardy situations before a permit can be revoked; (4) questioned what the standard ''in a timely fashion'' means or requested this term be further defined; (5) suggested that the revocation provision should also contain a reference to adverse modification of critical habitat; and (6) recommended that the word ''jeopardy'' be used instead of ''appreciable reduction in the likelihood of survival and recovery'' because the commenter viewed ''jeopardy'' to be a higher standard.

A few commenters stated the permit revocation regulations undermined the No Surprises Rule (*i.e.*, the regulations are overly protective of listed resources). The commenters requested: (1) the Service reaffirm that permit revocation should be ''an action of last resort;'' and (2) the Service limit permit revocation to instances where the permittee is not in compliance with the permit (*i.e.*, no permit revocation even if a species would be jeopardized by the continuation of activities covered under the permit as long as the plan is being properly implemented).

The vast majority of commenters, regardless of the three categories into which they fell, expressed the view that the No Surprises Rule and concomitant permit revocation regulations are effective incentives that are responsible for the large increase in the number of non-federal landowners who have chosen to participate in the Habitat Conservation Planning program.

General Issues

Issue: We received several comments on the public notice process in which the commenters viewed the Service's decision to repropose the same regulations that were vacated by the court as a violation of APA procedural requirements. These commenters felt the Service should have proposed permit revocation regulations that differed from those promulgated in the June 17, 1999, final rule (64 FR 32706) and the January 22, 2001, affirmation of the final rule (66 FR 6483). A few commenters thought the proposed rule ''deprived the public of meaningful notice,'' lacked sufficient explanation of the specific issues on which we were soliciting comments, and ''cannot be interpreted to fairly apprise interested persons of the subjects and the issues.'' Some of these commenters thought the Service should have provided more explanation of the differences between the proposed rule and the revocation standard in the general permitting regulations (*i.e.*, 50 CFR 13.28(a)(5)).

Response: We considered the revocation standard at 50 CFR 13.28(a)(5), but thought this standard was not appropriate given the plain language of section 10(a)(2)(B)(iv) of the ESA (16 U.S.C. 1539(a)(2)(B)(iv)). We reviewed the No Surprises assurances provided at 50 CFR 17.22(b)(5) and 17.32(b)(5) and came to the conclusion that the proposed rule appropriately describes the point at which permit

revocation should occur for a properly implemented HCP. Therefore, we reproposed the same regulations that were vacated, explaining our reasoning and soliciting public comment. In its comments, the National Marine Fisheries Service agreed that the revocation standard contained in the proposed rule was appropriate. Our intent to clarify the relevant standards for revocation of incidental take permits was well described in the proposed rule, and the record of events that led to this rulemaking was well chronicled. In our proposal we specifically invited the public to comment on the appropriateness of the proposed standard and if they thought the revocation standards at 50 CFR 13.28(a)(5) or some other standard was more appropriate. Through this rulemaking process we have complied with the procedural requirements and the intent of the APA.

Issue: One commenter found it difficult to understand the proposed rule and ''found the publication in the **Federal Register** to be totally inadequate for even an ''informed citizen'' to understand the intent of the proposal or the historical precedents which required this rules process.''

Response: The historical events that led to this rulemaking were well described in the proposal. Our intent was to clarify relevant standards for revocation of incidental take permits and solicit public comment on the appropriateness of the proposed standard. Based on the number of significant comments we received, the content of the proposal adequately described the historical precedents and the intent of the proposal.

Specific Issues

In this section we address specific issues relevant to the permit revocation regulations and the interrelationship of the permit revocation regulations and the No Surprises Rule that were raised by commenters.

Issue: Several commenters viewed the proposed revocation regulations coupled with No Surprises assurances as an inadequate standard to protect species. To remedy the perceived inadequacy, some of these commenters provided recommendations for revisions of the No Surprises Rule, the regulations governing incidental take permit revocation, or both. Suggested revisions generally included conditioning permits to allow for periodic evaluation in effectiveness, modifying the plan to incorporate new scientific information or changed conditions, and requiring performance bonds to ensure accountability. A couple of commenters requested that the Addendum to the HCP Handbook, the so-called Five Point Policy (65 FR 35242), be promulgated as a regulation. Some of these commenters objected to ''boilerplate'' language included in incidental take permits that they thought provided the same level of No Surprises assurances to all permittees. They viewed this approach as inadequate to achieve regulatory assurances commensurate with the level of scientific rigor underlying the HCP, the level of uncertainty regarding the conservation of the species, and the duration of the associated incidental take permit. A couple of commenters thought there should be flexibility in the level of assurances provided and that the Service should negotiate the level of assurances and the conditions for permit revocation on a case-by-case basis.

Response: We address these comments together, because the concerns raised are related to several aspects of permit issuance and revocation. In order to provide a clear response to this suite of issues, we begin by summarizing the permit process, specifically permit issuance criteria and the No Surprises Rule. In order for an applicant to receive an incidental take permit with No Surprises assurances, the Service must receive commitments from the applicant. The specific commitments vary widely and are unique to each plan, but generally the applicant must submit a Habitat Conservation Plan (HCP) that, among other things, includes measures to minimize and mitigate impacts and ensures adequate funding to implement the proposed plan. The HCP must support findings that the amount of incidental take of species covered by the plan and included on the incidental take permit will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. In addition to these findings and other issuance criteria in section 10(a)(2)(B) of the ESA that must be met, an applicant must demonstrate that (1) the species are adequately covered by the plan, (2) the plan has included provisions for changed circumstances and unforeseen circumstances, and (3) the applicant has ensured funding for changed circumstances. Changed circumstances are changes affecting a species or geographic area covered by an HCP that can reasonably be anticipated and planned for by plan developers and the Service. Unforeseen circumstances are changes affecting a species or geographic area covered by a conservation plan that could not reasonably have been anticipated by plan developers and the Service at the time of the conservation plan's negotiation and development, and that result in a substantial and adverse change in the status of the covered species.

Most commenters' concerns and suggested revisions to the No Surprises Rule or the permit revocation rule are already addressed in guidance developed jointly by the Service and the National Marine Fisheries Service in the form of an addendum to the HCP Handbook published on June 1, 2000, known as the ''Five Point Policy'' (65 FR 35242). The Five Point Policy provides clarifying guidance for the Service's and the National Marine Fisheries Service's administration of the incidental take permit program and for those applying for an incidental take permit. The Five Point Policy is considered agency policy, and the Service is fully committed to its implementation.

As described in the Five Point Policy, an HCP applicant must identify biological goals and objectives of the plan and must develop an operating conservation program (*i.e.*, conservation management activities expressly agreed upon and described in the HCP and implemented as part of the plan) to achieve these goals and objectives. As part of the operating conservation program, the applicant must develop a management plan with an appropriate level of flexibility, such as an adaptive management plan, and a monitoring program to assess the effectiveness of the management plan and other conservation measures being implemented under the operating conservation program. If all issuance criteria have been met, the duration of the permit is then determined by considering a number of factors, including the period of time over which the permittee's activities will occur, the reliability of information underlying the HCP, the length of time necessary to implement and achieve the benefits of the operating conservation program, the extent to which the program incorporates adaptive management strategies, and the level of biological uncertainty associated with the plan. In general, a long permit duration is likely to require a comprehensive adaptive management plan and minimal biological uncertainty.

The Five Point Policy also extends the minimum public comment period for most HCPs based on the complexity of the proposed plans. This increased public comment period assists the Service and the applicant in gathering information that may have been missed during the development of the HCP.

Through this process, an applicant, with assistance from the Service, develops an HCP that includes periodic review, modification to the plan to accommodate new scientific information, and funding that is assured through a variety of means, including performance bonds, all of which are mutually agreed upon in the operating conservation program developed to implement the plan. Rather than negotiate a different set of assurances and a different set of revocation criteria for each incidental take permit, the Service chose a threshold approach, where the applicant only receives No Surprises assurances for species that are adequately covered by the HCP. Determinations as to whether a species is adequately covered by a plan are made on a case by case basis, a process in which the Service considers the scientific rigor underlying the particular plan and any uncertainty associated with the plan and its operating conservation program as described above, and then ensures that appropriate monitoring, reporting, modification, and funding measures are included, and determines the appropriate duration of the permit and what type and amount of take, if any, can be authorized for each species.

Once a permit is issued, the permittee must properly implement the plan (*i.e.*, fully implement all commitments and provisions agreed to in the HCP, associated Implementing Agreement (if any), and incidental take permit) to receive No Surprises assurances and the assurance that permit revocation would be an ''action of last resort.'' This approach, which includes planning for change and contingencies, but uses one revocation standard for all, leads to greater consistency in our implementation of the Habitat Conservation Planning program while taking into account the unique circumstances associated with each plan.

Issue: One State and numerous other commenters expressed concern regarding the Service's ability to revoke a permit under the proposed permit revocation regulations if a permit holder is not in compliance with their permit and under what timeframe this action would occur.

Response: Nothing in the permit revocation regulations, including the provisions in 50 CFR 17.22(b)(8) and 17.32(b)(8) precludes the Service from suspending and, if necessary, revoking an incidental take permit if the permittee fails to comply with any of the terms and conditions of the incidental take permit. First, section 10(a)(2)(C) of the ESA provides that the Service ''shall revoke'' an incidental take permit if the Service ''finds that the permittee is not complying with the terms and conditions of the permit.'' Moreover, §§ 17.22(b)(8) and 17.32(b)(8) of the regulations state that the revocation provisions in 50 CFR 13.28(a)(1)–(4) apply to incidental take permits. Under these regulations, if a permittee is not properly implementing the HCP (for example, if the permittee is not adhering to the agreed-upon adaptive management program and monitoring regime or is not funding the operating conservation program as agreed), then the Service can suspend the permit (50 CFR 13.27(a)). And if the permittee fails within 60 days to correct deficiencies that were the cause of a permit suspension, then the Service can revoke the permit under 50 CFR 13.28(a)(2).

Issue: A few commenters were concerned that the Service would be unable to take any action if a permittee is in compliance with the plan, but the plan is not working as expected (*i.e.*, a substantial and adverse change in the status of a covered species has occurred) and the permittee is unwilling to modify the plan (*i.e.*, make monitoring, management, or other changes to the operating conservation program).

Response: The No Surprises Rule places limits on the Service's ability to require additional measures to respond to changes in circumstances after an incidental take permit is issued. It does not, however, affect the Service's revocation authority under the ESA. So long as the permittee is complying with the terms and conditions of the plan, the No Surprises Rule allows the Service to require additional conservation and mitigation measures of the permittee to respond to unforeseen circumstances; however, such measures must be limited to modifications of the conservation plan's operating conservation program that do not involve the commitment of additional land, water, or financial compensation or restrictions on the use of land, water, or other natural resources otherwise available for development or use under the HCP. The No Surprises Rule thus provides latitude to make changes to the plan as long as no additional cost (*i.e.*, land, water, funding, or other resources) is required of the permittee. However, the Service's revocation authority under the ESA allows the Service to revoke an incidental take permit even if the permittee is in compliance with the terms and conditions of the permit, if the permitted activity would appreciably reduce the likelihood of the survival and recovery of the species in the wild. This permit revocation rule does not create or change this authority, but describes the circumstances under which the Service would exercise it.

Issue: Some commenters did not see why the old provision in 50 CFR 13.28(a)(5) should be replaced with a standard they viewed as less protective. They viewed the proposed incidental take permit revocation standard and the general permitting standard at § 13.28(a)(5) as significantly different. Some of these commenters viewed the general permitting revocation standard that allows the Service to revoke an incidental take permit when the ''population(s) of the wildlife or plant that is the subject of the permit declines to the extent that continuation of the permitted activity would be detrimental to maintenance or recovery of the affected population,'' as the appropriate standard. A couple of these commenters thought the Service should be able to revoke incidental take permits if they are found to impair a species' long-term recovery, not just their short-term survival. A couple of commenters requested the word ''shall'' rather than ''may'' be used in the rule to indicate that revocation is not discretionary.

Response: We think that the standard for revocation of a permit should be the same as the standard for issuing the permit. In its comments, the National Marine Fisheries Service agreed that this standard for revocation was appropriate. When Congress amended the ESA in 1982 to create the HCP permit program, it clearly indicated that the relevant focus would be at the species level. Section 13.28(a)(5) predates the 1982 amendments and focuses only on the wildlife population in the permitted area. We therefore believe that it is appropriate to replace § 13.28(a)(5) with a provision that more accurately reflects the congressional intent behind the 1982 amendments. The timeframes ''short-term'' and ''long-term'' referred to by the commenter in reference to survival and recovery of species are not applicable here and are not a condition imposed on the Service for permit revocation. Under the new revocation provision, a permit may be revoked if effects to a population of a species affected by the permitted activity are determined to appreciably reduce the likelihood of survival and recovery of the species in the wild regardless of the time period over which this decline in the species' status is expected to take. In the unlikely event that an activity covered by a properly implemented incidental take permit is found likely to appreciably reduce the likelihood of the survival and recovery of any listed species in the wild and the problem cannot be corrected through

the unforeseen circumstances procedure of 50 CFR 17.22(b)(5)(iii) or 50 CFR 17.32(b)(5)(iii) or the additional actions provisions of 50 CFR 17.22(b)(6) or 50 CFR 17.32(b)(6), the Service will, as a matter of last resort, undertake the revocation procedures as described in 50 CFR 13.28(b) and 50 CFR 13.29.

The new revocation provision established in §§ 17.22(b)(8) and 17.32(b)(8) is written in a manner that indicates when revocation is not permissible instead of when it is. As a result, the suggestion that the word ''may'' be changed to ''shall'' is not practical. In addition, decisions involving permit revocation are fact-intensive and will require the exercise of discretion on the part of the agency. It is therefore questionable whether permit revocation standards can be described as being mandatory versus discretionary. We decline to substitute ''shall'' for ''may'' in the rule as the regulations are phrased to describe only those circumstances under which revocation is permissible within the agency's discretion.

Issue: Several commenters recommended that the word ''jeopardy'' be used instead of ''appreciable reduction in the likelihood of survival and recovery'' because the commenters viewed ''jeopardy'' to be a higher standard.

Response: The revocation standard in §§ 17.22(b)(8) and 17.32(b)(8) is effectively the same as the jeopardy standard. As stated in the background section of this publication, the criterion at section 10(a)(2)(B)(iv) of the ESA (16 U.S.C. 1539(a)(2)(B)(iv)) that the taking will not ''appreciably reduce the likelihood of the survival and recovery'' of the species in the wild is substantially identical to the definition of ''jeopardize the continued existence of'' in the joint Department of the Interior/Department of Commerce regulations implementing section 7 of the ESA (50 CFR 402.02). The Service is required to avoid jeopardizing the continued existence of any listed species under section 7 of the ESA and would do so by revoking the incidental take permit if other actions to avoid the jeopardy are not available.

Issue: A couple of commenters suggested that the revocation provision should also contain a reference to adverse modification of critical habitat.

Response: We do not see the need to add a reference to adverse modification of critical habitat. The statutory issuance criterion embodied in the new revocation provision applies only to actions that are likely to appreciably reduce the likelihood of the survival and recovery of the species in the wild, and makes no reference to critical habitat. We decline to expand the revocation provisions beyond the scope of the statutory issuance criterion.

Issue: Both States and several other commenters recommended that the phrase ''in a timely fashion'' be further defined or a timeframe be added to the rule that would establish when the Service would take revocation action.

Response: The phrase ''in a timely fashion'' was included in the proposed revocation provision to indicate that the Service would not move to revoke an incidental take permit the instant a concern about the effect of an activity on the species' likelihood of survival and recovery is identified, but only if subsequent efforts to remedy the situation were not successful. Because each HCP is case-specific, it is not possible to define what remedying in ''a timely fashion'' will mean in all instances. Whether a response can be deemed timely or not will depend on highly fact-specific issues, including the species involved and the source of the problem. However, like other such subjective terms that appear in laws and regulations, ''in a timely fashion'' is intended to be a reasonable period of time to allow for a good faith effort on the part of the Service and other interested parties to remedy the situation for the specific case at hand. In most cases we assume ''in a timely fashion'' would likely be a few days to a few months depending on the species involved and the source of the problem, but a shorter or longer period of time may be appropriate in some situations. Because we cannot define a more precise timeframe, we have decided to delete the phrase ''in a timely fashion'' from the final rule.

This change in the rule will have no effect on the actual period of time it would take the Service to remedy such a situation or to come to the conclusion that we cannot remedy the situation and need to revoke the permit. The timeframe needed to make this determination is a function of the No Surprises procedures to determine if unforeseen circumstances exist (*see* 50 CFR 17.22(b)(5)(iii) and 50 CFR 17.32(b)(5)(iii)). We review that process here to clarify this issue. The Service has the burden of demonstrating that unforeseen circumstances exist using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. The Service will consider, but not be limited to, the following factors: (1) Size of the current range of the affected species; (2) percentage of range adversely affected by the conservation plan; (3) percentage of range conserved by the conservation plan; (4) ecological significance of that portion of the range affected by the conservation plan; (5) level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; and (6) whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

If unforeseen circumstances are found to exist, the Service will consider changes in the operating conservation program or additional mitigation measures. However, measures required of the permittee must be as close as possible to the terms of the original HCP. Any adjustments or modifications will not include requirements for additional land, water, or financial compensation, or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the HCP, unless the permittee consents to such additional measures or such measures are provided by some other interested party. The Service will work with the permittee to increase the effectiveness of the HCP's operating conservation program to address the unforeseen circumstances without requiring the permittee to provide an additional commitment of resources. If the Service determines additional mitigation on behalf of the species is needed, the Service may request, but cannot require, the permittee to voluntarily undertake such measures. The Service has a wide array of authorities and resources that can be used to provide additional protection for the species. The Service will also work with other appropriate entities to find a remedy. However, if it is determined that the continuation of the permitted activity would appreciably reduce the likelihood of survival and recovery for one or more species in the wild and no remedy can be found and implemented, the Service will move to revoke the permit in accordance with the administrative procedures of 50 CFR 13.28(b) and 13.29.

Issue: One commenter stated the terms ''remedied'' and ''inconsistency'' in the proposed rule are ambiguous and should be clarified. More specifically, the commenter requested we explain the process associated with the ''remedy'' and the public's role when the Service is pursuing ''remedies?''

Response: The term ''remedied'' is case specific. As described in the response to the previous issue, through

the process of determining if unforeseen circumstances exist, the Service will identify a remedy, if any exists, specific to the situation. The term ''inconsistent'' means ''not in accordance with.'' As used in the regulations it means that continuation of activities covered by the HCP will appreciably reduce the likelihood of the survival and recovery for one or more species in the wild. Pursuit of a remedy is not a public process; however, the Service will work with any appropriate entities, including members of the public, to identify a remedy.

Issue: The commenting Tribe recommended amending the proposed regulations to include language conditioning permit revocation such that a permit issued to an ''Indian Tribe,'' as defined in Secretarial Order No. 3206, cannot be revoked unless the Department first determines that such inconsistency cannot be remedied through (1) the reasonable regulation of non-Indian activities, (2) revocation is the least restrictive alternative available to remedy the inconsistency, (3) revocation of the permit does not discriminate against Indian activities, either as stated or applied; and (4) voluntary tribal measures are not adequate to remedy the inconsistency.

Response: In accordance with the Secretarial Order 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (June 5, 1997); the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951); E.O. 13175; and the Department of the Interior's Manual at 512 DM 2, we understand that we must relate to recognized Federal Indian Tribes on a Government-to Government basis. However, the permit revocation regulations pertain to voluntary agreements, Habitat Conservation Plans, in which Tribes and individuals are not required to participate unless they volunteer to do so. Therefore, these regulations may have effects on Tribal resources and Native American Tribes, but solely at their discretion, should those Tribes or individuals choose to participate in the voluntary program. We view the permit revocation regulations, as proposed, along with the No Surprises Rule and our responsibilities under Secretarial Order 3206 and other policies, to provide adequate assurances to allow Tribes to enter into these voluntary agreements without including the suggested revisions.

Issue: Several commenters questioned why the Service should have to step in at public expense to remedy jeopardy situations before a permit can be revoked. One commenter stated that the Service is ''ill-equipped to take on the responsibility of implementing mitigation measures when unforeseen circumstances arise.''

Response: In the February 23, 1998, ''No Surprises'' final rule, we provided the rationale for committing the agency to step in and attempt to remedy jeopardy situations in cases where the permittee is in full compliance with the permit and has a properly implemented conservation plan in place. In exchange for assurances, the HCP permittee has agreed to undertake extensive planning and to include contingencies and assurances for additional funding for such contingencies, to address changed circumstances. This requirement does not exist in other Federal permitting programs. We believe it is fair, therefore, to commit the agency to step in and address unforeseen circumstances. The Service believes that it will be rare for unforeseen circumstances to result in a violation of an incidental take permit's issuance criteria. However, in such cases, the Service will use all of our authorities, will work with other Federal agencies and other appropriate entities to rectify the situation, and work with the permittee to redirect conservation and mitigation measures to remedy the situation. The Service has a wide array of authorities and resources that can be used to provide additional protection for threatened or endangered species covered by an HCP. Among those authorities and resources are a variety of grants administered by the Service, cooperative agreements with States, section 5 land acquisition authority, section 7(a)(1) interagency cooperation, recovery implementation, and other programs. Nevertheless, the new permit revocation rule recognizes that, if these efforts fail and jeopardy to a listed species persists, then the Service, pursuant to the ESA, may revoke the permit even if the permittee is fully complying with the terms and conditions of the permit.

Issue: One State commenter recommended close coordination with State fish and wildlife agencies during the mediation process to help in the determination of jeopardy for the species, and during the identification of potential alternatives to permit revocation.

Response: Under the Service's interagency cooperative policy regarding the role of State agencies in Endangered Species Act activities (59 FR 34275), it is the policy of the Service to utilize the expertise and solicit information and participation of State agencies in all aspects of the Habitat Conservation Planning process. In the event of unforeseen circumstances, the Service will work with the permittee, the State, and any other appropriate entities to increase the effectiveness of the HCP's operating conservation program to address unforeseen circumstances without requiring the permittee to produce an additional commitment of resources as stated above and to identify alternatives to permit revocation. Under 50 CFR 17.22(b)(6) and 17.32(b)(6), the Service is not limited or constrained—nor is any other Federal, State, local, or tribal government agency, or a private entity constrained—from taking additional actions at its own expense to protect or conserve a species included in a conservation plan.

Issue: A few commenters stated that the permit revocation regulations undermine the No Surprises Rule. A couple of these commenters thought the Service should limit permit revocation to instances where the permittee is not in compliance with the permit. One commenter questioned the Service's authority to revoke a permit, citing section 10(a)(2)(C) of the ESA, which states, ''the Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.'' This commenter viewed this revocation standard as negating the existence of any general authority to revoke incidental take permits on other conditions (*i.e.*, 50 CFR 13.28(a)(1) through (4)). Furthermore, this commenter did not think the Service could revoke a permit under the authority of section 7 of the ESA (16 U.S.C. section 1536(7)(a)(2)) to avoid jeopardy once an incidental take permit had been issued.

Response: Because this permit revocation rule codifies and clarifies the statutory permit revocation standard, it does not affect the No Surprises Rule. The Service's general permitting regulations in 50 CFR part 13 predate the 1982 amendments to the ESA that added the incidental take permit provisions to the ESA. By their terms, these regulations apply to all ESA permits, including incidental take permits (*see* 50 CFR 13.3). The Service has always considered incidental take permits to be subject to the general 50 CFR part 13 regulations and includes as a standard condition in all incidental take permits that they are subject to 50 CFR part 13. Nothing in section 10(a)(2)(C) indicates otherwise. It states that the Service shall revoke a permit if the permittee fails to comply with the

terms and conditions of the permit, but it does not indicate that this is the sole permissible basis for revocation. Moreover, the legislative history of the 1982 ESA amendments shows that the language was included simply to emphasize that an incidental take permit, like any other section 10 permit, should be revoked if the permittee fails to comply with its terms and conditions.

Furthermore, the Service's act of issuing an incidental take permit under section 10(a)(1)(B) is a Federal action, subject to the section 7(a)(2) duty to insure that the action is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. Congress emphasized the importance of this duty in the incidental take permit context by expressly including an issuance criterion that mirrors the regulatory definition established for jeopardizing the continued existence of a listed species in the wild. If, at any time, carrying out such an action (*i.e.*, implementing an HCP) is found likely to appreciably reduce the likelihood of the survival and recovery for one or more species in the wild, the Service can no longer authorize such action and must amend or revoke the permit. Under the No Surprises Rule, if the Service finds that unforeseen circumstances exist and additional conservation measures are needed to avoid appreciably reducing the likelihood of survival and recovery of a listed species in the wild, the Service must remedy the situation at its own expense or in cooperation with the permittee or other appropriate entities. If no remedy can be found or implemented, the Service, as a last resort, will revoke the permit.

Issue: Many commenters requested the Service reaffirm that permit revocation should be ''an action of last resort.''

Response: As we stated in our notice of February 11, 2000 (65 FR 6916), and in our final rule of January 22, 2001 (66 FR 6483), ''the Service is firmly committed, as required by the ''No Surprises'' final rule, to utilizing its resources to address any such unforeseen circumstances,'' and we view the revocation provision ''as a last resort in the narrow and unlikely situation in which an unforeseen circumstance results in likely jeopardy to a species covered by the permit and the Service has not been successful in remedying the situation through other means.'' We continue to adhere to this position and view permit revocation under the terms of this rule as an unlikely action of last resort.

Revisions to the Proposed Rule

In §§ 17.22(b)(8) and 17.32(b)(8) we deleted the phrase ''in a timely fashion'' from the regulations. Because each HCP is unique, the situation associated with a finding of unforeseen circumstances and a determination that continued activity under the permit would appreciably reduce the likelihood of survival and recovery of a species covered by the permit is case-specific; therefore, it is not possible to define what remedying a situation in ''a timely fashion'' will mean in all instances. Because we cannot define a precise timeframe in which we would remedy such a situation or revoke an incidental take permit, we have deleted this phrase from the final rule. However, the procedures in §§ 17.22(b)(5)(iii) and 17.32(b)(5)(iii) for determining if unforeseen circumstances exist describe the administrative steps that must be followed.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule because it may raise novel legal or policy issues, and was reviewed by the Office of Management and Budget (OMB) in accordance with the four criteria discussed below.

(a) This rule will not have an annual economic effect of $100 million or more or adversely affect an economic sector, productivity, jobs, the environment, or other units of government.

(b) This rule is not expected to create inconsistencies with other agencies' actions. These regulations would amend potentially conflicting permitting regulations established for a voluntary program, Habitat Conservation Planning, for non-Federal property owners and would not create inconsistencies with the actions of non-Federal agencies.

(c) This regulation is not expected to significantly affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) OMB has determined that this rule may raise novel legal or policy issues and, as a result, this rule has undergone OMB review. This rule is a direct response to a previous legal challenge.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), 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 effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions), unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act requires 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.

Pursuant to the Regulatory Flexibility Act, we certified to the Small Business Administration that these regulations would not have a significant economic impact on a substantial number of small entities. The proposed changes clarify the circumstances under which an incidental take permit issued under the authority of section 10(a)(1)(B) of the Endangered Species Act might be subject to revocation. As of September 27, 2004, the Service has approved 470 Habitat Conservation Plans (HCPs) and issued 737 incidental take permits associated with these HCPs, and none have required revocation. As identified in the preamble and the response to comments, the specific circumstances under which the proposed regulations would provide for revocation are expected to be extraordinarily rare.

Small Business Regulatory Enforcement Fairness Act

This regulation will not be a major rule under 5 U.S.C. 801 *et seq.*, the Small Business Regulatory Enforcement Fairness Act.

(a) This regulation would not produce an annual economic effect of $100 million.

(b) This regulation would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) This regulation would not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Although this rule is a significant action under Executive Order 12866, it is not expected to significantly affect energy supplies, distribution, or use. Therefore,

this action is not a significant energy action and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) The Service has determined and certifies pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of $100 million or more in any given year on local or State governments or private entities. No additional information will be required from a non-Federal entity solely as a result of this rule. These regulations implement a voluntary program; no incremental costs are being imposed on non-Federal landowners.

(b) These regulations will not produce a Federal mandate of $100 million or greater in any year; that is, this rule is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

Takings

In accordance with Executive Order 12630, these regulations do not have significant takings implications concerning taking of private property by the Federal Government. These regulations pertain to a voluntary program that does not require individuals to participate unless they volunteer to do so. Therefore, these regulations have no impact on personal property rights.

Federalism

These regulations will not have substantial direct effects on the States, in the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among various levels of government. Therefore, in accordance with Executive Order 13132, the Service has determined that this rule does not have sufficient federalism implications to warrant a Federalism Assessment.

Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Interior has determined that this rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This rule would not impose any new requirements for collection of information associated with incidental take permits other than those already approved for incidental take permits under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This rule will not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. We may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number.

National Environmental Policy Act

The Department of the Interior has determined that the issuance of this rule is categorically excluded under the Department's NEPA procedures in 516 DM 2, Appendix 1.10.

Government-to-Government Relationship With Indian Tribes

In accordance with the Secretarial Order 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (June 5, 1997); the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951); E.O. 13175; and the Department of the Interior's Manual at 512 DM 2, we understand that we must relate to recognized Federal Indian Tribes on a Government-to Government basis. However, these regulations pertain to voluntary agreements, Habitat Conservation Plans, in which Tribes and individuals are not required to participate unless they volunteer to do so. Therefore, these regulations may have effects on Tribal resources and Native American Tribes, but solely at their discretion, should those Tribes or individuals choose to participate in the voluntary program.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Final Regulation Promulgation

■ For the reasons set out in the preamble, the Service amends Title 50, Chapter I, subchapter B of the Code of Federal Regulations, as set forth below.

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.22 by adding a new paragraph (b)(8) to read as follows:

§ 17.22 Permits for scientific purposes, enhancement of propagation or survival, or for incidental taking.

* * * * *

(b) * * *

(8) *Criteria for revocation.* A permit issued under paragraph (b) of this section may not be revoked for any reason except those set forth in § 13.28(a)(1) through (4) of this subchapter or unless continuation of the permitted activity would be inconsistent with the criterion set forth in 16 U.S.C. 1539(a)(2)(B)(iv) and the inconsistency has not been remedied.

* * * * *

■ 3. Amend § 17.32 by adding a new paragraph (b)(8) to read as follows:

§ 17.32 Permits—general.

* * * * *

(b) * * *

(8) *Criteria for revocation.* A permit issued under paragraph (b) of this section may not be revoked for any reason except those set forth in § 13.28(a)(1) through (4) of this subchapter or unless continuation of the permitted activity would be inconsistent with the criterion set forth in 16 U.S.C. 1539(a)(2)(B)(iv) and the inconsistency has not been remedied.

* * * * *

Dated: November 23, 2004.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–27202 Filed 12–9–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 040617186–4302; I.D. 120704A]

International Fisheries; Pacific Tuna Fisheries; Restrictions for 2004 Purse Seine and Longline Fisheries in the Eastern Tropical Pacific Ocean

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

ACTION: Fishing closure, restrictions.

SUMMARY: NMFS publishes this document to prevent overfishing of bigeye tuna in the eastern tropical Pacific Ocean (ETP), consistent with recommendations by the Inter-American Tropical Tuna Commission (IATTC) that have been approved by the Department of State (DOS) under the Tuna

Conventions Act. NMFS hereby closes the U.S. longline fishery for bigeye tuna in the Convention Area for the remainder of 2004 because the bigeye tuna catch in the Convention Area has reached the reported level of catch made in 2001. This action is intended to limit fishing mortality on bigeye tuna stock caused by longline fishing in the Convention Area and contribute to the long-term conservation of bigeye tuna stock at levels that support healthy fisheries.

DATES: Effective from December 13, 2004 through the end of the 2004 fishing season, unless NMFS publishes a superceding document in the **Federal Register**.

ADDRESSES: Southwest Regional Administrator, Southwest Region, NMFS, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90902–4213.

This **Federal Register** document is also accessible via the Internet at the Office of the **Federal Register**'s website at *http://www.gpoaccess.gov/*.

FOR FURTHER INFORMATION CONTACT: J. Allison Routt, Sustainable Fisheries Division, Southwest Region, NMFS, (562) 980–4030.

SUPPLEMENTARY INFORMATION: The United States is a member of the IATTC, which was established under the Convention for the Establishment of an Inter-American Tropical Tuna Commission signed in 1949 (Convention). The IATTC was established to provide an international arrangement to ensure the effective international conservation and management of highly migratory species of fish in the Convention Area. The Convention Area is defined to include the waters of the ETP bounded by the coast of the Americas, the 40° N. and 40° S. parallels, and the 150° W. meridian. The IATTC has maintained a scientific research and fishery monitoring program for many years and annually assesses the status of stocks of tuna and the fisheries to determine appropriate harvest limits or other measures to prevent overexploitation of tuna stocks and promote viable fisheries. Under the Tuna Conventions Act, 16 U.S.C. 951–962, NMFS must publish regulations to carry out IATTC recommendations and resolutions that have been approved by DOS. A proposed rule and request for comments was published in the **Federal Register** (69 FR 122) on June 25, 2004, and a final rule was published on November 12, 2004 (69 FR 65382). The Southwest Regional Administrator also is required by regulations at 50 CFR 300.29(b)(3) to issue a direct notice to the owners or agents of U.S. vessels that operate in the ETP of actions recommended by the IATTC and approved by the DOS. Notices to the fleet were issued in October 2003, May 2004, and again in October 2004 regarding these actions.

The November 12, 2004, final rule provides that the U.S. longline fishery for bigeye tuna in the Convention Area will close for the remainder of calendar year 2004 if the catch of bigeye tuna by U.S. longline vessels in the Convention Area reaches 150 mt, which is the amount estimated to have been caught by the U.S. longline fishery in the Convention Area in 2001. Specifically, once the fishery is closed upon reaching the 2001 catch level, no bigeye tuna may be caught and retained by U.S. longline vessels in the Convention Area during the remainder of calendar year 2004.

NMFS has determined that the 150 mt catch level has been reached and hereby closes the U.S. longline fishery for bigeye tuna in the Convention Area for the remainder of the year 2004. It is therefore prohibited for a U.S. longline vessel to catch and retain bigeye tuna in the Convention Area from the effective date of this action through December 31, 2004.

Authority: 16 U.S.C. 951–962.

Dated: December 7, 2004.

Alan D. Risenhoover,

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

[FR Doc. 04–27177 Filed 12–9–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[I.D. 120704C]

Atlantic Highly Migratory Species; Bluefin Tuna Fisheries

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

ACTION: Quota transfer; fishery reopening; catch limit adjustment.

SUMMARY: NMFS has determined that Atlantic bluefin tuna (BFT) quota transfers from the Atlantic tunas General, Harpoon, and Incidental Longline categories to the Angling and Reserve categories, are warranted. In addition, NMFS is reopening the coastwide General category BFT fishery and reopening the Angling category BFT fishery. Finally, NMFS prohibits retention of school BFT less than 47 inches (119 cm) in the recreational fishery for the remainder of the fishing year. These actions are being taken to ensure that U.S. BFT harvest is consistent with recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT), pursuant to the Atlantic Tunas Convention Act (ATCA), and to meet domestic management objectives under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Fishery Management Plan for Atlantic Tunas, Swordfish and Sharks (HMS FMP).

DATES: The effective date of the BFT quota transfers and recreational catch limit adjustment is December 7, 2004 through May 31, 2005. The effective dates for the reopening of the General and Angling categories, as specified in this rule, are provided in Table 1 under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Brad McHale at (978) 281–9260.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the ATCA (16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Act (16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by ICCAT among the various domestic fishing categories, and together with General category effort controls are specified annually under procedures specified at 50 CFR 635.23(a) and 635.27(a). The proposed initial 2004 BFT Quota and General category effort controls were filed with the Office of the Federal Register on December 7, 2004.

Quota Transfer

Under the implementing regulations at 50 CFR 635.27(a)(8), NMFS has the authority to transfer quotas among categories, or, as appropriate, subcategories, of the fishery, after considering the following factors: (1) The usefulness of information obtained from catches in the particular category for biological sampling and monitoring of the status of the stock; (2) the catches of the particular category quota to date and the likelihood of closure of that segment of the fishery if no allocation is made; (3) the projected ability of the vessels fishing under the particular category quota to harvest the additional amount of BFT before the end of the fishing year; (4) the estimated amounts by which quotas established for other gear segments of the fishery might be exceeded; (5) the effects of the transfer

on BFT rebuilding and overfishing; and (6) the effects of the transfer on accomplishing the objectives of the HMS FMP.

If it is determined, based on the factors listed here and the probability of exceeding the total quota, that vessels fishing under any category or subcategory quota are not likely to take that quota, NMFS may transfer inseason any portion of the remaining quota of that fishing category to any other fishing category or to the Reserve quota.

The 2004 fishing year proposed initial BFT quota specifications were prepared in accordance with the 2002 ICCAT quota recommendation, the ICCAT recommendation regarding the dead discard allowance, the HMS FMP percentage shares for each of the domestic categories, including restrictions on landings of school BFT, and the addition or subtraction of any underharvest or overharvest from the previous fishing year. NMFS proposed initial quota specifications for the 2004 fishing year as follows: General category – 659.0 mt; Harpoon category – 81.4 mt; Purse Seine category – 389.4 mt; Angling category – 65.5 mt; Longline category – 171.2 mt; and Trap category – 2.3 mt. Additionally, 36.6 mt would be allocated to the Reserve category.

On November 19, 2004, (69 FR 68094, November 23, 2004) NMFS closed the coastwide General and Angling category BFT fisheries due to uncertainties in the amount of available quota remaining given preliminary landing estimates for the 2004 fishing year. Since that closure, NMFS has been able to more accurately assess the level of BFT landings to date after applying quality assurance procedures for commercial dealer reports. Current landings of incidentally caught BFT in the Longline category total approximately 27.8 mt, not including landings against the NED set-aside. The Harpoon category closed on November 15, 2004 (68 FR 74504, December 24, 2003) with a total of 29.9 mt landed by vessels in this category. The General category has landed a total of 251.5 mt to date. In addition, and also since the closure, NMFS has completed a report that analyzes the recreational catch estimate procedures and provides final BFT landings estimates for both the 2002 and 2003 fishing years. Based on the above report, the filing of the 2004 proposed BFT specifications, an assessment of the commercial landings data to date, and considering the factors for making quota transfers between categories, NMFS has determined that BFT quota transfers are warranted and that quota remains available for limited General and Angling category BFT fisheries.

Landings and effort information from the General and Angling category BFT fisheries are used by NMFS scientists for calculation of Catch-Per-Unit-Effort (CPUE) indices and are useful for stock assessment purposes. Extending the General and Angling category seasons has traditionally provided for enhanced CPUE data estimates due to the collection of additional data over a greater time frame and with broader spatial coverage. Without conducting an inseason transfer, NMFS would not be able to obtain an optimal temporal or geographic distribution of CPUE data for the 2004 fishing year. Based on previous fishing years catch rates late in the season, availability of quota, and availability of BFT on the fishing grounds, NMFS expects that transferred quota would be harvested prior to the end of the 2004 fishing year.

The effects on rebuilding and overfishing as a result of an inseason transfers are predicted to be neutral. The prime effect is to transfer quota among categories and no additional harvest above the quota level authorized in the BFT rebuilding plan is anticipated. The transfers are consistent with the objectives of the HMS FMP as they would provide for fair and reasonable fishing opportunities, allow for maximum utilization of the 2004 U.S. BFT allocation while preventing an overharvest of that allocation.

Therefore, NMFS has determined to transfer 223.1 mt of the proposed General category quota of approximately 659.0 mt to the Angling category. Also, in part to address the anticipated landings from the 2004 recreational season, NMFS has determined to transfer 76.9 mt of the proposed General category quota, 45 mt of the proposed Longline category quota, and 40 mt of the proposed Harpoon category quota to the Reserve category. The Reserve category was established, in part, for the purpose of compensating overharvest in any category and to ensure overall U.S. landings do not exceed ICCAT recommended quotas.

Reopening of the General and Angling BFT Fisheries

TABLE 1. REOPENING EFFECTIVE DATES

Category	Effective Dates	Areas	BFT Size Class Limit
General	December 8 through December 20, 2004, inclusive	All	One large medium or giant BFT per vessel/day/trip, measuring 73 inches (185 cm) CFL or greater.
Angling	December 8 through May 31, 2005, inclusive	All	One large school or small medium BFT per vessel/day/trip, measuring 47 to less than 73 inches (119 cm to less than 185 cm) CFL. One large medium or giant "trophy" BFT per vessel/year, measuring 73 inches (185 cm) or greater (no sale).

General category

The General category fishery was closed (69 FR 68094, November 23, 2004) and is reopened to provide commercial fishing opportunities to both General and Charter/Headboat category fishery participants to harvest the remainder of the available General category quota. Given the proposed specifications and the above transfers, a limited quota of approximately 107 mt remains available which is approximately the same level of landings attributed to southern area fishermen during last winter's commercial fishery. Recent information indicates that the commercial sized BFT have now migrated off the coast off North Carolina and are available to General and Charter/Headboat category fishery participants. Due to the

anticipated General category catch rates in December, the unpredictable nature of the weather, the availability of BFT on the fishing grounds, and the amount of available quota, NMFS has determined to limit the coastwide General category reopening period for large medium and giant BFT to 13 days.

Therefore, the coastwide General category is scheduled to reopen on 12:30 a.m. December 8, 2004, and close at 11:30 p.m. December 20, 2004. The General category daily retention limit during this reopening is one large medium or giant BFT, measuring 73 inches or greater (185 cm or greater) curved fork length (CFL) per vessel/day/trip and applies in all areas, for all vessels fishing under the General category quota (i.e., permitted HMS General and Charter/Headboat vessels). Fishing for, retaining, possessing, or landing large medium or giant BFT by persons fishing under the General category quota must cease at 11:30 p.m. local time December 20, 2004.

Angling category

The Angling category fishery was closed on November 19, 2004 (69 FR 68094, November 23, 2004) and is reopened to provide recreational fishing opportunities to both Angling and Charter/Headboat category fishery participants. Given the 2004 proposed specifications and the above transfer, an approximate quota of 288 mt is available for the 2004 fishing year. Preliminary 2004 recreational landings estimates to date are not yet available. Winter recreational BFT landings are very limited (less than 30 mt) due to the low numbers of participants and limited availability of recreational sized BFT through the winter to spring time frame.

This transfer is intended to ensure sufficient quota remains available for the Angling category for the 2004 fishing year. In addition, under the western BFT rebuilding plan, ICCAT recommended limiting the catch of recreationally caught school BFT, measuring 27 to less than 47 inches (69 to less than 119 cm) CFL, to no more than 8–percent by weight of the total domestic landings quota over each 4–consecutive-year period. NMFS implements this ICCAT recommendation through annual and inseason adjustments to the school BFT retention limits, as necessary, and through the establishment of a school BFT reserve (64 FR 29090, May 28, 1999; 64 FR 29806, June 3, 1999). This ICCAT recommendation allows NMFS the flexibility to enhance fishing opportunities and to collect information on a broad range of BFT size classes and to make interannual adjustments for overharvests and underharvests, provided that the 8–percent landings limit is met over the applicable 4–consecutive-year period.

After the transfers mentioned above and the resultant available quota, the expected Angling category catch rates during the winter months, availability of BFT on the fishing grounds, NMFS has determined to reopen the Angling category BFT fishery. Based on school size class BFT landing estimates from the 2002 and 2003 fishing years and the most recently available 2004 Angling category landings estimates, NMFS has determined to limit the recreational BFT retention of school BFT for the remainder of the 2004 fishing year to ensure the 8–percent school landings limit is not exceeded.

Therefore, the Angling category BFT fishery is reopened at 12:30 a.m. December 8, 2004, and continue through May 31, 2005. The Angling category daily retention limit will be one large school or small medium BFT, measuring 47 to less than 73 inches (119 to less than 185 cm) CFL and per vessel/day/trip. In addition, one large medium or giant BFT per vessel per year is available under the trophy fishery program (no sale), for all vessels fishing under the Angling category quota (i.e., permitted HMS Angling and Charter/Headboat vessels).

Monitoring and Reporting

NMFS selected the duration of the openings and the daily retention limits based on a review of 2004 proposed quotas, transfers, dealer reports, daily landing trends, the availability of BFT on the fishing grounds, and previous fishing years effort and landings rates from December through May. NMFS will continue to monitor both the General and Angling category BFT fisheries closely.

The General category will be monitored via the commercial BFT landing reports submitted by authorized BFT dealers. Should the available quota projected to be reached, any interim closures will be published in the **Federal Register**. Once the General category BFT fishery has closed, NMFS will assess reported landings and available quota and determine if a reopening in January is warranted.

The Angling category will be monitored through the Automated Landings Reporting System (ALRS) and the state harvest tagging programs in North Carolina and Maryland. Depending on the level of fishing effort and catch rates of BFT, NMFS may determine that an interim closure or an additional retention limit adjustment is necessary to enhance scientific data collection from, and fishing opportunities in, all geographic areas. Closures or subsequent adjustments to the Angling category fishery, if any, will be published in the **Federal Register**. All BFT landed under the Angling category quota must be reported within 24 hours of landing to the NMFS ALRS via toll-free phone at (888) 872–8862; or the Internet (*http://www.nmfspermits.com*); or, if landed in the state of North Carolina, to a reporting station prior to offloading. Information about North Carolina's harvest tagging program, including reporting station locations, can be obtained by calling (800) 338–7804. Information about Maryland's harvest tagging program can be obtained from the Maryland Department of Natural Resources at (410) 213–1531. In addition, BFT fishery participants may call the Atlantic Tunas Information Line at (888) 872–8862 or (978) 281–9305 for updates on quota monitoring and regulatory updates.

Classification

The Assistant Administrator for Fisheries, NOAA (AA), finds that it is impracticable and contrary to the public interest to provide prior notice of, and an opportunity for public comment on, this action. The General and Angling category fisheries have been closed since November 23, 2004 (69 FR 68094) due to uncertainty in availability of quota and accurate landings estimates and concern over potential overharvest of anticipated quotas. Since that time NMFS has completed a Report analyzing recreational BFT landings estimates from 2002 and 2003, and the information was used to prepare the proposed initial 2004 BFT specifications, which show that quota is available for a limited fishery for the remainder of the current fishing year. Recent information shows BFT in both recreational and commercial size classes are now available off southern Atlantic states in nearshore areas and accessible to recreational and commercial anglers as well as Charter/Headboat operations. Under ATCA and the HMS FMP, NMFS is obliged to provide fishing opportunities to catch the available quota. Through this action, NMFS is using its authority to transfer quota among categories, which is biologically neutral with respect to the ICCAT BFT rebuilding plan, is consistent with the HMS FMP to ensure specific categories do not overharvest allocated quota, and will provide equitable fishing opportunities to a wide geographic range of fishery participants. Restricting retention of school size BFT will ensure that the ICCAT recommended 8–percent

limit on school size over a 4-year consecutive period is not exceeded, and closing the General category fishery on December 20 will reduce the likelihood of overharvest of quota in this commercial fishery.

Delaying this action would be contrary to the public interest as BFT are now available in nearshore waters and will soon migrate out of range of the commercial and recreational fleets. As both the Angling and General categories are currently closed, fishery participants are not currently able to access the BFT while the fish are available and accessible in nearshore areas off the south Atlantic states. It is in the public interest to act quickly to open the fisheries while the BFT are available so that the short window of fishing opportunity is not lost. Therefore, the AA finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. For all of the above reasons and because this action relieves a restriction (e.g., reopens fisheries), there is good cause under 5 U.S.C. 553(d) to waive the delay in effectiveness of this action.

This action is being taken under 50 CFR 635.23(a)(4) and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C 971 *et seq.* and 1801 *et seq.*

Dated: December 7, 2004.

Alan D. Risenhoover,

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

[FR Doc. 04–27193 Filed 12–7–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 040910261–4325–02; I.D. 072704A]

RIN 0648–AS08

Atlantic Highly Migratory Species; Atlantic Commercial Shark Management Measures; Correction

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

ACTION: Final rule; fishing season notification; correction.

SUMMARY: This document corrects the season closure dates in a final rule published November 30, 2004. Corrections concern the first trimester season closure dates for large coastal sharks (LCS) for the Gulf of Mexico and the first trimester season closure dates for the South Atlantic.

DATES: Effective January 1, 2005.

FOR FURTHER INFORMATION CONTACT: Chris Rilling by phone: 301–713–2347 or by fax: 301–713–1917.

SUPPLEMENTARY INFORMATION: On November 30, 2004, NMFS published in the **Federal Register** a final rule that established the opening and closure dates of the first trimester season for the Atlantic commercial shark fishery (69 FR 69537). In that rule, the closure dates for LCS in the Gulf of Mexico and the South Atlantic in Table 1 were inverted. This document corrects that error.

Correction

Rule FR Doc. 04–26414 published on November 30, 2004 (69 FR 69537), to be effective January 1, 2005, is corrected as follows.

On page 69538, in Table 1, the first two rows are corrected to read as follows:

Species Group	Region	First Trimester Season Opening Dates	First Trimester Season Closure Dates
Large Coastal Sharks	Gulf of Mexico	January 1 - February 28, 2005, 11:30 p.m. local time	February 28, - April 30, 2005, 11:30 p.m. local time
	South Atlantic	January 1 - February 15, 2005, 11:30 p.m. local time	February 15, - April 30, 2005, 11:30 p.m. local time
* * * * *			

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

Dated: December 7, 2004.

Alan D. Risenhoover,

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

[FR Doc. 04–27178 Filed 12–9–04; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 69, No. 237
Friday, December 10, 2004

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

7 CFR Part 319

[Docket No. 03–069–1]

RIN 0579–AB85

Nursery Stock Regulations

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Advance notice of proposed rulemaking and request for comments.

SUMMARY: We are soliciting public comment on whether and how we should amend the regulations that govern the importation of nursery stock, also known as plants for planting. Under the current regulations, all plants for planting are allowed to enter the United States if they are accompanied by a phytosanitary certificate and if they are inspected and found to be free of plant pests, unless their importation is specifically prohibited or further restricted by the regulations. We are considering several possible changes to this approach, including establishing a category in the regulations for plants for planting that would be excluded from importation pending risk evaluation and approval; developing ongoing programs to reduce the risk of entry and establishment of quarantine pests via imported plants for planting; combining existing regulations governing the importation of plants for planting into one subpart; and reevaluating the risks posed by importation of plants for planting whose importation is currently prohibited. We are also considering how to best collect data on current imports of plants for planting so we can accurately ascertain the volume, type, and origin of such plants entering the United States. We are soliciting public comment on these issues to help us determine what changes we should propose to improve our regulations and which of these changes should be assigned the highest priority for implementation.

DATES: We will consider all comments that we receive on or before March 10, 2005.

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

- *EDOCKET:* Go to *http://www.epa.gov/feddocket* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once you have entered EDOCKET, click on the ''View Open APHIS Dockets'' link to locate this document.
- *Postal Mail/Commercial Delivery:* Please send four copies of your comment (an original and three copies) to Docket No. 03–069–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 03–069–1.
- *E-mail:* Address your comment to *regulations@aphis.usda.gov.* Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and ''Docket No. 03–069–1'' on the subject line.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for locating this docket and submitting comments.

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

Other Information: You may view APHIS documents published in the **Federal Register** and related information, including the names of groups and individuals who have commented on APHIS dockets, on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html.*

FOR FURTHER INFORMATION CONTACT: Dr. Arnold T. Tschanz, Senior Staff Officer, Regulatory Coordination, PPQ, APHIS, 4700 River Road Unit 141, Riverdale, MD 20737–1236; (301) 734–5306.

SUPPLEMENTARY INFORMATION:

Background

Scope and Approach of the Current Regulations

Under the Plant Protection Act (7 U.S.C. 7701–7772), *plant pest* is defined as: ''Any living stage of any of the following that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product: A protozoan, a nonhuman animal, a parasitic plant, a bacterium, a fungus, a virus or viroid, an infectious agent or other pathogen, or any article similar to or allied with any of the these articles.'' The Plant Protection Act defines *noxious weed* as: ''Any plant or plant product that can directly or indirectly injure or cause damage to crops (including nursery stock or plant products), livestock, poultry, or other interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment.'' Under the Plant Protection Act, the Secretary of Agriculture is authorized to undertake such actions as may be necessary to prevent the introduction and spread of plant pests and noxious weeds within the United States. The Secretary has delegated this responsibility to the Administrator of the Animal and Plant Health Inspection Service (APHIS).

The regulations in 7 CFR part 319 prohibit or restrict the importation of certain plants and plant products into the United States to prevent the introduction or spread of plant pests and noxious weeds. The regulations contained in ''Subpart—Nursery Stock, Plants, Roots, Bulbs, Seeds, and Other Plant Products,'' §§ 319.37 through 319.37–14 (referred to below as the regulations), restrict, among other things, the importation of living plants, plant parts, seeds, and plant cuttings for or capable of propagation. (The regulations in 7 CFR part 360, ''Noxious Weed Regulations,'' contain restrictions on the movement of noxious weed plants or plant products listed in that part into or through the United States and interstate; the importation of some plants and seeds is subject to both the nursery stock regulations and the noxious weed regulations.) To refer to the articles subject to the nursery stock regulations collectively in this document, we will use the term *plants for planting,* which the International

Plant Protection Convention defines as: ''Living plants and parts thereof, including seeds and germplasm, intended to remain planted, to be planted, or to be replanted to ensure their subsequent growth, reproduction or propagation.'' This definition matches the scope of the articles subject to the nursery stock regulations.

APHIS' nursery stock regulations prohibit or restrict the importation of certain taxa of plants for planting that pose a risk of introducing plant pests of quarantine concern (referred to below as *quarantine pests*) into the United States. We use the word *taxon* (plural: taxa) in this document to refer to any grouping within botanical nomenclature, such as family, genus, species, or cultivar. A *quarantine pest* is defined by the International Plant Protection Convention as: ''A pest of potential economic importance to the area endangered thereby and not yet present there, or present but not widely distributed and being officially controlled.'' (In this definition, *pest* includes ''any species, strain or biotype of plant, animal or pathogenic agent injurious to plants or plant products.'')

Plants for planting that APHIS has determined cannot be feasibly inspected, treated, or handled to prevent quarantine pests that may accompany them from being introduced into the United States are listed in the regulations as prohibited articles. Prohibited articles may not be imported into the United States, unless imported by the U.S. Department of Agriculture (USDA) for experimental or scientific purposes under specified safeguards.

Plants for planting that APHIS has determined can be inspected, treated, or handled to prevent quarantine pests that may accompany them from being introduced into the United States are listed in the regulations as restricted articles. Restricted articles may be imported into the United States if they are imported in compliance with conditions that may include permit and phytosanitary certificate requirements, inspection, treatment, postentry quarantine, or combinations of these safeguards.

Finally, under the regulations in § 319.37–14(a), plants for planting that are required to be imported under a written permit under § 319.37–3(a)(1) through (a)(6) may be imported or offered for importation only at a Federal plant inspection station. Such stations are designated by asterisks in the list of ports of entry in § 319.37–14(b). Plants for planting offered for importation at a Federal plant inspection station are inspected and, if necessary, treated before being allowed entry into the United States. All other plants for planting whose importation is restricted by the regulations must be presented for inspection and may be inspected and treated, if necessary, at any of the ports listed in § 319.37–14(b) or, in certain limited cases, at another Customs designated port of entry.

The importation of plants for planting is further restricted or prohibited if there is specific evidence that such importation could introduce a quarantine pest into the United States. If we have reason to believe that the importation of a currently admissible taxon of plants for planting may pose a risk of introducing a quarantine pest, a pest risk assessment (PRA) is completed to examine the available evidence on the subject; if the PRA indicates that the risk posed by the importation of the taxon warrants restrictions on or the prohibition of its importation, we undertake rulemaking to amend the regulations to impose the necessary restrictions or prohibition.

We estimate that plants for planting from representative species of more than 2,000 genera are being imported or have been imported in the past. Most of the taxa of plants for planting currently being imported have not been thoroughly studied to determine whether their importation presents a risk of introducing a quarantine pest into the United States. We typically rely on inspection at a Federal plant inspection station or port of entry to mitigate the risks of pest introduction associated with the importation of these taxa.

Conditions of Importation When the Regulations Were Established

When the regulations were originally established, we believed that most taxa of plants for planting could be imported safely without such thorough study, as the volume and types of plants for planting that were imported and the phytosanitary conditions of their importation were significantly different than they are today. Typically, the permits we issued for the importation of plants for planting limited such importation to either seed or, for cultivars that could not be propagated by seed, small amounts of plant material (usually 100 or fewer plants). The intent was to limit the number of plants for planting imported to the minimum necessary to establish a specific species or cultivar within the United States. The plants for planting that were then imported were thus not intended for immediate sale to U.S. consumers; these imported species or cultivars were only sold to U.S. consumers after they had been established and propagated for sale within the United States. As such, importation of living plant material was limited to species or cultivars that were not grown in the United States and would not breed true from seed or were difficult to establish from seed. Thus, both the quantity of living plant material and the number of types of plants for planting that were imported into the United States were originally very limited.

In addition, when the regulations were originally established, all plants for planting that were imported into the United States were required to be fumigated with methyl bromide or otherwise treated for insect pests as a condition of entry. Fumigation with methyl bromide often has a severe adverse effect on plants for planting in consignments offered for importation into the United States; however, since the plants for planting were being imported to establish specific species or cultivars, the adverse effects were not a concern as long as enough plants for planting survived the treatment to allow for such establishment. Treatment was mandatory and was performed regardless of whether there was evidence that the plants for planting offered for importation could serve as a pathway for the introduction of a quarantine arthropod pest. Because these pests were eliminated by fumigation, the regulations were mainly intended to prevent the introduction of pathogens that fumigation could not control and that were associated with imported plants for planting. When it was determined that the entry of a certain taxon of plants for planting could introduce a pathogen into the United States, regulations were established that prohibited the entry of that taxon, as listed in § 319.37–2, or prescribed specific phytosanitary mitigation conditions, as specified in the regulations in §§ 319.37–3 through 319.37–8 or in departmental permit conditions, that would eliminate the pathogen or allow APHIS inspectors to determine that it was not present in the plants for planting offered for importation. These circumstances prevailed from the first years after the regulations were established until the 1970s.

Problems for the Regulations Posed by Recent Trends in the Importation of Plants for Planting

While allowing the importation of most taxa of plants for planting with few restrictions may have been a reasonable course of action when the regulations were established, the circumstances of the importation of plants for planting have since changed greatly. APHIS no

longer limits the number of plants for planting that may be imported to the amount necessary to establish a species or cultivar in the United States, primarily due to industry requests to import large amounts of commercial plants for planting for immediate sale to U.S. consumers rather than for further cultivation within the United States. (As mentioned above, limits on the number of plants for planting had been imposed through the permitting process rather than through the regulations governing the importation of plants for planting.) Since this change was made, importation of plants for planting has steadily increased, as producers have found that many plants for planting can be grown in other countries under more favorable conditions than those available in the United States. In addition, many importers have found that there is a large domestic market for new and rare taxa of plants for planting, further driving increases in the number of taxa imported, the number of foreign areas from which plants for planting are imported, and the overall volume of imported plants for planting.

These increases are reflected in all the data available to us. For example, the Federal plant inspection station at Miami International Airport handles about 76 percent of all plants for planting that are offered for importation into the United States. Between fiscal year 1995 and fiscal year 2002, the total number of plant shipments imported through that inspection station almost doubled, the number of plants imported through that inspection station increased by 250 percent, and the number of quarantine pests found in those shipments increased by 275 percent. While, as noted above, importation of plants for planting was at one time limited to 100 articles of any given taxon, over 1 million apple rootstocks per year were imported through various ports of entry into the State of Washington alone in the early 1990s. The overall volume of imports of field crop, grass, and garden seed for sowing has doubled between 1995 and 2002, to 332,538 metric tons.[1] The recent increases in the volume of imports of plants for planting have been dramatic.

In part due to the fact that plants for planting are now imported for immediate sale to U.S. consumers, imported plants for planting are no longer routinely fumigated with methyl bromide or otherwise treated as a condition of entry; as noted previously in this document, the adverse effects resulting from the fumigation of plants for planting with methyl bromide are quite severe, which means that importing plants for planting for immediate sale to U.S. consumers would be impractical if fumigation were required. We will not resume routine fumigation. Under the Montreal Protocol and Subchapter VI of the Clean Air Act (42 U.S.C. 7671–7671p), the United States is obligated to minimize its use of substances such as methyl bromide that deplete stratospheric ozone. In addition, Article 2 of the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures requires that any restrictions APHIS imposes on the importation of plants for plants be based on scientific principles and is not maintained without sufficient scientific evidence; as mentioned previously, routine fumigation was conducted regardless of whether there was evidence that the plants for planting offered for importation could serve as a pathway for the introduction of a quarantine pest.

As noted previously, the only remaining restriction on the importation of most shipments of plants for planting is that they must enter the United States through a Federal plant inspection station, at which the plants for planting are randomly sampled and visually inspected for quarantine pests. However, this inspection may not always provide an adequate level of protection against quarantine pests, particularly if the pest is rare, small in size, borne within the plant, an asymptomatic plant pathogen, or not yet recognized and regulated as a quarantine pest.

Appropriately mitigating the risks of quarantine pest introduction associated with the importation of plants for planting is especially important because quarantine pests introduced via imported plants for planting are much more likely to become established than quarantine pests introduced via other imported articles, such as fruits and vegetables. The introduced plants for planting themselves may serve as hosts for quarantine pests for months or years, while the shelf life of most fruits and vegetables is days or weeks. In addition, the destinations of imported plants for planting, such as plant nurseries, farms, greenhouses, orchards, and gardens, are likely to be favorable environments for plant growth and pest development in general, which could present problems in the event that a taxon of imported plants for planting turns out to be a carrier of a pathogen or pest or is itself an invasive plant warranting further consideration as a noxious weed. Other host material for quarantine pests is also usually abundant in the environment surrounding imported plants for planting. Under these circumstances, the introduction of even a few individuals of a quarantine pest via imported plants for planting may lead to the establishment of that pest in the United States.

In addition, concern has grown in recent years among national plant protection organizations (NPPOs), State plant protection organizations, and members of the plants for planting industry and the scientific community that there may be many little-known quarantine pests that could be introduced into the United States via the importation of plants for planting or by other articles. In many countries, research capabilities are limited due to a shortage of funds for research as well as a shortage of trained weed scientists, entomologists, plant pathologists, and nematologists. Given this shortage, NPPOs in these countries are likely to concentrate their limited research capabilities on studying crops of local economic importance. Such crops are mostly agronomic crops and fruits and vegetables grown for domestic consumption or export; non-agronomic or ornamental plants are less likely to be studied for possible pest risks. Therefore, quarantine pests of plants for planting in these countries are generally not well known. If research is done on potential pests, it may not be readily available to the international community. Resources in many countries, particularly developing countries, may also be concentrated on locally serious pest problems that may not be of quarantine concern to the United States; conversely, pests that would be of concern to us if they were to be introduced via the importation of plants for planting may not be considered a significant problem in other countries. In addition, pests that may not have serious consequences in one environment may pose great risks in another, and the conditions that increase the risk posed by pests can be difficult to predict.

Recommendations of the Safeguarding Report With Regard to Plants for Planting

The National Plant Board's 1999 ''Safeguarding American Plant Resources'' report[2] (referred to below as

[1] More information on the volume of imports of seed and other plants for planting can be found in the Foreign Agricultural Service's U.S. Trade Internet System at *http://www.fas.usda.gov/ustrade.*

[2] ''Safeguarding American Plant Resources: A Stakeholder Review of the APHIS–PPQ Safeguarding System,'' National Plant Board. July 1999. Text available at *http://www.aphis.usda.gov/ppq/safeguarding/.*

the Safeguarding Report) contrasted the approach of the regulations governing the importation of plants for planting with the approach of the regulations governing the importation of fruits and vegetables, which are found in ''Subpart—Fruits and Vegetables'' (§§ 319.56 through 319.56–8) within 7 CFR part 319. While quarantine pests that enter the United States via imported fruits and vegetables are less likely to become established than quarantine pests that enter the United States via imported plants for planting, many of the other problems associated with the importation of plants for planting, such as a lack of research or information concerning the plant pests that may be associated with an article, can be an issue in the importation of fruits and vegetables as well.

However, the importation of fruits and vegetables is generally prohibited under the regulations in ''Subpart—Fruits and Vegetables,'' and the importation of a fruit or vegetable is only allowed if sufficient information is available to prove that its importation is safe. The process of allowing the importation of a fruit or vegetable from a particular area or country begins when APHIS receives an import request from an importer or an exporting country or when there is a request to reconsider the entry status of a commodity previously denied entry. If the request is for a fruit or vegetable for which no previous entry decision has been made, or if new evidence indicates that the previous entry decision may no longer be applicable, then a PRA is performed to determine the sources of pest risk associated with the requested importation. The fruit or vegetable is only allowed to be imported if the PRA indicates that the risk can be effectively mitigated and if notice-and-comment rulemaking to allow the importation is successfully completed. In other words, all commodities whose importation is governed by ''Subpart—Fruits and Vegetables'' are prohibited from importation pending risk evaluation and approval.

By contrast, as described above, the nursery stock regulations do not require that a PRA be completed prior to the importation of a new taxon of plants for planting or prior to the taxon's importation from a new area; most plants for planting are allowed to be imported after visual inspection at a Federal plant inspection station or port of entry. APHIS can take administrative action to prohibit or restrict the entry or subsequent interstate movement of a taxon of plants for planting under the Plant Protection Act if it poses an immediate danger of introducing or spreading a plant pest or noxious weed in the United States; in such an emergency situation, rulemaking may be completed after the prohibition or restrictions are imposed. However, in routine situations, the entry of a taxon of plants for planting is only prohibited or restricted after a PRA and subsequent notice-and-comment rulemaking are completed. This difference between the regulatory approaches for plants for planting and for fruits and vegetables means that the risks associated with the importation of specific taxa of plants for planting are generally much less well known than the risks associated with the importation of taxa of fruits and vegetables under the regulations in 7 CFR part 319.

As the Safeguarding Report states, the regulations' current approach to restricting the importation of plants for planting ''is based solely on known pest and disease problems of the plants on the established lists [of prohibited and restricted articles]. Everything is admissible unless specifically listed as restricted or prohibited. This assumes there is no risk associated with the unknown, an alarming assumption given the resources at stake and the quality of information available.'' It can be assumed that some taxa of plants for planting that are presently being imported pose risks of introducing quarantine pests that are currently unknown to us; as the Safeguarding Report states, ''new species of plant that have not been subjected to risk assessment can enter channels of trade with no regulation. Since these are not listed, they are by default admissible and subject to the least stringent protocol regardless of their potential to carry pests or diseases, or become invasive themselves.''

As the importation of plants for planting has increased dramatically over the last decade, there has not been a commensurate increase in available resources to determine the number and distribution of pests that could be introduced via imported plants for planting, to initiate PRAs, and, when necessary, to amend the regulations to address risks presented by quarantine pests and noxious weeds after their importation. A significant number of pests that could be introduced to the United States via imports of plants for planting need to be evaluated for quarantine significance, but their evaluation has been delayed by this lack of resources. Although we have been able to initiate rulemaking to mitigate risks posed by certain exotic pests, in general our ability to quickly apply new scientific research and information has been hampered by this lack of resources.

These conditions are believed to have led to several pest introductions in recent years. For example, articles of *Pelargonium* spp. that were contaminated with *Ralstonia solanacearum* race 3 biovar 2, a bacterium that is listed in our regulations in 7 CFR 331.3(a) as an agent capable of posing a severe threat to plant health or plant products, have been imported into the United States multiple times, most recently in February 2003. In the February 2003 outbreak, contaminated articles of *Pelargonium* spp. were imported from both Guatemala and, subsequently, Kenya. The articles were required to be inspected at the port of entry, but at the time of their importation they may not have been showing symptoms of the wilt disease that *R. solanacearum* race 3 biovar 2 causes in geraniums. The bacterium was eradicated in greenhouse plants before it could become established in the U.S. environment, where it could have severely affected the U.S. potato crop; more than 2.1 million plants at 471 greenhouses throughout the United States were destroyed as part of the eradication effort. The eradication effort was costly to APHIS, State plant health authorities, and the U.S. plants for planting industry. In response to this outbreak, we amended the regulations by establishing requirements at § 319.37–5(r) for the importation of articles of *Pelargonium* spp. and *Solanum* spp., two hosts of the bacterium. However, it would have been preferable to establish regulations, including conditions of entry, that would have allowed us to avoid the outbreak entirely.

The factors described above led the National Plant Board to recommend in the Safeguarding Report that the plants for planting regulations be revised to better protect U.S. plant resources from quarantine pests. Specifically, the Safeguarding Report recommended that APHIS:

- Review the plants for planting regulations for conformance with the Plant Protection Act and adherence to international standards for quarantine regulations (recommendation E–2);
- Develop a strategy of quarantine development tied to pest risk potential that is reasonable, enforceable, and transparent (recommendation E–3);
- Begin its quarantine revision process with the revision of the fruits and vegetables and plants for planting quarantine regulations (recommendation E–4):
- Consider adopting a modified ''clean list'' approach for propagative material, specifying what is permissible subsequent to risk assessment, rather

than the current ''dirty list'' approach that prohibits or restricts specific articles only (recommendation E–46); and

• Purge lists of ''phantom diseases,'' like the rose wilt virus, that are not recognized by the scientific community (recommendation E–48).

In response to these recommendations, this advance notice of proposed rulemaking solicits public comment on five measures we are considering as part of an effort to revise the regulations. We believe these measures, taken together, would enable APHIS to provide a more appropriate level of protection against the risk of introduction of quarantine pests via imported plants for planting than the current regulations provide. The measures we are considering are: (1) Collecting data on the current importation of taxa of plants for planting; (2) establishing a new category for certain taxa of plants for planting that would be excluded from importation pending risk evaluation and approval; (3) establishing programs to reduce the risk of importation and establishment of quarantine pests; (4) combining existing regulations governing the importation of plants for planting; and (5) reevaluating taxa whose importation is currently prohibited. These measures are described in more detail below.

Collecting Data on the Current Importation of Taxa of Plants for Planting

To effectively determine what changes may need to be made to the regulations and the possible impact of those changes, we must have accurate and complete data regarding the volume, types, and origin of plants for planting that are currently being imported into the United States. We do not currently have such data.

Although the regulations in § 319.37–4 require that all imported plants for planting must be accompanied by a phytosanitary certificate, the phytosanitary certificates accompanying these articles often do not contain the data we would need to evaluate current imports of plants for planting. Currently, importers are not required to provide the scientific name or even the genus of the plants for planting being imported on the phytosanitary certificate, and several genera may be included in one broad category (such as ''tropical foliage'') on the certificate, although we anticipate amending the regulations to require that importers provide genus and species information. In addition, estimates of the volume of imports derived from phytosanitary certificates may not be reliable.

The Foreign Agricultural Service (FAS) reports data on imports of plants for planting into the United States according to certain categories developed by FAS, and these data are generally considered to accurately indicate the volume of trade in any given category. However, the categories FAS uses typically include many genera of plants for planting, meaning that the FAS data also do not provide the detailed information about imports of plants for planting that we need.

We are considering what sources to use to acquire data regarding the volume, types, and origin of plants for planting that are currently being imported into the United States and how to use those sources. APHIS records could provide some of the data, although, as noted above, there are gaps in APHIS' data set. We could ask importers to provide data on the volume, types, and origin of past and present importations of plants for planting. Other potential data sources we identified include professional societies, horticultural groups, trade groups, businesses, researchers, universities, arboretums, and individuals. We are also considering making changes to the regulations that would allow us to more easily obtain such data; for example, we could require that, for any consignment of plants for planting offered for importation into the United States, the importer provide or the phytosanitary certificate include the quantity in which the plants for planting are being offered.

Once we collect the data, we would analyze the information to determine what taxa of plants for planting are already being imported in significant amounts. This would allow us to make better informed decisions about whatever changes to the regulations may be necessary.

We invite responses to the following questions in particular on the data collection activities we are considering:

1. Are there any sources other than those listed above from which we should solicit or obtain data?

2. What should we do to ensure that the data we receive accurately reflect actual importations of plants for planting?

3. What are the taxa or types of plants for planting for which obtaining accurate data might be especially difficult?

Establishing a New Category for Certain Taxa of Plants for Planting That Would Be Excluded From Importation Pending Risk Evaluation and Approval

As described above under the heading ''Scope and Approach of the Current Regulations,'' the regulations currently either prohibit the importation of plants for planting, allow the importation of plants for planting subject to specific restrictions such as additional declarations on phytosanitary certificates or postentry quarantine, or allow the importation of plants for planting subject to general restrictions such as phytosanitary certificates and inspection at a Federal plant inspection station or port of entry. We plan to retain these categories in the regulations for plants for planting. We are considering adding an additional category for certain taxa of plants for planting that would be excluded from importation pending risk evaluation and approval. These taxa would be listed in the regulations under a heading separate from the prohibited and restricted articles.

A taxon excluded from importation pending risk evaluation and approval could be removed entirely from the list if a PRA was completed and the PRA indicated that the taxon could be imported safely. The PRA would identify any phytosanitary mitigation measures that might be necessary for plants for planting of the taxon to be imported safely; we would then amend the regulations through notice-and-comment rulemaking to require those measures.

While a taxon is excluded from importation pending risk evaluation and approval, we would allow it to be imported into the United States if the producer that wishes to export the taxon to the United States is participating in an approved clean stock program. We would additionally allow the importation of small quantities of such a taxon under the conditions of a best management practices program so that it could be tested within the United States. We would establish a permit system to allow and control such importation. (The clean stock and best management practices programs are another measure we are considering to improve the effectiveness of the regulations. Both programs would be designed to mitigate the risks posed by all types of plant pests, not just the specific plant pests a PRA would identify and address. They are discussed in more detail below under the heading ''Programs To Reduce the Risk of Importation and Establishment of Quarantine Pests.'') Thus, under the

plan we are considering, the exclusion of taxa of plants for planting listed in this category would not be total, nor would it necessarily be permanent.

We are considering two possible options for determining which taxa of plants for planting would be added to this category. In the first option, taxa of plants for planting that are currently being imported in significant amounts and whose importation is subject to general restrictions in the regulations would, in most cases, be presumed to be safe and would not be excluded from importation pending risk evaluation and approval. (We would determine which taxa are currently being imported in significant amounts by analyzing the importation data we are interested in collecting, as described below under the heading ''Collecting Data on the Current Importation of Taxa of Plants for Planting.'') All taxa of plants for planting that are not currently being imported in significant amounts would then be excluded pending risk evaluation and approval.

This first option would allow the continued importation of taxa of plants for planting that are being imported in significant amounts because the risks associated with such taxa are generally better known than the risks associated with taxa that are being imported in smaller amounts. In general, the risks associated with taxa of plants for planting that have not previously been imported into the United States, in small quantities, or from different areas than those from which they have previously been imported are the least well-known risks associated with plants for planting; thus, these are the plants for planting that we would want to exclude pending risk evaluation and approval. For example, if a taxon is being imported in significant amounts, it is more likely that some study of its potential risks has been undertaken in either the exporting country or the United States. In addition, inspectors have more experience with taxa of plants for planting that are being imported in significant amounts, and thus can better recognize potential risks associated with such plants for planting than may be possible with taxa that are being imported in smaller amounts. If other evidence, such as a PRA or evidence required by the second option that is described below, indicated that a taxon of plants for planting that was currently being imported in significant amounts could introduce a quarantine pest, we would reserve the right to restrict or prohibit its importation, perhaps by excluding it pending risk evaluation and approval.

In accordance with the above information, with regard to this option, we are considering whether to treat a taxon of plants for planting that is being imported in significant quantities from one area but is not being imported in significant quantities from another area as two separate taxa for the purposes of exclusion pending risk evaluation and approval. For example, a taxon that is currently being imported in significant quantities from Africa but has never been imported from Asia may pose different pest risks when it is imported from the new area and therefore could be excluded pending risk evaluation and approval.

However, the first option has some potential problems. If this option were implemented without also increasing the resources available to us for conducting and completing PRAs, the volume of requests for importation of new taxa of plants for planting would likely overwhelm our ability to evaluate the new taxa for possible risk in a timely manner. In addition, since we do not currently have detailed data on what taxa of plants for planting are being imported into the United States, implementation of this approach would take some time.

In the second option that we are considering, we would exclude taxa of plants for planting from importation pending risk evaluation and approval when evidence other than a PRA was available that indicated either that the importation of the plant could introduce a quarantine pest into the United States or that the plant itself could be a quarantine pest or a noxious weed. Evidence used in such an evaluation would be drawn from sources such as scientific literature, government reports, professional organizations, and international databases. We would publish criteria regarding the sources of information that could be used and the volume of evidence that would be necessary to exclude a taxon. We anticipate that most taxa of plants presently being imported in significant amounts would continue to be allowed to be imported under the second option, although, for reasons discussed above under the heading ''Collecting Data on the Current Importation of Taxa of Plants for Planting,'' we lack the data to make a definite prediction on this subject.

Although under this option, taxa of plants for planting would be added to this category through notice-and-comment rulemaking, removing the obligation to complete a PRA before such rulemaking could be initiated would allow us to respond more quickly when other evidence indicates that the importation of certain taxa of plants for planting could pose a risk of introducing quarantine pests into the United States. Because it would require fewer resources to exclude a taxon pending risk evaluation and approval under this option than conducting a PRA in order to prohibit or restrict a taxon's importation does under the current regulations, the second option could be implemented with the resources presently available; however, it would be more effective if additional resources were available to search for and evaluate available information.

The two options for adding taxa of plants for planting to the category of excluded pending risk evaluation and approval could be combined to some extent. If the options were combined and implemented, taxa of plants for planting that are currently being imported in significant quantities but whose importation poses an uncertain risk of introducing quarantine pests into the United States could still be excluded from importation pending risk evaluation and approval if evidence other than a PRA supported such an exclusion. For example, a taxon that is currently being imported but which an importer wishes to import from a different area than the area from which it is currently being imported could be placed in the category of excluded pending risk evaluation and approval if we had evidence that a quarantine pest existed in the new area.

We invite responses to the following questions in particular on the ''excluded pending risk evaluation and approval'' category we are considering:

1. How would each of the two options for adding taxa of plants for planting to this category affect the sectors of the horticultural industry that propagate and sell imported plants for planting? Which option would disrupt current trade in plants for planting the least?

2. If the first option were implemented, what should constitute a ''significant'' amount for taxa of plants for planting that are already being imported?

3. If the second option were implemented, what sources of information and what minimum criteria should be used to determine whether a specific taxon should be excluded pending risk evaluation and approval?

4. Should taxa of plants for planting imported from different regions be considered separate regulated articles for the purposes of this category? For example, if a taxon is currently being imported in significant quantities from Africa but has never been imported from Asia, should imports of this taxon from

Asia be excluded pending risk evaluation and approval?

Programs To Reduce the Risk of Importation and Establishment of Quarantine Pests

The regulations currently contain a few programs that prescribe procedures for growing establishments in foreign countries that wish to export plants for planting to the United States. For example, § 319.37–4(c) describes a voluntary program for greenhouse-grown plants from Canada that includes requirements for identification of exported plants, recordkeeping, shipping, and pest management practices; if growers in Canada participate in this program, their plants may be offered for importation into the United States without a phytosanitary certificate. Under § 319.37–5(b), to prevent the introduction of certain pathogens of fruit trees into the United States, exporters of various plants for planting in Belgium, Canada, Germany, France, Great Britain, or the Netherlands must present phytosanitary certificates with an additional declaration that the NPPO of the exporting country had examined the stock from which the plants for planting have been derived and found the stock to be free of the pathogens of concern. True seed (botanical seed) of *Solanum tuberosum* imported from Chile under § 319.37–5(o) must be sampled by the NPPO of that country and tested for various diseases before being exported; growers must also agree to undertake various pest management and exclusion practices to be eligible to export *Solanum tuberosum* true seed into the United States. Certain plants for planting may be imported in growing media if they meet the conditions in § 319.37–8(e), which include a mandatory compliance agreement, greenhouse phytosanitary standards, growing requirements, and, for some articles, treatment and inspection requirements. These programs have all been effective at excluding quarantine pests from shipments of these articles that are imported into the United States.

We are considering establishing similar programs that exporters would have to participate in if they wished to export certain plants for planting to the United States. Participants in these programs would follow practices that would be designed to mitigate the risks posed by all pests, whether known or unknown to APHIS, that could be introduced into the United States via imported plants for planting. These programs would be broadly divided into two types. Clean stock programs would establish procedures for foreign exporters to ensure through testing that the stock from which plants for planting are derived is free of disease and to exclude pests from the growing environment of these plants for planting. Best management practices programs would allow U.S. importers to establish methods of excluding quarantine pests from plants for planting that importers test for propagation or propagate within the United States and prevent the establishment of those pests in the United States, or, if the plants for planting themselves appear to be potential noxious weeds, to prevent their establishment in the United States. The regulations in § 319.37–5(b) are an example of a clean stock program; the Draft Voluntary Codes of Conduct developed as part of the Saint Louis Declaration, a product of the Workshop on Linking Ecology and Horticulture to Prevent Plant Invasion held in St. Louis, Missouri, in December 2001, are collectively an example of a best management practices program.[3]

Clean stock programs could be established in countries that wish to export plants for planting to the United States. Many clean stock-type programs already exist in the nursery and floriculture industry; some have been established independently by industry, while others are based on regulatory requirements. In general, the clean stock programs we envision would have several basic elements:

- Production facilities would generate plants for planting from propagative material that is free or nearly free of pests.
- Production facilities would have an International Organization for Standardization-like set of standard operating procedures that include adequate pest control, regular inspection and testing, and detailed recordkeeping of all aspects of plant production, including the origin of plants for planting that are eventually exported so that they may be traced back if necessary.[4]
- The NPPO of the country in which the production facility is located would have oversight over the production facility and perform regular audits to ensure that all elements of the production system were in compliance with program standards.
- APHIS would have the ability to perform on-site audits of the production system as well. APHIS would also perform audits upon importation to ensure that these plants for planting meet the approved standards for the clean stock program. Because these programs would be designed to exclude all pests, the presence of non-quarantine pests above established tolerance levels could be used as an indication of program failure. Such audits could take the form of inspections or laboratory testing.
- Penalties and remedial action would be required in the case of noncompliance. Shipments of plants for planting exported under a clean stock program would be held or rejected if an audit revealed that the plants for planting were not grown in compliance with the clean stock program.

These general standards, if adequately developed, could be used as a template to develop specific regulatory approaches. For example, the regulations in § 319.37–5(r)(3) that govern the importation of articles of *Pelargonium* spp. and *Solanum* spp. from countries where *R. solanacearum* race 3 biovar 2 is known to occur were developed after we had drafted these general guidelines; collectively, the requirements in that paragraph satisfy the basic elements listed above. We believe that, had a clean stock program been in place for the importation of articles of *Pelargonium* spp., it would have excluded *R. solanacearum* race 3 biovar 2 from articles of *Pelargonium* spp. imported into the United States.

While the clean stock programs would allow exporters to address pest risk before plants for planting are offered for importation into the United States, the best management practices programs would be established so that U.S. entities could detect and eliminate quarantine pests that may be associated with imported plants for planting and determine whether an imported plant for planting has the potential to become a noxious weed. Participants in these programs would be domestic producers and importers of plants for planting that wish to grow small amounts of a taxon of plants for planting within the United States to determine the taxon's biological and commercial viability, in addition to the risks its importation may pose.

The best management practices programs would be used within the United States to allow the importation for testing purposes of small quantities of plants and plant parts from taxa that were excluded from importation pending risk evaluation and approval, in tandem with the permit system

[3] *See http://www.fleppc.org/FNGA/St.Louis.htm* for more information on the Workshop and text of the Draft Voluntary Codes of Conduct.

[4] The International Organization for Standardization develops and codifies standard production methods and quality control procedures (such as the ISO 9000 standards) for a variety of industries.

mentioned in the discussion of this possible new category. Following the best management practices prescribed in these programs would greatly reduce the risk that any quarantine pest that might escape detection and enter the United States via the imported plants for planting would then become established in the United States. In the case that the plants for planting themselves proved to be noxious weeds, the best management practices would also reduce the risk that those plants for planting could become established in the United States.

The best management practices programs we envision would include several basic elements, including:

- A code of conduct or documented standard operating procedures that include pest control practices, inspection and testing, and recordkeeping, similar to that described above in the clean stock program;
- Oversight and audits by a professional organization or a State agricultural organization to ensure compliance with the agreed-upon code of conduct or standard operating procedures;
- Some form of Federal oversight; and
- Penalties and remedial action for noncompliance.

General principles under which these programs would operate and performance standards these programs would have to achieve would be specified in the regulations. To develop the clean stock programs, APHIS would consult with the NPPOs of exporting countries to develop workplans that would specify how these principles and standards would be achieved in local conditions for each country or for areas within countries. The NPPO would share with APHIS responsibility for ensuring that participants in the programs comply with the requirements of the program. To develop the best management practices program, APHIS could cooperate with professional organizations or work directly with importers.

Penalties for not complying with the requirements of the programs would be imposed in a graded manner, to encourage compliance. Penalties would ultimately include suspension or removal from the program. Facilities, exporters, importers, and countries could all ultimately be removed from the programs if major or repeated violations of program requirements occurred.

Participants would have a continuing incentive to satisfy the requirements of the programs, as the importation of certain plants for planting would be contingent on satisfying the programs' requirements. For example, taxa of plants for planting that would be excluded from importation pending risk evaluation and approval could be imported if they were exported by producers that participated in a clean stock program or were imported by participants in a best practices program; plants for planting exported by producers in full compliance with the requirements of a clean stock program would likely be free of both pathogens and insect pests upon importation into the United States, while domestic firms participating in a best practices program would minimize the risk that any pathogens or insect pests that might still be present would be introduced into the United States. In addition, it is possible that we could allow importation of plants for planting from countries in which certain pathogens or other pests are prevalent if the specific facility that wished to export such plants for planting participated in a clean stock program.

We invite responses to the following questions in particular on the clean stock programs we are considering:

1. Is it feasible to use this type of program in producing large volumes of taxa of plants for planting other than those that are currently exported to the United States under the programs in our regulations? What additional costs might be associated with growing other taxa of plants for planting under this type of program? What benefits might be associated with implementing such a program?

2. What specific aspects of these programs could prove problematic or would require detailed attention?

3. How could a clean stock program be designed to ensure that quarantine pests are not inadvertently brought to the United States along with plants for planting?

4. Are there any foreign clean stock programs not mentioned in our regulations that could serve as models for a general clean stock program?

We invite responses to the following questions in particular on the best management practices program we are considering:

1. As noted above, draft codes of conduct that could form the core of a best management practices program already exist. Are these codes a feasible starting point from which to develop a best management practices program?

2. Do other applicable best management practices programs exist? Which of these is the best one, and why? What additional costs might be associated with growing plants for planting under this type of program? What benefits might be associated with implementing such a program?

3. What existing industry practices should be incorporated into this program?

4. What permit conditions would help to reduce the risk that quarantine pests associated with plants for planting imported in limited quantities for testing could become established, or that the plants for planting themselves, if the taxon proves to be invasive, could become established?

5. What would be the best way to identify and assess any environmental risks that might be associated with the importation of plants for planting under a best management practices program?

Combining Existing Regulations Governing the Importation of Plants for Planting

As described above, the nursery stock regulations restrict, among other things, the importation of living plants, plant parts, seeds, and plant cuttings for planting or propagation. Other subparts in 7 CFR part 319 also contain regulations restricting, among other things, the importation of plants for planting. These subparts address the risks associated with the importation of specific articles or the prevention of the introduction and establishment of specific diseases, as opposed to the more general scope of the nursery stock regulations. Subparts containing such restrictions include ''Subpart—Foreign Cotton and Covers'' (§§ 319.8 through 319.8–26), ''Subpart—Sugarcane'' (§§ 319.15 and 319.15a), ''Subpart—Citrus Canker'' (§ 319.19), ''Subpart—Corn Diseases'' (§§ 319.24 through 319.24–5), ''Subpart—Indian Corn or Maize, Broomcorn, and Related Plants'' (§§ 319.41 through 319.41–6), ''Subpart—Rice'' (§§ 319.55 through 319.55–7), ''Subpart—Wheat'' (§§ 319.59 through 319.59–2), and ''Subpart—Coffee'' (§§ 319.73–1 through 319.73–4). In addition, the regulations in 7 CFR part 361, ''Importation of Seed and Screenings Under the Federal Seed Act,'' requires shipments of imported agricultural and vegetable seeds to be labeled correctly and to be tested for the presence of seeds of certain noxious weed seeds as a condition of entry into the United States, while the regulations in 7 CFR part 360, ''Noxious Weed Regulations,'' contain restrictions on the movement of noxious weed plants and plant parts listed in that part into or through the United States and interstate.

We are considering whether to incorporate all the regulations regarding the importation of plants for planting into a single subpart. We would change the name of this subpart from ''Subpart—Nursery Stock, Plants, Roots, Bulbs, Seeds, and Other Plant Products''

to ''Subpart—Plants for Planting'' to reflect this change. We would also include the weed taxa whose importation is restricted by 7 CFR part 360 as restricted articles in the new plants for planting regulations. Our intent in making such a change would be to improve the clarity and transparency of our regulations governing the importation of plants for planting by allowing users of the regulations to find all these regulations in one subpart. By making it easier for users of the regulations to find and follow the regulations relevant to their situation, this action could also improve compliance.

We invite responses to the following questions in particular on the reorganization of the regulations for plants for planting we are considering:

1. Should all the regulations governing the importation of plants for planting in the subparts listed above be incorporated into one subpart? If not, which subparts should be excluded, and why?

2. If we should incorporate the regulations governing the importation of plants for planting in the subparts listed above into one subpart, which subparts should we incorporate first? Should we combine them all at once?

Reevaluating Taxa Whose Importation Is Currently Prohibited

The regulations in § 319.37–2(a) list taxa whose importation is prohibited because the importation of plants for planting from these taxa poses a risk of introducing a quarantine pest into the United States. Several of the other subparts listed above also prohibit the importation of certain taxa of plants for planting. Many of these taxa were prohibited from being imported after the discovery of a single quarantine pest as found in a shipment offered for importation into the United States or as reported in the scientific literature. Complete quarantine pest lists are not available for each of these taxa. In addition, the regulations in § 319.37–2(b) prohibit the importation of certain taxa of plants for planting if the plants for planting exceed certain sizes or ages. These limits have not been reviewed recently.

In accordance with recommendation E–48 in the Safeguarding Report, we are considering reviewing the taxa of plants for planting whose importation is currently prohibited to determine whether the pests of concern presently qualify as quarantine pests by the definition cited above. Since the time these plant taxa were designated as prohibited, the pest of concern may have become established in the United States, or scientific evidence may have become available that indicates that the pest of concern does not qualify as a quarantine pest. If we undertake this review, we will begin by conducting a PRA to determine the pests of quarantine concern associated with these taxa and whether prohibition is the only approach to mitigation that would prevent quarantine pests associated with these taxa of plants for planting from becoming established in the United States.

We invite responses to the following question on our potential reevaluation of taxa of plants for planting whose importation is currently prohibited:

1. Which taxa should be candidates for review? Which of these taxa should be assigned the highest priority for review? Please identify the taxa by scientific name and provide scientific information to support your suggestion. Please also provide information, if known, on any quarantine pests other than the pest(s) of concern listed in the regulations that may be associated with the taxa.

2. Which prohibitions on the basis of size or age should be candidates for review? Which of these prohibitions should be assigned the highest priority for review?

We further invite comment on which of the five measures above should be assigned the highest priority for implementation, if any.

Economic Data About the Plants for Planting Industry

Except for combining existing regulations governing the importation of plants for planting, which would be an administrative change, all the measures we are considering for revising the regulations would be likely to have an economic impact on numerous entities considered ''small'' according to the size standards established by the Small Business Administration (SBA).[5] After we receive answers to the specific questions listed above regarding the five measures we are considering, we may issue a proposal or proposals with the goal of implementing one or more of these measures. In order to conduct the economic analysis required by the Regulatory Flexibility Act for those potential proposals and assess the impact of any changes we might propose on small entities, we will need more economic data about the plants for planting industry than are currently available to us. Therefore, we invite the public to provide us with data regarding the structure of the plants for planting industry, including the number of firms in the industry, the number of firms that could be considered small according to the SBA's size standards, the number of firms whose business directly involves the importation of plants for planting, and any other data that would assist us in conducting economic analyses associated with these measures.

We would also appreciate any suggestions the public may have for improving other aspects of the regulations to reduce the risk of introducing quarantine pests into the United States.

[5] A guide to SBA's definitions of small business is available on the Internet at *http://www.sba.gov/size/indexguide.html.* A table of small business size standards matched to the North American Industry Classification System is available at *http://www.sba.gov/size/sizetable2002.html.*

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

Done in Washington, DC, this 6th day of December 2004.

Bill Hawks,

Under Secretary for Marketing and Regulatory Programs.

[FR Doc. 04–27139 Filed 12–9–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. FV04–930–2 PR]

Tart Cherries Grown in the States of Michigan, et al.; Final Free and Restricted Percentages for the 2004–2005 Crop Year

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule invites comments on the establishment of final free and restricted percentages for the 2004–2005 crop year. The percentages are 72 percent free and 28 percent restricted and would establish the proportion of tart cherries from the 2004 crop which may be handled in commercial outlets. The percentages are intended to stabilize supplies and prices, and strengthen market conditions. The percentages were recommended by the Cherry Industry Administrative Board, the body that locally administers the marketing order. The marketing order regulates the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

DATES: Comments must be received by January 10, 2005.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or e-mail: *moabdocket.clerk@usda.gov.* Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours or can be viewed at: *http://www.ams.usda.gov/fv/moab.html.*

FOR FURTHER INFORMATION CONTACT: Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Suite 6C02, Unit 155, 4700 River Road, Riverdale, MD 20737; Telephone: (301) 734–5243 or Fax: (301) 734–5275; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491 or Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation, or obtain a guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or e-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This proposal is issued under Marketing Agreement and Order No. 930 (7 CFR part 930), regulating the handling of tart cherries produced in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order provisions now in effect, final free and restricted percentages may be established for tart cherries handled by handlers during the crop year. This rule would establish final free and restricted percentages for tart cherries for the 2004–2005 crop year, beginning July 1, 2004, through June 30, 2005. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempt therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, the USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

The order prescribes procedures for computing an optimum supply and preliminary and final percentages that establish the amount of tart cherries that can be marketed throughout the season. The regulations apply to all handlers of tart cherries that are in the regulated districts. Tart cherries in the free percentage category may be shipped immediately to any market, while restricted percentage tart cherries must be held by handlers in a primary or secondary reserve, or be diverted in accordance with § 930.59 of the order and § 930.159 of the regulations, or used for exempt purposes (and obtaining diversion credit) under § 930.62 of the order and § 930.162 of the regulations. The regulated districts for this season are: District one—Northern Michigan; District two—Central Michigan; District three—Southwest Michigan; District four—New York; District seven—Utah; District eight—Washington, and District nine—Wisconsin. Districts five and six (Oregon and Pennsylvania, respectively) would not be regulated for the 2004–2005 season.

The order prescribes under § 930.52 that those districts to be regulated shall be those districts in which the average annual production of cherries over the prior three years has exceeded six million pounds. A district not meeting the six million-pound requirement shall not be regulated in such crop year. Because this requirement was not met in the Districts of Oregon and Pennsylvania, handlers in those districts would not be subject to volume regulation during the 2004–2005 crop year.

Demand for tart cherries at the farm level is derived from the demand for tart cherry products at retail. Demand for tart cherries and tart cherry products tends to be relatively stable from year to year. The supply of tart cherries, by contrast, varies greatly from crop year to crop year. The magnitude of annual fluctuations in tart cherry supplies is one of the most pronounced for any agricultural commodity in the United States. In addition, since tart cherries are processed into cans or frozen, they can be stored and carried over from crop year to crop year. This creates substantial coordination and marketing problems. The supply and demand for tart cherries is rarely balanced. The primary purpose of setting free and restricted percentages is to balance supply with demand and reduce large surpluses that may occur.

Section 930.50(a) of the order prescribes procedures for computing an optimum supply for each crop year. The Board must meet on or about July 1 of each crop year, to review sales data, inventory data, current crop forecasts and market conditions. The optimum supply volume shall be calculated as 100 percent of the average sales of the prior three years (taking into account sales of exempt and restricted percentage cherries qualifying for diversion credit) to which is added a desirable carryout inventory not to exceed 20 million pounds or such other amount as may be established with the approval of USDA. The optimum supply represents the desirable volume of tart cherries that should be available for sale in the coming crop year.

The order also provides that on or about July 1 of each crop year, the Board is required to establish preliminary free and restricted percentages. These percentages are computed by deducting the actual carryin inventory from the optimum supply figure (adjusted to raw product equivalent—the actual weight of cherries handled to process into cherry products) and subtracting that figure (referred to as the current crop year requirement) from the current year's USDA crop forecast or by an average of such other crop estimates the Board votes to use. If the resulting number is positive, this represents the estimated over-production, which would be the restricted percentage tonnage. The restricted percentage tonnage is then divided by the sum of the crop forecast(s) for the regulated districts to obtain a preliminary

restricted percentage, rounded to the nearest whole number, for the regulated districts. If subtracting the current crop year requirement, from the current crop forecast, results in a negative number, the Board is required to establish a preliminary free tonnage percentage of 100 percent with a preliminary restricted percentage of zero. The Board is required to announce the preliminary percentages in accordance with paragraph (h) of § 930.50.

The Board met on June 24, 2004, and computed, for the 2004–2005 crop year, an optimum supply volume of 177 million pounds. The Board recommended that the desirable carryout figure be zero pounds. Desirable carryout is the amount of fruit required to be carried into the succeeding crop year and is set by the Board after considering market circumstances and needs. This figure can range from zero to a maximum of 20 million pounds. The Board calculated preliminary free and restricted percentages as follows: The USDA estimate of the crop for the entire production area was 215 million pounds; a 24 million pound carryin (based on Board estimates) was subtracted from the optimum supply of 177 million pounds which resulted in 2004–2005 tonnage requirements (adjusted optimum supply) of 153 million pounds. The carryin figure reflects the amount of cherries that handlers actually had in inventory at the beginning of the crop year. Subtracting the adjusted optimum supply of 153 million pounds from the 215 million pound USDA crop estimate (for the entire production area) results in a surplus of 62 million pounds of tart cherries. The surplus was then divided by the production in the regulated districts (207 million pounds) and this resulted in a restricted percentage of 30 percent for the 2004–2005 crop year. The free percentage was 70 percent (100 percent minus 30 percent). The Board established these percentages and announced them to the industry as required by the order.

The table below summarizes the preliminary percentage computations made by the Board at its June meeting for the 2004–2005 year:

	Millions of pounds	
Optimum Supply Formula:		
(1) Average sales of the prior three crop years		177
(2) Plus desirable carryout		0
(3) Optimum supply calculated by the Board at the June meeting		177
Preliminary Percentages:		
(4) USDA crop estimate		215
(5) Carryin held by handlers as of July 1, 2004.		24
(6) Adjusted optimum supply for current crop year (Item 3 minus Item 5)		153
(7) Surplus (restricted tonnage) (Item 4 minus Item 6)		62
(8) USDA crop estimate for regulated districts		207
	Percentages	
	Free	Restricted
(9) Preliminary percentages (Item 7 divided by Item 8 x 100 equals restricted percentage; 100 minus restricted percentage equals free percentage)	70	30

Between July 1 and September 15 of each crop year, the Board may modify the preliminary free and restricted percentages by announcing interim free and restricted percentages to adjust to the actual pack occurring in the industry. No interim adjustments were made.

USDA establishes final free and restricted percentages through the informal rulemaking process. These percentages would make available the tart cherries necessary to achieve the optimum supply figure calculated by the Board. The difference between any final free percentage designated by USDA and 100 percent is the final restricted percentage. The Board met on September 10, 2004, to recommend final free and restricted percentages.

The actual production reported by the Board for the entire production area was 209 million pounds, which is a 6 million pound decrease from the USDA crop estimate of 215 million pounds.

A 25 million pound carryin (based on handler reports) was subtracted from the Board's optimum supply of 177 million pounds, yielding an adjusted optimum supply for the current crop year of 152 million pounds. The adjusted optimum supply of 152 million pounds was subtracted from the actual production of 209 million pounds, which resulted in a 57 million pound surplus. The total surplus of 57 million pounds was then divided by the 202 million-pound volume of tart cherries produced in the regulated districts. This results in a 28 percent restricted percentage and a corresponding 72 percent free percentage for the regulated districts.

The final percentages are based on the Board's reported production figures and the following supply and demand information available in September for the 2004–2005 crop year:

	Millions of pounds
Optimum Supply Formula:	
(1) Average sales of the prior three years	177
(2) Plus desirable carryout	0
(3) Optimum supply calculated by the Board at the June meeting	177
Final Percentages:	
(4) Board reported production	209
(5) Carryin held by handlers as of July 1, 2004	25
(6) Adjusted optimum supply (Item 3 minus Item 5)	152
(7) Surplus (restricted tonnage)(Item 4 minus Item 6)	57
(8) Production in regulated districts	202

	Millions of pounds	
	Percentages	
	Free	Restricted
(9) Final Percentages (Item 7 divided by Item 8 x 100 equals restricted percentage; 100 minus restricted percentage equals free percentage)	72	28

The Department's ''Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders'' specify that 110 percent of recent years' sales should be made available to primary markets each season before recommendations for volume regulation are approved. This goal would be met by the establishment of final percentages which release 100 percent of the optimum supply volume and the additional release of tart cherries provided under § 930.50(g). This release of tonnage, equal to 10 percent of the average sales of the prior three years sales, is made available to handlers each season.

The Board recommended that such release should be made available to handlers the first week of December and the first week of May. Handlers can decide how much of the 10 percent release they would like to receive on the December and May release dates. Once released, such cherries are released for free use by such handler.

Approximately 18 million pounds would be made available to handlers this season in accordance with Department Guidelines. These cherries would be made available to every handler and released in proportion to the handler's percentage of the total regulated crop handled. If a handler does not take his/her proportionate amount, such amount remains in the inventory reserve.

The Regulatory Flexibility Act and Effects on Small Businesses

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 40 handlers of tart cherries who are subject to regulation under the tart cherry marketing order and approximately 900 producers of tart cherries in the regulated area. Small agricultural service firms, which includes handlers, have been defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than $5,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000. A majority of the producers and handlers are considered small entities under SBA's standards.

The principal demand for tart cherries is in the form of processed products. Tart cherries are dried, frozen, canned, juiced, and pureed. During the period 1998/99 through 2003/04, approximately 92 percent of the U.S. tart cherry crop, or 252.8 million pounds, was processed annually. Of the 252.8 million pounds of tart cherries processed, 59 percent was frozen, 29 percent was canned, and 12 percent was utilized for juice and other products.

Based on National Agricultural Statistics Service data, acreage in the United States devoted to tart cherry production has been trending downward. Bearing acreage has declined from a high of 50,050 acres in 1987/88 to 37,000 acres in 2003/04. This represents a 26 percent decrease in total bearing acres. Michigan leads the nation in tart cherry acreage with 73 percent of the total and produces about 75 percent of the U.S. tart cherry crop each year.

The 2004/05 crop is moderate in size at 209 million pounds. The largest crop occurred in 1995 with production in the regulated districts reaching a record 395.6 million pounds. The price per pound received by tart cherry growers ranged from a low of 7.3 cents in 1987 to a high of 46.4 cents in 1991. These problems of wide supply and price fluctuations in the tart cherry industry are national in scope and impact. Growers testified during the order promulgation process that the prices they received often did not come close to covering the costs of production.

The industry demonstrated a need for an order during the promulgation process of the marketing order because large variations in annual tart cherry supplies tend to lead to fluctuations in prices and disorderly marketing. As a result of these fluctuations in supply and price, growers realize less income. The industry chose a volume control marketing order to even out these wide variations in supply and improve returns to growers. During the promulgation process, proponents testified that small growers and processors would have the most to gain from implementation of a marketing order because many such growers and handlers had been going out of business due to low tart cherry prices. They also testified that, since an order would help increase grower returns, this should increase the buffer between business success and failure because small growers and handlers tend to be less capitalized than larger growers and handlers.

Aggregate demand for tart cherries and tart cherry products tends to be relatively stable from year-to-year. Similarly, prices at the retail level show minimal variation. Consumer prices in grocery stores, and particularly in food service markets, largely do not reflect fluctuations in cherry supplies. Retail demand is assumed to be highly inelastic which indicates that price reductions do not result in large increases in the quantity demanded. Most tart cherries are sold to food service outlets and to consumers as pie filling; frozen cherries are sold as an ingredient to manufacturers of pies and cherry desserts. Juice and dried cherries are expanding market outlets for tart cherries.

Demand for tart cherries at the farm level is derived from the demand for tart cherry products at retail. In general, the farm-level demand for a commodity consists of the demand at retail or food service outlets minus per-unit processing and distribution costs incurred in transforming the raw farm commodity into a product available to consumers. These costs comprise what is known as the ''marketing margin.''

The supply of tart cherries, by contrast, varies greatly. The magnitude of annual fluctuations in tart cherry supplies is one of the most pronounced for any agricultural commodity in the United States. In addition, since tart cherries are processed either into cans or frozen, they can be stored and carried over from year-to-year. This creates substantial coordination and marketing problems. The supply and demand for

tart cherries is rarely in equilibrium. As a result, grower prices fluctuate widely, reflecting the large swings in annual supplies.

In an effort to stabilize prices, the tart cherry industry uses the volume control mechanisms under the authority of the Federal marketing order. This authority allows the industry to set free and restricted percentages. These percentages are only applied to states or districts with a 3-year average of production greater than six million pounds, and to states or districts in which the production is 50 percent or more of the previous 5-year processed production average.

The primary purpose of setting restricted percentages is an attempt to bring supply and demand into balance. If the primary market is over-supplied with cherries, grower prices decline substantially.

The tart cherry sector uses an industry-wide storage program as a supplemental coordinating mechanism under the Federal marketing order. The primary purpose of the storage program is to warehouse supplies in large crop years in order to supplement supplies in short crop years. The storage approach is feasible because the increase in price—when moving from a large crop to a short crop year—more than offsets the costs for storage, interest, and handling of the stored cherries.

The price that growers' receive for their crop is largely determined by the total production volume and carryin inventories. The Federal marketing order permits the industry to exercise supply control provisions, which allow for the establishment of free and restricted percentages for the primary market, and a storage program. The establishment of restricted percentages impacts the production to be marketed in the primary market, while the storage program has an impact on the volume of unsold inventories.

The volume control mechanism used by the cherry industry results in decreased shipments to primary markets. Without volume control the primary markets (domestic) would likely be over-supplied, resulting in lower grower prices.

To assess the impact that volume control has on the prices growers receive for their product, an econometric model has been developed. The econometric model provides a way to see what impacts volume control may have on grower prices. The three districts in Michigan, along with the districts in Utah, New York, Washington, and Wisconsin are the restricted areas for this crop year and their combined total production is 202 million pounds. A 28 percent restriction means 145 million pounds is available to be shipped to primary markets from these five states. Production levels of 3.9 million pounds for Oregon, and 2.8 million pounds for Pennsylvania (the unregulated areas in 2004–2005), result in an additional 6.7 million pounds available for primary market shipments.

In addition, USDA requires a 10 percent release from reserves as a market growth factor. This will result in an additional 18 million pounds being available for the primary market. The 145 million pounds from Michigan, New York, Utah, Washington, and Wisconsin, the approximately 7 million pounds from the other producing states, the 18 million pound release, and the 25 million pound carryin inventory gives a total of 195 million pounds being available for the primary markets.

The econometric model is used to estimate the difference between grower prices with and without restrictions. With volume controls, grower prices are estimated to be approximately $0.08 higher than without volume controls.

The use of volume controls is estimated to have a positive impact on growers' total revenues. With restriction, revenues are estimated to be $10.7 million higher than without restrictions. The without restrictions scenario assumes that all tart cherries produced would be delivered to processors for payments. This scenario is likely since the total available supply in this crop year is very similar to last year's when there was a full release of the reserve pool, and handlers appear to be encouraging growers to deliver their entire crop this year. Although carryout inventories are 25 million pounds, only 1 million pounds is in the reserve while 24 million pounds are held in free inventories held by packers.

It is concluded that the 28 percent volume control would not unduly burden producers and handlers, particularly smaller growers and handlers. The 28 percent restriction would be applied in Michigan, New York, Utah, Washington, and Wisconsin. The growers and handlers in the other two states covered under the marketing order will benefit from the market stability anticipated to result from this restriction.

Recent grower prices have been as high as $0.44 per pound in the 2002–2003 crop year. At current production and yield levels, the cost of production is reported to be $0.43 per pound. Thus, the estimated $0.43 per pound received by growers under the regulation scenario just covers the cost of production. Under the no regulation scenario, estimated grower prices would not cover the total cost of production. Lower yields and production result in higher costs of production. Overhead or fixed costs are spread over lower levels of production which results in higher costs of production per acre. Even in years when no production is harvested, growers face fixed costs of production and additional costs associated with maintaining the orchard for future years of production. The use of volume controls is believed to have little or no effect on consumer prices and will not result in fewer retail sales or sales to food service outlets.

Without the use of volume controls, the industry could be expected to start to build large amounts of unwanted inventories. These inventories would have a depressing effect on grower prices. The econometric model shows for every 1 million-pound increase in carryin inventories, a decrease in grower prices of $0.0033 per pound occurs. The use of volume controls allows the industry to supply the primary markets while avoiding the disastrous results of over-supplying these markets. In addition, through volume control, the industry has an additional supply of cherries that can be used to develop secondary markets such as exports and the development of new products. The use of reserve cherries in the production shortened 2002–2003 crop year proved to be very useful and beneficial to growers and packers.

In discussing the possibility of marketing percentages for the 2004–2005 crop year, the Board considered the following factors contained in the marketing policy: (1) The estimated total production of cherries; (2) the estimated size of the crop to be handled; (3) the expected general quality of such cherry production; (4) the expected carryover as of July 1 of canned and frozen cherries and other cherry products; (5) the expected demand conditions for cherries in different market segments; (6) supplies of competing commodities; (7) an analysis of economic factors having a bearing on the marketing of cherries; (8) the estimated tonnage held by handlers in primary or secondary inventory reserves; and (9) any estimated release of primary or secondary inventory reserve cherries during the crop year.

The Board's review of the factors resulted in the computation and announcement in September 2004 of the free and restricted percentages proposed to be established by this rule (72 percent free and 28 percent restricted).

One alternative to this action would be not to have volume regulation this season. Board members stated that no volume regulation would be detrimental

to the tart cherry industry due to the size of the 2004–2005 crop. Returns to growers would not cover their costs of production for this season which might cause some to go out of business.

As mentioned earlier, the Department's ''Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders'' specify that 110 percent of recent years' sales should be made available to primary markets each season before recommendations for volume regulation are approved. The quantity available under this rule is 110 percent of the quantity shipped in the prior three years.

The free and restricted percentages established by this rule release the optimum supply and apply uniformly to all regulated handlers in the industry, regardless of size. There are no known additional costs incurred by small handlers that are not incurred by large handlers. The stabilizing effects of the percentages impact all handlers positively by helping them maintain and expand markets, despite seasonal supply fluctuations. Likewise, price stability positively impacts all producers by allowing them to better anticipate the revenues their tart cherries will generate.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this regulation.

While the benefits resulting from this rulemaking are difficult to quantify, the stabilizing effects of the volume regulations impact both small and large handlers positively by helping them maintain markets even though tart cherry supplies fluctuate widely from season to season.

In compliance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction Act of 1995 (Pub. L. 104–13), the information collection and recordkeeping requirements under the tart cherry marketing order have been previously approved by OMB and assigned OMB Number 0581–0177.

Reporting and recordkeeping burdens are necessary for compliance purposes and for developing statistical data for maintenance of the program. The forms require information which is readily available from handler records and which can be provided without data processing equipment or trained statistical staff. As with other, similar marketing order programs, reports and forms are periodically studied to reduce or eliminate duplicate information collection burdens by industry and public sector agencies. This rule would not change those requirements.

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate because this rule would need to be in place as soon as possible since handlers are already shipping tart cherries from the 2004–2005 crop. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

For the reasons set forth in the preamble, 7 CFR part 930 is proposed to be amended as follows:

PART 930—TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

1. The authority citation for 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 930.254 is added to read as follows:

Note: This section will not appear in the annual Code of Federal Regulations.

§ 930.254 Final free and restricted percentages for the 2004–2005 crop year.

The final percentages for tart cherries handled by handlers during the crop year beginning on July 1, 2004, which shall be free and restricted, respectively, are designated as follows: Free percentage, 72 percent and restricted percentage, 28 percent.

Dated: December 7, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04–27161 Filed 12–9–04; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 983

[Docket No. FV04–983–2 PR]

Pistachios Grown in California; Establishment of Continuing Assessment Rate and Reporting Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule would establish a continuing assessment rate for the Administrative Committee for Pistachios (Committee) for the 2004–05 and subsequent fiscal periods of $0.0014 per pound of pistachios received for processing and would establish reporting requirements under the California pistachio marketing order (order). The order regulates the handling of pistachios grown in California and is administered by the Committee. Authorization to assess pistachio handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program. The fiscal period begins September 1 and ends August 31. The assessment rate would remain in effect indefinitely unless modified, suspended, or terminated. Requiring handlers to file annual reports with the Committee would facilitate the Committee's collection of handler assessments.

DATES: Comments must be received by February 8, 2005.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; E-mail: *moab.docketclerk@usda.gov*; or Internet: *http://www.regulations.gov*. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html*.

FOR FURTHER INFORMATION CONTACT: Toni Sasselli, Program Analyst, or Rose Aguayo, Marketing Specialist, California Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (559) 487–5901; Fax (559) 487–5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 983, regulating the handling of pistachios grown in California, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, pistachio handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as proposed herein would be applicable to all assessable pistachios beginning September 1, 2004, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule would establish a continuing assessment rate for the Committee for the 2004–05 and subsequent fiscal periods of $0.0014 per pound of pistachios received for processing and would establish reporting requirements under the California pistachio order. The quantity of pistachios received by the handler for processing is converted to an assessed weight pursuant to § 983.6 and the assessment rate is applied to that weight in determining a handler's assessment obligation for the fiscal period. Requiring handlers to file annual Receipts/Assessment Reports with the Committee would facilitate the Committee's collection of handler assessments.

Continuing Assessment Rate

Sections 983.52 and 983.53 of the pistachio order provide authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and to collect assessments from handlers to administer the marketing order. Each handler who receives pistachios for processing in each production year (fiscal year) is required to pay an assessment based on the pro rata share of the expenses authorized by USDA which are reasonable and likely to be incurred by the Committee during that year. The assessment obligation for each handler is computed by applying the assessment rate set by USDA to each handler's assessed weight computed pursuant to § 983.6 of the pistachio order.

The members of the Committee are producers and handlers of California pistachios. They are familiar with the Committee needs and with the costs for goods and services in their local area, and are, thus, in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

The Committee met on August 17, 2004, and unanimously recommended 2004–05 expenditures of $271,499 and an assessment rate of $0.0014 per pound of pistachios received for processing. This was the first public meeting of the newly formed Committee since the pistachio marketing order became effective on April 6, 2004 (69 FR 17944). The major expenditures recommended by the Committee for the 2004–05 fiscal period include $ 110,249 for administrative expenses; $34,500 for compliance expenses; $101,750 for salaries; and $25,000 for a contingency reserve.

Because this is a new order and there is no carry-in income, the Committee is borrowing funds from the California Pistachio Commission (Commission) until assessments are collected in March 2005. The Committee discussed the necessity of setting a relatively high assessment rate for the 2004–05 fiscal period because it is necessary to generate sufficient funds to reimburse the Commission, to cover the Committee's 2004–05 expenditures, and to build an adequate reserve to cover Committee expenditures until the 2005–06 fiscal period's assessments are available in December 2005.

The assessment rate recommended by the Committee was derived by dividing anticipated expenses plus funds to establish a reserve by expected receipts (the assessed weight) of pistachios grown in California during 2004–05 ($271,499 plus $190,501 divided by 330,000,000 pounds = $0.0014. With pistachio receipts for the year estimated at 330,000,000 pounds, assessment income is expected to total of $462,000.

The Committee may carry over excess funds into subsequent production years (fiscal years) as a reserve, provided that funds already in the reserve do not exceed approximately two production years' budgeted expenses. In the event that funds exceed two production years' budgeted expenses, future assessments would be reduced to bring the reserves to an amount that is less than or equal to two production years' budgeted expenses (§ 983.56). Funds in the reserve would be kept within the maximum permitted by the order.

Under § 983.53 the Committee, prior to the beginning of each production year, shall recommend and the Secretary shall set the assessment for the following production year, which shall not exceed one-half of one percent of the average price received by producers in the preceding production year. According to the Commission's Annual Report for the 2003–04 crop year, the average price received by producers was $1.15 per pound. One half of one percent equals $0.005. Taking ($0.005) × ($1.15) = $0.00575 for the maximum assessment rate allowed. The rates considered by the Committee ranged from $0.001 to $0.0014. The recommended assessment rate of $0.0014 is less than the maximum provided for in the order.

The proposed assessment rate would continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate would be in effect for an indefinite period, the Committee would continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA would evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's 2004–05 budget and those

for subsequent fiscal periods would be reviewed and, as appropriate, approved by USDA.

Reporting Requirements

Section 983.47 of the pistachio order provides authority for establishing reporting requirements. Under the order, the Committee may, with the approval of the Secretary, establish reporting requirements to collect necessary information or data.

At its first meeting, the Committee also unanimously recommended that handlers file a Receipts/Assessment Report with the Committee to facilitate the Committee's collection of handler assessments.

Handlers, including custom hullers, who receive pistachios for processing (removal of green hulls and drying pistachios to 5 percent moisture), would be required to pay an assessment attributable to the assessed weight of pistachios received by that handler and to report that assessed weight to the Committee on the Receipts/Assessment Form. Pursuant to § 983.6 of the order, the term ''assessed weight'' means the pounds of inshell pistachios, free of internal defects as defined in § 983.39(b)(4) and (5), with the weight computed at 5 percent moisture, received for processing by a handler within each production year: *Provided,* That for loose kernels, the actual weight shall be multiplied by two to obtain an inshell weight.

A final order published on July 26, 2004, (69 FR 44460), delayed the implementation date for § 983.39(b)(4) and (5), of the order until February 1, 2005. Therefore, for the 2004–05 fiscal period, each handler who receives pistachios for processing would be required to furnish the Receipts/Assessment Report to the Committee and pay all due assessments to the Committee by March 15, 2005. For subsequent fiscal periods, each handler who receives pistachios for processing would be required to furnish the Receipts/Assessment Report and pay all due assessments to the Committee by December 15 of the applicable fiscal period.

The recommended reporting requirements are similar to those required by the Commission. Because the Commission is prohibited from sharing confidential handler information, the Committee recommended that a Receipt/Assessment Report be developed for Committee use and that the receipts information already compiled for the Commission be attached to the newly developed Committee form. Thus, handlers would not be duplicating their efforts and both agencies would receive necessary receipts/assessment data. The Committee estimates this action would affect 20 handlers of pistachios and further estimates that, on average, handlers would expend approximately 4 minutes per year to prepare and submit this report to the Committee. These actions are in the interest of producers and handlers. Detailed information on these burdens is contained in the Paperwork Reduction Act section of this document.

Assessment Collection

To facilitate assessment collections under the order, the Committee unanimously recommended establishing § 983.253. This section sets the continuing assessment rate and establishes the reporting requirements necessary to verify that each handler has paid the correct assessment. Section 925.253 would read as follows: ''§ 983.253 Assessment rate. (a) On and after September 1, 2004, an assessment rate of $0.0014 per pound of pistachios received for processing is established for California Pistachios. The assessment obligation of each handler would be computed by applying the assessment rate to the assessed weight computed pursuant to § 983.6. (b) For the 2004–05 fiscal period each handler who receives pistachios for processing shall furnish the Receipts/Assessment Report to the Committee and pay all due assessments to the Committee by March 15, 2005. For subsequent fiscal periods, each handler who receives pistachios for processing shall furnish the Receipts/Assessment Report and pay all due assessments to the Committee by December 15 of the applicable fiscal period.''

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 20 handlers of California pistachios subject to regulation under the order and approximately 741 producers in the production area. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $5,000,000. Eight of the 20 handlers subject to regulation have annual pistachio receipts of at least $5,000,000. In addition, 722 producers have annual receipts less than $750,000. Thus, the majority of handlers and producers of California pistachios may be classified as small entities.

This rule would establish a continuing assessment rate for the Committee and collected from handlers for the 2004–05 and subsequent fiscal periods of $0.0014 per pound of pistachios received for processing and would establish reporting requirements under the California pistachio order. Requiring handlers to file annual Receipts/Assessment Reports with the Committee would facilitate the Committee's collection of handler assessments. Pistachios harvested and received in August of any year shall be applied to the subsequent production year for order purposes.

Continuing Assessment Rate

The California pistachio order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of California pistachios. They are familiar with the Committee needs and with the costs for goods and services in their local area, and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

The Committee met on August 17, 2004, and unanimously recommended 2004–05 expenditures of $271,499 and an assessment rate of $0.0014 per pound of pistachios received for processing. This was the first public meeting of the newly formed Committee since the pistachio marketing order became effective on April 6, 2004 (69 FR 17944). The major expenditures recommended by the Committee for the 2004–05 fiscal period include $110,249 for administrative expenses; $34,500 for compliance expenses; $101,750 for salaries; and $25,000 for a contingency reserve.

Because this is a new order and there is no carry-in income, the Committee is borrowing funds from the Commission until assessments are collected in March 2005. The Committee discussed the necessity of setting a relatively high assessment rate for the 2004–05 fiscal period because it is necessary to generate sufficient funds to reimburse the Commission, to cover the Committee's 2004–05 expenditures, and to build an adequate reserve to cover Committee expenditures until the 2005–06 fiscal period's assessments are available in December 2005.

The assessment rate recommended by the Committee was derived by dividing anticipated expenses plus funds to establish a reserve by expected receipts of pistachios grown in California ($271,499 plus $190,501 divided by 330,000,000 pounds = $0.0014. With pistachio receipts for the year estimated at 330,000,000 pounds, assessment income should total $462,000.

The Committee may carry over such excess into subsequent production years as a reserve, provided that funds already in the reserve do not exceed approximately two production years' budgeted expenses. In the event that funds exceed two productions years' budgeted expenses, future assessments would be reduced to bring the reserves to an amount that is less than or equal to two production years' budgeted expenses. Funds in the reserve would be kept within the maximum permitted by the order (§ 983.56).

The proposed assessment rate would continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate would be in effect for an indefinite period, the Committee would continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA would evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's 2004–05 budget and those for subsequent fiscal periods would be reviewed and, as appropriate, approved by USDA.

The Committee discussed alternative 2004–05 expenditures of $246,499, which did not include $25,000 for a contingency reserve. However, the Committee believes that it is important to establish a contingency reserve for unforeseen expenditures, and, thus, unanimously recommended expenditures in the amount of $271,499.

A review of historical information and preliminary information pertaining to the upcoming fiscal period indicates that the grower price for the 2004–05 season could range between $1.30 and $1.40 per pound of assessed weight pistachios. Therefore, the estimated assessment revenue for the 2004–05 fiscal period as a percentage of total grower revenue could range between .11 and .10 percent.

Reporting Requirements

Section 983.47 of the pistachio order provides authority for establishing reporting requirements. Under the order, the Committee may, with the approval of the Secretary, establish reporting requirements to collect necessary information or data.

To facilitate the collection of handler assessments, the Committee also unanimously recommended that handlers file a Receipts/Assessment Report with the Committee. Both small and large handlers would be required to file the report and to pay assessments. The report would be filed by handlers (including custom hullers) who receive pistachios for processing (removal of green hulls and drying pistachios to 5 percent moisture).

Handlers who receive pistachios for processing, would be required to pay an assessment attributable to the assessed weight of pistachios received by that handler and to report that assessed weight to the Committee on the Receipts/Assessment Form. The term ''assessed weight'' is defined in § 983.6 of the pistachio order.

Assessment Obligations

The computation of assessed weight involves requirements specified in §§ 983.39(b)(4) and (5). A final order published on July 26, 2004, (69 FR 44460), delayed the implementation date of those sections until February 1, 2005. Therefore, for the 2004–05 fiscal period, each handler who receives pistachios for processing would be required to furnish the Receipts/Assessment Report to the Committee and pay all due assessments to the Committee by March 15, 2005. For subsequent fiscal periods, each handler who receives pistachios for processing would be required to furnish the Receipts/Assessment Report and pay all due assessments to the Committee by December 15 of the applicable fiscal period.

While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs would be offset by the benefits derived by the operation of the marketing order. In addition, the Committee's meeting was widely publicized throughout the production area commodity industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the August 17, 2004, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

Interested persons are invited to submit comments on the informational and regulatory impacts of this action on small businesses. A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab.html*. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule would impose some additional reporting and recordkeeping on both small and large pistachio handlers. This action would require one new Committee form. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), AMS is submitting to the Office of Management and Budget a revision to approved information collection OMB No. 0581–0215, ''Pistachios Grown in California.''

Abstract

These information collection requirements are essential to carry out the intent of the Act, to provide respondents the type of service they request, and to administer the California pistachio marketing order program, which was established in 2004.

Under the order, the committee may, with the approval of the Secretary, establish reporting requirements to collect necessary information or data.

On August 17, 2004, the Committee met and unanimously recommended establishing a reporting requirement under the order similar to that applied under the California Pistachio Commission. Because the Commission is prohibited from sharing confidential handler information, the committee recommended that a receipt/assessment report be developed for committee use and that the receipts information already compiled for the Commission be attached to the newly developed committee form. Thus, handlers would not be duplicating their efforts and both agencies would receive necessary receipts/assessment data.

The information collected will be used only by authorized representatives of the USDA, including AMS, Fruit and Vegetable Programs regional and headquarters' staff, and authorized Committee employees. Authorized Committee employees are the primary users of the information and AMS is the secondary user. The name of the form is the Administrative Committee for Pistachios (ACP)–1; Receipts/Assessment Report.

Total Annual Estimated Burden

The total burden for the information collection under the order is as follows:

Estimate of Burden: 4 minutes per response.

Respondents: Qualified handlers or producers.

Estimated Number of Respondents: 20.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Average Burden on Respondents): 1 hour and 20 minutes.

Comments: Sixty days are provided for comments. Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments should reference OMB No. 0581–0215 and the marketing order for pistachios grown in California, and be sent to USDA in care of the Docket Clerk at the previously mentioned address. All comments received will be available for public inspection during regular business hours at the same address. All responses to this notice on informational impacts will be summarized and included in the request for OMB approval of the above described form. All comments will become a matter of public record.

List of Subjects in 7 CFR Part 983

Pistachios, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 983 is proposed to be amended as follows:

PART 983—PISTACHIOS GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 983 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. In part 983, a new Subpart—Assessment Rate and § 983.253 are added to read as follows:

Subpart—Assessment Rate

§ 983.253 Assessment rate.

(a) On and after September 1, 2004, a continuing assessment rate of $0.0014 per pound of assessed weight pistachios is established for California Pistachios. The assessment obligation of each handler would be computed by applying the assessment rate to the assessed weight computed pursuant to § 983.6.

(b) For the 2004–05 fiscal period each handler who receives pistachios for processing shall furnish the Receipts/Assessment Report to the Committee and pay all due assessments to the Committee by March 15, 2005. For subsequent fiscal periods, each handler who receives pistachios for processing shall furnish the Receipts/Assessment Report and pay all due assessments to the Committee by December 15 of the applicable fiscal period.

Dated: December 7, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04–27157 Filed 12–7–04; 2:54 pm]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 989

[Docket No. FV05–989–1 PR]

Raisins Produced From Grapes Grown in California; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule would increase the assessment rate established for the Raisin Administrative Committee (Committee) for the 2004–05 and subsequent crop years from $8.00 to $11.00 per ton of free tonnage raisins acquired by handlers, and reserve tonnage raisins released or sold to handlers for use in free tonnage outlets. The Committee locally administers the Federal marketing order which regulates the handling of raisins produced from grapes grown in California (order). Authorization to assess raisin handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program. The crop year runs from August 1 through July 31. The 2004–05 crop is smaller than normal, and no volume regulation will be implemented this year. As a result, some expenses funded by handler assessments will increase. The $8.00 per ton assessment rate will not generate enough revenue to cover expenses. The $11.00 per ton assessment would remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Comments must be received by December 20, 2004.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938, or e-mail: *moab.docketclerk@usda.gov;* or *Internet:http://www.regulations.gov.* Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html.*

FOR FURTHER INFORMATION CONTACT: Martin Engeler, Assistant Regional Manager, California Marketing Field

Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (559) 487–5901, Fax: (559) 487–5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938, or e-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 989 (7 CFR part 989), both as amended, regulating the handling of raisins produced from grapes grown in California, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California raisin handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as proposed herein would be applicable to all assessable raisins beginning on August 1, 2004, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule would increase the assessment rate established under the order for the 2004–05 and subsequent crop years from $8.00 to $11.00 per ton of free tonnage raisins acquired by handlers, and reserve tonnage raisins released or sold to handlers for use in free tonnage outlets. Authorization to assess raisin handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program. The 2004–05 crop is smaller than normal, and no volume regulation will be implemented this year. As a result, some expenses funded by handler assessments will increase. The $8.00 per ton assessment rate will not generate enough revenue to cover expenses. This action was recommended by the Committee at a meeting on October 5, 2004.

Sections 989.79 and 989.80, respectively, of the order provide authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of California raisins. They are familiar with the Committee's needs and with the costs of goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

Section 989.79 also provides authority for the Committee to formulate an annual budget of expenses likely to be incurred during the crop year in connection with reserve raisins held for the account of the Committee. A certain percentage of each year's raisin crop may be held in a reserve pool during years when volume regulation is implemented to help stabilize raisin supplies and prices. The remaining ''free'' percentage may be sold by handlers to any market. Reserve raisins are disposed of through various programs authorized under the order. Reserve pool expenses are deducted from proceeds obtained from the sale of reserve raisins. Net proceeds are returned to the pool's equity holders, primarily producers.

When volume regulation is in effect, an administrative budget funded by handler assessments is developed, and a reserve pool budget funded by the current year's reserve pool is developed. Committee costs are apportioned between the two revenue sources. When volume regulation is not implemented, the Committee develops an administrative budget funded solely from handler assessments.

When the Committee met on August 12, 2004, it recommended two budget scenarios for the 2004–2005 crop year to accommodate both situations, because it was not known at that time if volume regulation would be implemented. At that time, it appeared the crop may be short, but the initial crop estimate would not be available until a later date.

The first budget scenario recommended was premised on the assumption that volume regulation would be implemented. Under this scenario, the Committee recommended an administrative budget of expenses totaling $2,200,000 and a reserve pool budget of $2,839,225. The assessment rate would remain unchanged at $8.00 per ton. This assessment rate applied to estimated acquisitions of raisins by handlers of 275,000 tons would provide adequate revenue to fund the administrative budget.

The second budget scenario recommended was based on the premise that volume regulation would not be implemented for the 2004–05 season. Under this scenario, various expenses typically split between the reserve pool budget and the administrative budget would be funded by the administrative budget. In addition, some expense categories would be eliminated, some reduced, and another would be allocated to the existing 2003–04 reserve pool budget. The administrative budget would increase to $3,025,000, thus necessitating an increase in the assessment rate to $11.00 per ton.

The Committee met on October 5, 2004, and determined that no volume regulation for the 2004–05 crop year was warranted because of a short crop. The crop estimate for Natural (sun-dried) Seedless raisins, the major raisin variety produced, was 199,344 tons. If realized, this would be the smallest crop in over 20 years. Production of other varietal types was also estimated to be relatively low. The lack of volume regulation triggered implementation of the Committee's recommendation for an administrative budget of $3,025,000 and an increased assessment rate from $8.00 per ton to $11.00 per ton.

In developing this budget, the Committee reviewed and identified those expenses that were considered reasonable and necessary to continue operation of the raisin marketing order

program. Several costs normally associated with administering a reserve pool would be eliminated, such as insurance coverage ($400,000), costs for repairing reserve storage bins ($300,000), raisin hauling costs ($65,000), auditing fees ($20,000), and bank charges ($20,000). Other costs usually split between the administrative and reserve pool budgets would also be eliminated, such as production of industry brochures ($20,000) and research and communication activities ($70,000). It was determined that these activities, while desirable, could be eliminated without adversely impacting Committee operations.

Other expenses traditionally split between the reserve and administrative budgets would be reduced. For example, total compliance activity costs budgeted at $500,000 ($250,000 allocated to the reserve budget and $250,000 allocated to the administrative budget) would be reduced to $320,000, to be funded from the administrative budget. Purchase of equipment would also be reduced, from a combined amount of $50,000, to $25,000 funded from the administrative budget.

Other costs usually split between the reserve pool and administrative budgets that would be funded by the administrative budget include general overhead costs such as salaries, taxes, retirement and other benefits, insurance, rent, office supplies, and Committee travel. These costs remain the same regardless of whether there is a reserve pool, as they are necessary to continue administration of the program. Finally, $836,000 in costs associated with administering export programs would be funded by the existing 2003–04 reserve pool budget, and $536,000 would be funded under administrative budget for 2004–05.

A direct comparison of expenses between the recommended 2004–05 budget and the 2003–04 budget is difficult because the 2004–05 budget is only administrative, whereas in 2003–04 there was an administrative and a reserve pool budget. In total, the 2004–05 recommended administrative budget of $3,025,000 compares to the 2003–04 administrative budget of $2,000,000. However, the $3,025,000 administrative budget is $1,609,800 less than the combined 2003–04 administrative and reserve pool budgets of $4,634,800.

Major expense categories include $1,000,000 for salaries, $536,000 for export program activities (administrative budget only), $320,000 for compliance activities, $150,000 for group health insurance, $110,000 for rent, $120,000 for Committee member and staff travel, and $110,000 for computer software and programming.

A continuous assessment rate of $8.00 per ton has been in effect since the 2002–03 crop year. For the 2004–05 crop year, the Committee recommended increasing the assessment rate to $11.00 per ton of assessable raisins to cover recommended administrative expenditures of $3,025,000. The recommended $11.00 per ton assessment rate was derived by dividing the $3,025,000 in anticipated expenses by an estimated 275,000 tons of assessable raisins. Sufficient income should be generated at the higher assessment rate for the Committee to meet its anticipated expenses. Pursuant to § 989.81(a) of the order, any unexpended assessment funds from the crop year must be credited or refunded to the handlers from whom collected.

The proposed assessment rate would continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and other information submitted by the Committee or other available information.

Although this assessment rate would be in effect for an indefinite period, the Committee would continue to meet prior to or during each crop year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA would evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's 2004–05 budget and those for subsequent crop years would be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 20 handlers of California raisins who are subject to regulation under the order and approximately 4,500 raisin producers in the regulated area. Small agricultural firms are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less that $5,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000. Thirteen of the 20 handlers subject to regulation have annual sales estimated to be at least $5,000,000, and the remaining 7 handlers have sales less than $5,000,000. No more than 7 handlers, and a majority of producers, of California raisins may be classified as small entities.

This rule would increase the assessment rate established for the Committee and collected from handlers for the 2004–05 and subsequent crop years from $8.00 to $11.00 per ton of assessable raisins acquired by handlers. The 2004–05 crop is estimated to be smaller than normal, and as a result, the Committee determined that volume regulation for the season was not warranted.

When volume regulation is in effect, the Committee establishes two budgets; one for administrative expenses funded by handler assessments, and one for expenses incurred in connection with a reserve pool. Many of the Committee costs are split between the reserve pool budget and the administrative budget.

When no volume regulation is in effect during a crop year, there is no reserve pool budget for that crop year. However, the Committee continues to incur fixed costs associated with administering the marketing order program. Therefore, the Committee reviewed and identified the expenses that would be reasonable and necessary to continue program operations without a reserve pool in effect during the 2004–05 crop year. Operating expenses typically split between the administrative and reserve pool budgets were allocated to the administrative budget, some expenses were reduced, some expenses were eliminated, and some export program activity expenses were allocated to the existing 2003–04 reserve pool budget.

The resulting administrative budget recommended includes expenses totaling $3,025,000 for the 2004–05 crop year. While this is an increase from the 2003–04 administrative budget of $2,000,000, it represents a decrease in the 2003–04 combined administrative

and reserve pool budgets which totaled $4,634,800.

Because the 2004–05 administrative budget funded some of the costs typically allocated to a reserve budget, a direct comparison to 2003–04 administrative costs would be difficult. A comparison of 2004–05 recommended administrative expenditures to combined 2003–04 administrative and reserve pool budget expenditures therefore follows: 2004–05 salaries, $1,000,000 (2003–04 combined budgeted expenditures for salaries was $1,000,000); $456,000 for export program activities, ($1,246,000); $320,000 for compliance activities, ($320,000); $150,000 for group health insurance, ($165,000); $110,000 for rent, ($106,000); $120,000 for Committee member and staff travel, ($120,000); and $110,000 for computer software and programming, ($107,800).

With anticipated assessable tonnage at 275,000 tons, sufficient income should be generated at the $11.00 per ton assessment rate to meet expenses. Pursuant to § 989.81(a) of the order, any unexpended assessment funds from the crop year must be credited or refunded to the handlers from whom collected.

The industry considered an alternative assessment rate and budget prior to arriving at the $11.00 per ton and $3,025,000 administrative budget recommendation. The Committee's Audit Subcommittee met on July 1, 2004, to review preliminary budget information. The subcommittee was aware that the 2004–05 crop may be short and no volume regulation may be implemented. The subcommittee thus developed two budgets and assessment rates to accommodate a scenario with volume regulation and another scenario with no volume regulation. If volume regulation was to be implemented, the assessment rate would remain at $8.00 per ton. If volume regulation was not implemented, costs typically allocated to a reserve pool budget would be absorbed by the administrative budget, thus necessitating an increased assessment rate to $11.00 per ton. The Committee approved these budget and assessment recommendations on August 12, 2004.

The Committee met again on October 5, 2004, and determined that volume regulation was not warranted for the season. This triggered implementation of the Committee's recommendation for an administrative budget of $3,025,000 and assessment rate of $11.00 per ton.

A review of statistical data on the California raisin industry indicates that assessment revenue has consistently been less than one percent of grower revenue in recent years. A grower price of a minimum of $1,210 per ton for the 2004–05 crop raisins has been announced by the Raisin Bargaining Association. If this price is realized, assessment revenue would continue to be less than one percent of grower revenue in the 2004–05 crop year, even with the increased assessment rate.

Regarding the impact of this action on affected entities, this action would increase the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs would be offset by the benefits derived by the operation of the marketing order.

Additionally, the Audit Subcommittee and full Committee meetings held on July 1, 2004, and August 12, 2004, respectively, where this action was deliberated were public meetings widely publicized throughout the California raisin industry. All interested persons were invited to attend the meetings and participate in the industry's deliberations. Finally, all interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

This proposed rule would impose no additional reporting or recordkeeping requirements on either small or large raisin handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. Finally, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab.html.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 10-day comment period is provided to allow interested persons to respond to this proposed rule. Ten days is deemed appropriate because a final decision on increasing the rate as proposed should be made as soon as possible so the Committee can begin billing handlers for assessments at the higher rate. The Committee usually begins assessment billings in November.

List of Subjects in 7 CFR Part 989

Grapes, Marketing agreements, Raisins, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 989 is proposed to be amended as follows:

PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 989 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 989.347 is revised to read as follows:

§ 989.347 Assessment rate.

On and after August 1, 2004, an assessment rate of $11.00 per ton is established for assessable raisins produced from grapes grown in California.

Dated: December 7, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04–27162 Filed 12–9–04; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2004–19237; Airspace Docket No. 04–AGL–19]

Proposed Establishment of Class E Airspace; Tracy, MN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposed to establish Class E airspace at Tracy, MN. Standard Instrument Approach Procedures have been developed for Tracy Municipal Airport, Tracy, MN. Controlled airspace extending upward from 700 feet or more above the surface of the earth is needed to contain aircraft executing these approaches. This action would establish an area of controlled airspace for Tracy Municipal Airport.

DATES: Comments must be received on or before February 1, 2005.

ADDRESSES: Send comments on the proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the Docket Number FAA–2004–19237/ Airspace Docket No. 04–AGL–19, at the beginning of your comments. You may also submit comments on the internet at *http://dms.dot.gov.* You may review the public docket containing the proposal,

any comments received, and any final disposition in person in the Docket Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018.

FOR FURTHER INFORMATION CONTACT: J. Mark Reeves, Central Service Office, Airspace Branch, AGL–520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (847) 294–7477.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this document must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2004–19237/Airspace Docket No. 04–AGL–19.'' The postcard will be date/time stamped and returned to the commenter. All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the Rules Docket, FAA, Great Lakes Region, Office of the Regional Counsel, 2300 East Devon Avenue, Des Plaines, Illinois, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRML's

An electronic copy of this document may be downloaded through the Internet at *http://dms.dot.gov.* Recently published rulemaking documents can also be accessed through the FFA's Web page at *http://www.faa.gov* or the Superintendent of Document's Web page at *http://www.access.gpo.gov/nara.*

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration, Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to 14 CFR part 71 to establish Class E airspace at Tracy, MN, for Tracy Municipal Airport. Controlled airspace extending upward from 700 feet or more above the surface of the earth is needed to contain aircraft executing instrument approach procedures. The area would be depicted on appropriate aeronautical charts. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9M dated August 30, 2004, and effective September 16, 2004, which is incorporated by reference in 14 CFR 71.1. The Class E designations listed in this document would be published subsequently in the Order.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for 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.

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9M, Airspace Designations and Reporting Points, dated August 30, 2004, and effective September 16, 2004, is amended as follows:

* * * * *

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

* * * * *

AGL MN E5 Tracy, MN [New]

Tracy Municipal Airport, MN
(Lat. 44°14′57″N., long. 95°36′26″W.)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the Tracy Municipal Airport.

Issued in Des Plaines, Illinois, on November 16, 2004.

Nancy B. Kort,

Area Director, Central Terminal Operations.

[FR Doc. 04–27093 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[REG–101282–04]

RIN 1545–BD06

Treatment of a Stapled Foreign Corporation Under Section 269B and 367(b); Hearing Cancellation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Cancellation of notice of public hearing on proposed rulemaking.

SUMMARY: This document cancels a public hearing on proposed regulations concerning the definition and tax treatment of a stapled foreign corporation, which generally is treated for tax purposes as a domestic corporation under section 269B of the Internal Revenue Code.

DATES: The public hearing originally scheduled for December 15, 2004 at 10 a.m., is cancelled.

FOR FURTHER INFORMATION CONTACT: LaNita Van Dyke of the Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedures and Administration), at (202) 622–7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION: A notice of proposed rulemaking and notice of public hearing that appeared in the **Federal Register** on Tuesday, September 7, 2004, (69 FR 54067), announced that a public hearing was scheduled for December 15, 2004, at 10 a.m., in the IRS Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue, NW., Washington, DC. The subject of the public hearing is under section 269B of the Internal Revenue Code.

The public comment period for these regulations expired on December 6, 2004. The notice of proposed rulemaking and notice of public hearing, instructed those interested in testifying at the public hearing to submit a request to speak and an outline of the topics to be addressed. As of Tuesday, December 7, 2004, no one has requested to speak. Therefore, the public hearing scheduled for December 15, 2004, is cancelled.

Cynthia E. Grigsby,

Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedures and Administration).

[FR Doc. 04–27160 Filed 12–7–04; 3:13 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 110 and 165

[CGD07–04–090]

RIN 1625–AA11, 1625–AA87, 1625–AA01

Regulated Navigation Areas, Security Zones, and Temporary Anchorage Areas; St. Johns River, Jacksonville, FL

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a series of temporary regulated navigation areas, security zones and temporary anchorage areas on the St. Johns River, Jacksonville, FL, from Winter Point to the Intracoastal Waterway, for Super Bowl XXXIX activities and events. The river will be divided into two regulated navigation areas and four security zones in order to provide increased layered security in close proximity to the downtown area of the river. Additionally, the size of existing fixed security zones around docked cruise ships will be increased. Existing anchorage grounds will be modified and temporary anchorages will be added to accommodate the vessel traffic expected during the Super Bowl events. The regulated navigation areas, security zones and temporary anchorages are necessary to protect national security interests and the safety of navigation during Super Bowl events. These areas will be enforced at various designated time periods beginning February 2, 2005, through February 7, 2005. Entry into the security zones will be prohibited to all persons and vessels unless authorized by the Coast Guard Captain of the Port Jacksonville or his designated representatives.

DATES: Comments and related material must reach the Coast Guard on or before January 10, 2005.

ADDRESSES: You may mail comments and related material to Coast Guard Marine Safety Office Jacksonville, 7820 Arlington Expressway, Suite 400, Jacksonville, FL, 32211. Coast Guard Marine Safety Office Jacksonville maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at Coast Guard Marine Safety Office Jacksonville, 7820 Arlington Expressway, Suite 400, Jacksonville, FL, 32211, between 8 a.m. and 4 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant James Tedtaotao at Coast Guard Marine Safety Office Jacksonville, FL, tel: (904) 232–2640 ext 111.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD07–04–090), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know that your submission reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

If, as we anticipate we make this temporary final rule effective less than 30 days after publication in the **Federal Register**, we will explain in that publication, as required by 5 U.S.C. (d)(3), our good cause for doing so.

Public Meeting

We do not plan to hold a public meeting. The United States Coast Guard, along with other state and federal law enforcement agencies, has conducted numerous outreach meetings with port users and the affected maritime community regarding port restrictions. However, you may submit a request for a meeting by writing to Coast Guard Marine Safety Office Jacksonville at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a separate notice in the **Federal Register**.

Background and Purpose

In light of terrorist attacks on New York City and the Pentagon in Arlington, VA, on September 11, 2001, and the continuing concern for future terrorist and or subversive acts against the United States, especially at high visibility events where a large number of persons are likely to congregate, the Coast Guard proposes to establish temporary regulated navigation areas and security zones in certain waters of the St. Johns River.

The Super Bowl is a sporting event, hosted each year in a different city in the United States, sponsored by the National Football League (NFL). Super Bowl XXXIX will be held in Jacksonville, FL, on Sunday, February 6, 2005, at ALLTEL Stadium. Security measures for Super Bowl XXXIX and the events preceding it, including temporary regulated navigation areas, security zones and anchorages proposed herein, are necessary from February 2, 2005, to February 7, 2005, and are needed to safeguard the maritime transportation infrastructure, the public, and designated participants from potential acts of violence or terrorism during Super Bowl XXXIX activities.

The planning for these regulated navigation areas and security zones has been conducted in conjunction with federal, state and local law enforcement agencies. There is significant national security interest during the Super Bowl in protecting the waterways surrounding downtown Jacksonville, cruise ships, nearby vessels, and the public from destruction, loss, or injury from sabotage or other subversive acts, accidents or other causes of a similar nature.

These proposed regulations include amends of existing security zones established at 33 CFR 165.759 to increase the fixed security zones around cruise ships docked at the Talleyrand Marine Terminal and the Jacksonville Cruise Ship Passenger Terminal from 100 yards to 400 yards.

These proposed regulations also amend existing anchorage regulations established at 33 CFR 110.183 by removing Anchorage A, modifying Anchorage B, and establishing various temporary anchorages marked by buoys. Some of the temporary anchorages will be exclusively for use by small recreational vessels and others will be for larger recreational vessels and commercial vessels.

Discussion of Proposed Rule

The Coast Guard proposes to establish regulated navigation areas and security zones on the St. Johns River, Jacksonville, FL, to include the waters from Winter Point to the Intracoastal Waterway. The regulated navigation areas and security zones are necessary to protect national security interests during Super Bowl XXXIX and for the safety of navigation on the waterway.

Temporary regulated navigation areas are proposed from Wednesday, February 2, 2005, commencing at 6 a.m. (EST) until Monday, February 7, 2005 at 6 p.m. (EST) for: (1) Winter Point to the Matthews Bridge and (2) the Matthews Bridge to St. Johns Bluff Reach.

All vessels entering the regulated navigation areas must comply with orders from the Coast Guard Captain of the Port, Jacksonville, Florida, or that officer's designated representatives, and accordingly regulate their course, direction and movements within the regulated navigation areas. Vessels must exercise continuous transit at minimum safe speed while within 400 yards of the federal channel as marked by buoys and day boards.

The public will be reminded of the locations and effective periods of the regulated navigation areas, security zones and temporary anchorage regulations by a local notice to mariners. No commercial vessels will be permitted to anchor between the Fuller Warren Bridge and the Matthews Bridge.

In addition to the regulated navigation areas described as (1) and (2), the following temporary security zones described as (3), (4), (5) and (6) are proposed for the waters of the St. Johns River. Security Zone (3): the waters between the Fuller Warren Bridge and the Matthews Bridge to be enforced Friday, February 4, 2005, beginning at 11:59 p.m. (EST) until Monday, February 7, 2005, at 3 a.m. (EST). Vessel operators entering the security zone outlined as (3) must receive express permission from local, state or federal enforcement personnel designated by the Captain of the Port; not transport or possess certain dangerous cargo as defined in 33 CFR 160.204; and not operate or place in the water jet skis or other motorized personal watercraft at any time while this security zone, or security zones (4), (5) and (6) are in effect. Vessel operators may not enter or remain in the security zone outlined as (3) without completing a satisfactory security screening.

Security Zones (4), (5) and (6) are smaller zones located geographically within security zone (3) which will be enforced at various times and present additional restrictions. Security zone (4): a 25-yard zone (entry prohibited without prior approval by the Captain of the Port or his designated representatives) around the passenger terminals at JEA Park and the Transportation Hub, to be enforced Wednesday, February 2, 2005, commencing at 6 a.m. (EST) until Monday, February 7, 2005, at 11:59 a.m. (EST).

Security zone (5): A ''no move'' zone (in addition to permission to enter the zone, all vessels will be required to obtain approval by the Captain of the Port or his designated representatives prior to getting underway from the pier or anchorage, including vessels which previously received permission to enter the zone) on the north bank of the St. Johns River from the Main Street Bridge to the Hart Bridge, extending 25 yards offshore, to be enforced Sunday, February 6, 2005, beginning at 11:59 a.m. (EST) until Monday, February 7, 2005 at 3 a.m. (EST).

Security zone (6): Restricts entry into the zone without prior approval by the Captain of the Port or his designated representatives, north bank to south bank, between JEA Park and the Transportation Hub, to be enforced Sunday, February 6, 2005, from 11:59 a.m. (EST) until Monday, February 7, at 3 a.m. (EST).

The temporary security zones described as (3), (4), (5) and (6) prohibit the transport or possession on vessels of certain dangerous cargo as defined in 33 CFR 160.204.

Regulations currently exist at 33 CFR 165.759 which establish 100 yard moving security zones around all cruise ships entering or departing the Port of Jacksonville, Florida. Fixed security zones are established 100 yards around all cruise ships docked in the Port of Jacksonville. This proposed regulation temporarily suspends these security zones and replaces them with a 400 yard security zone for all cruise ships docked at the Talleyrand Marine Terminal and Jacksonville Cruise Ship Passenger Terminal to be enforced Wednesday, February 2, 2005, commencing at 6 a.m. (EST) until Monday, February 7, 2005, at 11:59 p.m. (EST).

These proposed regulations also amend existing anchorage regulations established at 33 CFR 110.183 which regulate the anchoring of vessels on the St. Johns River from the Main Street Bridge to the ocean. The rule proposes to amend the regulations to temporarily close Anchorage A and reduce the size of Anchorage B. Further, anchoring anywhere between the Fuller Warren Bridge and the Matthews Bridge will be limited to recreational vessels 40 feet or less in length within marked areas to be identified by temporary buoys. Rafting of vessels outboard of one another in these marked areas will be limited to 20 rafted vessels. Anchorage B will be reduced in size and will retain its existing restrictions. In addition to anchoring availability in Anchorage B, recreational vessels in excess of 40 feet in length and commercial vessels may seek Captain of the Port permission to anchor north of the Matthews Bridge within marked areas to be identified by temporary buoys. The Captain of the Port Jacksonville, Florida, will continue to notify the maritime community of the periods during which the regulated navigation areas and security zones will be effective. Broadcast notifications will be made to the maritime community advising them of the boundaries of these zones.

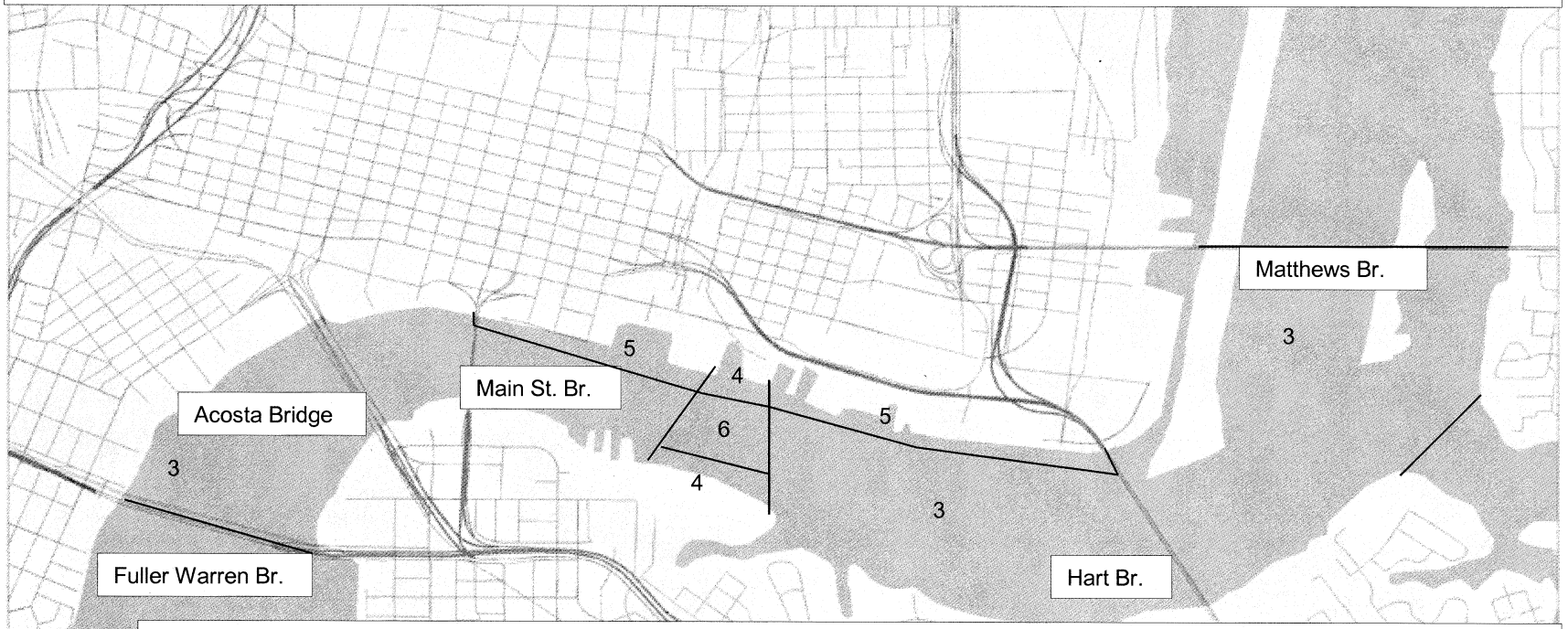
BILLING CODE 4910–15–P

BILLING CODE 4910–15–C

Figure 1

Security Zones for Super Bowl XXXIX

St. Johns River, Jacksonville, FL



3. Security Zone – All Waters from Fuller Warren Bridge to Matthews Bridge

11:59 p.m. February 4, 2005 until 3 a.m. February 7, 2005

4. Security Zone – Within 25 yards of River Bank at Passenger Terminals; JEA Park and Transportation Hub

6:00 a.m. February 2, 2005 until 11:59 p.m. February 7, 2005

5. Security Zone – Within 25 yards of North River Bank from Main Street Bridge to Hart Bridge

11:59 a.m. February 6, 2005 until 3 a.m. February 7, 2005

6. Security Zone – All Waters, bank to bank from JEA Park to the Transportation Hub

11:59 a.m. February 6, 2005 until 3 a.m. February 7, 2005

Regulatory Evaluation

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. Although the regulated navigation areas apply to a large section of the St. Johns River, traffic will be allowed to pass through the zones with the permission of the Captain of the Port Jacksonville or his designated representatives. Additionally, the Coast Guard has consulted with industry representatives to obtain concurrence with the proposed rule and has attended public meetings with recreational boaters to discuss impact of the proposed rule. Before the effective period, the Coast Guard will issue maritime advisories widely available to users of the river.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which might be small entities: the owners or operators of vessels intending to transit or anchor in portions of the St. Johns River at various times between February 2, 2005 and February 7, 2005.

These regulations would not have a significant economic impact on a substantial number of small entities for the following reasons. Each area, zone or anchorage restriction in this rule will only be in effect for a limited duration. With the exception of vessels carrying certain dangerous cargo as defined in 33 CFR 160.204, vessels will still be allowed to transit after obtaining authorization from the Captain of the Port or his designated representatives. All vessels carrying certain dangerous cargo as defined in 33 CFR 160.204 will be prohibited from transiting the security zones. Based upon consultation with local industry representatives it has been determined there is no regular traffic of such vessels on the St Johns River through the area of the anticipated security zones and no such traffic is expected.

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.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Lieutenant James Tedtaotao at the address listed in **ADDRESSES** above. 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.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

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 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed 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.

Protection of Children

We have analyzed this proposed 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.

Indian Tribal Governments

This proposed 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

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraphs (34)(f) and (g), of the Instruction, from further environmental documentation. As anchorage regulations, regulated navigation areas and security zones, the proposed rules satisfy the requirements of paragraphs 34(f) and (g).

Under figure 2–1, paragraphs (34)(f) and (g) of the Instruction, an ''Environmental Analysis Check List'' and a ''Categorical Exclusion Determination'' are not required for this rule. Comments on this section will be considered before we make the final decision on whether to categorically exclude this rule from further environmental review.

List of Subjects

33 CFR Part 110

Anchorage grounds.

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 proposes to amend 33 CFR parts 110 and 165 as follows:

PART 110—ANCHORAGE REGULATIONS

1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 471, 1221 through 1236, 2030, 2035, and 2071; 33 CFR 1.05–1(g; Department of Homeland Security Delegation No. 0170.1.

2. From 6 a.m.(EST) on February 2, 2005 until 11:59 p.m. (EST) on February 7, 2005, in § 110.183, paragraphs (a) and (b) are suspended in their entirety and new paragraphs (c), (d) and (e) are added to read as follows:

§ 110.183 St. Johns River, Florida.

* * * * *

(c) *Anchorage B.* (Lower Anchorage) The Anchorage is established within the following coordinates, the area enclosed by a line starting at a point on the eastern shore of the river at 'Floral Bluff' at 30°21′00″ N, 081°36′41″ W; thence to 30°20′50″ N, 081°37′08″ W in vicinity of buoy G″75″; thence to 30°21′50″ N, 081°36′56″ W; thence to 30°21′54″ N, 081°36′48″ W; thence returning to the point of beginning.

(d) *Regulations.* (1) Except in case of emergency, only vessels meeting the conditions of this paragraph will be authorized by the Captain of the Port to anchor in Anchorage B. Vessels unable to meet any of the following restrictions must obtain specific authorization from the Captain of the Port prior to anchoring in Anchorage B.

(2) All vessels intending to enter and anchor in Anchorage B must notify the Captain of the Port prior to entering.

(3) Anchorage B is a temporary anchorage. Additionally, Anchorage B is used as a turning basin. Vessels may not anchor for more than 24 hours without specific written authorization from the Captain of the Port.

(4) All vessels at anchor must maintain a watch on VHF-FM channels 13 and 16 by a person fluent in English, and must make a security broadcast on channel 13 upon anchoring and every 4 hours thereafter.

(5) Anchorage B is restricted to vessels with a draft of 24 feet or less, regardless of length.

(6) Any vessel transferring petroleum products within Anchorage B must have a pilot or Docking Master aboard, and employ sufficient assist tugs to assure the safety of the vessel at anchor and any vessels transiting the area.

(7) Any vessel over 300 feet in length within Anchorage B must have a pilot or Docking Master onboard, and employ sufficient assist tugs to assure the safety of the vessel at anchor and any vessels transiting the area.

(e) *Temporary anchorages.* (1) Five temporary anchorage areas will be established in the waters of the St. Johns River between the Fuller Warren Bridge and the southern end of Anchorage B to exclusively accommodate recreational vessels, 40 feet in length or less, for various events during the effective period. Vessels must seek authorization from the Captain of the Port prior to anchoring. Up to twenty recreational vessels may raft outboard of one another. Buoys will mark all temporary anchorage areas.

(2) Several temporary anchorage areas will be established in the waters north of the Matthews Bridge to accommodate larger recreational vessels and commercial vessels. Buoys will mark all temporary anchorage areas.

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

3. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

4. From February 2, 2005, at 6 a.m. (EST) until February 7, 2005, at 11:59 p.m. (EST) in § 165.759, paragraph (a) is suspended and a new paragraph (e) is added to read as follows:

§ 165.759 Security Zones; Ports of Jacksonville, Fernandina, and Canaveral, Florida.

* * * * *

(e) *Regulated area.* (1) Moving Security zones are established around all tank vessels, cruise ships, and military pre-positioned ships during transits entering or departing the ports of Jacksonville, Fernandina, and Canaveral, Florida. These moving security zones are activated when the subject vessels pass the St. Johns River Sea Buoy, at approximate position 30°23′35″ N, 81°19′08″ W, when entering the port of Jacksonville, or pass port Canaveral Channel Entrance Buoys #3 or #4, at respective approximate positions 28°22.7′ N, 80°31.8′ W, and 28°23.7′ N, 80°29.2′ W when entering Port Canaveral. Fixed security zones are established 100 yards around all tank vessels and military pre-positioned ships docked in the Ports of Jacksonville, Fernandina, and Canaveral, Florida.

(2) Fixed security zones are established 100 yards around all cruise ships docked in the Ports of Jacksonville, Fernandina, and Canaveral, Florida except for security zones around vessels docked at the

Talleyrand Marine Terminal and the Jacksonville Cruise Ship Passenger Terminal in the Port of Jacksonville that extend 400 yards around cruise ships.

5. Temporarily add § 165.T07–090 to read as follows:

§ 165.T07–090 Regulated Navigation Areas and Security Zones; St. Johns River, Jacksonville, FL.

(a) *Locations—(1) Regulated navigation area; Winter Point to the Matthews Bridge*—(i) *Area.* All waters, shore-to-shore and surface to bottom, between an imaginary line drawn between Winter Point (30°18′36″ N, 81°40′36″ W), south through Winter Point Light 1 (30°17′48″ N, 81°40′24″ W) to Point La Vista (30°16′42″ N, 81°39′48″ W), and the Matthews bridge, excluding the waters of the Arlington River east of an imaginary line between 30°19′12″ N, 81°36′42″ W and 30°19′00″ N, 81°36′48″ W.

(ii) *Enforcement period.* The regulated navigation area in paragraph (a)(1)(i) will be enforced from 6 a.m. on February 2, 2005, until 6 p.m. on February 7, 2005.

(2) *Regulated navigation area; St. Johns River, Matthews Bridge to St. Johns Bluff Reach*—(i) *Area.* All waters, surface to bottom, and bank to bank, within the St. Johns River from the Matthews Bridge to an imaginary line between the south bank of the Trout River at 30°23′06″ N, 81°38′00″ W and 30°23′06″ N, 81°37′18″ W, and within 400 yards of the Federal Channel of the St. Johns River, as visually marked by buoys and day boards, including around both sides of Blount Island, from an imaginary line between the south bank of the Trout River at 30°23′06″ N, 81°38′00″ W and 30°23′06N″, 81°37′18″ W, to an imaginary line at the front range light of the Fulton Cutoff Range between 30°23′36″ N, 81°30′06″ W south to 30°23′12″ N, 81°30′06″ W.

(ii) *Enforcement period.* The regulated navigation area in paragraph (a)(2)(i) will be enforced from 6 a.m. on February 2, 2005, until 6 a.m. on February 7, 2005.

(3) *Security Zone, St. Johns River, Fuller Warren Bridge to the Matthews Bridge*—(i) *Area.* All waters shore-to-shore and surface to bottom of the St. Johns River, between the Fuller Warren Bridge and the Matthews Bridge excluding the waters of the Arlington River east of an imaginary line between 30°19′12″ N, 81°36′42″ W and 30°19′00″ N, 81°36′48″ W.

(ii) *Enforcement period.* The security zone in paragraph (a)(3)(i) will be enforced from 11:59 p.m. on February 4, 2005, until 3 a.m. on February 7, 2005.

(4) *Security Zone, St. Johns River, Passenger terminals at JEA Park and the Transportation Hub*— (i) *Area.* All waters extending 25 yards into the river and following the contour of the southern bank of the river between 30°19.04′ N, 081°38.59′ W and 30°18.53′ N, 081°38.40′ W, and all waters extending 25 yards into the river and following the contour of the northern bank of the river between 30°19.16′ N, 081°38.50′ W and 30°19.16′ N, 081°38.41′ W.

(ii) *Enforcement period.* The security zone in paragraph (a)(4)(i) will be enforced from 6 a.m. on February 2, 2005, until 11:59 a.m. on February 7, 2005.

(5) *Security Zone, St. Johns River, Main Street Bridge to the Hart Bridge*—(i) *Area.* All waters extending 25 yards into the river and following the contour of the northern bank of the river, between the Main Street Bridge and the Hart Bridge.

(ii) *Enforcement period.* The security zone in paragraph (a)(5)(i) will be enforced from 11:59 a.m. on February 6, 2005 until 3 a.m. on February 7, 2005.

(6) *Security Zone, St. Johns River, JEA Park to the Transportation Hub.*—(i) *Area.* All waters within the perimeter of the following: originating at 30°19.04′ N, 081°38.59′ W then north to 30°19.16′ N, 081°38.50′ W, then east following the contour of the northern bank of the river to 30°19.16′ N, 081°38.41′ W, then south to 30°18.53′ N, 081°38.40′ W, and west following the contour of the south bank of the river to the origin at 30°19.04′ N, 081°38.59′ W.

(ii) *Enforcement period.* The security zone in paragraph (a)(6)(i) will be enforced from 11:59 a.m. on February 6, 2005 until 3 a.m. on February 7.

(b) *Definitions.* The following definitions apply to this section.

Designated representatives means Coast Guard Patrol Commanders including Coast Guard coxswains, petty officers and other officers operating Coast Guard vessels, and federal, state, and local officers designated by or assisting the Captain of the Port (COTP), Jacksonville, Florida, in the enforcement of the regulated navigation areas and security zones.

Minimum safe speed means the speed at which a vessel proceeds when it is fully off plane, completely settled in the water and not creating excessive wake. Due to the different speeds at which vessels of different sizes and configurations may travel while in compliance with this definition, no specific speed is assigned to minimum safe speed. In no instance should minimum safe speed be interpreted as a speed less than that required for a particular vessel to maintain steerageway. A vessel is not proceeding at minimum safe speed if it is:

(1) On a plane;

(2) In the process of coming up onto or coming off a plane; or

(3) Creating an excessive wake.

Motorized personal watercraft means vessels less than 16 feet in length which are designed to be operated by a person or persons sitting, standing, or kneeling on the craft, rather than within the confines of a hull.

(c) *Regulations*—(1) *Regulated navigation areas.* The regulations in paragraph (c)(1) apply to the area in paragraphs (a)(1) and (a)(2) of this section.

(i) All vessels and persons entering and transiting through the regulated navigation area must proceed continuously and at a minimum safe speed. In no instance should minimum safe speed be interpreted as a speed less than that required for a particular vessel to maintain steerageway. Nothing in this rule alleviates vessels or operators from complying with all state and local laws in the area.

(ii) All vessels and persons must comply with orders from the Coast Guard Captain of the Port, Jacksonville, Florida, or that officer's designated representatives, regulating their speed, course, direction and movements within the regulated navigation areas.

(2) *Security zones.* The regulations in this paragraph apply to the zones in paragraph (a)(3) through (a)(6) of this section. All vessels that seek entry to the zones, and those vessels that are located in the zones when the zones become effective, will be subject to a security screening. Vessel operators must receive express permission to enter, or, for vessels already inside the zone when it becomes effective, permission to remain in the security zone from federal, state or local personnel designated by the Captain of the Port; vessels must not transport or possess certain dangerous cargo as defined in 33 CFR 160.204; and persons must not operate or place in the water jet skis or other motorized personal watercraft at any time while the security zone is in effect. Entry into and continued presence within the security zones by vessels or persons that entered without authorization from the Captain of the Port is prohibited unless authorized by the Coast Guard Captain of the Port, Jacksonville, Florida, or that officer's designated representatives. Vessels moored, docked or anchored in the security zones when they become effective must remain in place unless ordered by or given permission from the COTP to do otherwise. Security Zone (a)(5) further prohibits vessel movement

within the zone without prior approval by the Captain of the Port or his designated representatives. Vessels or persons desiring to enter or transit the areas encompassed by any of the security zones may contact the Coast Guard Captain of the Port or his designated representatives on VHF Channel Marine 12 to seek permission to enter or transit the zone. If permission is granted, all persons and vessels must comply with the instructions of the COTP or that officer's designated representatives.

(d) *Effective period.* This section is effective from 6 a.m. on February 2, 2004, until 11:59 p.m. on February 7, 2005.

Dated: November 26, 2004.

David B. Peterman,

Rear Admiral, U.S. Coast Guard, Commander, Seventh Coast Guard District.

[FR Doc. 04–27100 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Region 2 Docket No. R02–OAR–2004–NJ–0004, FRL–7847–1]

Approval and Promulgation of Implementation Plans; New Jersey Consumer Product Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a revision to the New Jersey State Implementation Plan (SIP) for ozone concerning the control of volatile organic compounds. The SIP revision consists of amendments to Subchapter 24 ''Prevention of Air Pollution From Consumer Products'' of 7:27 of the New Jersey Administrative Codes. This SIP revision consists of two control measures, consumer products and portable fuel containers, needed to meet the shortfall emissions reduction identified by EPA in New Jersey's 1-hour ozone attainment demonstration SIP. The intended effect of this action is to approve control strategies required by the Clean Air Act which will result in emission reductions that will help achieve attainment of the national ambient air quality standard for ozone.

DATES: Comments must be received on or before January 10, 2005.

ADDRESSES: Submit your comments, identified by Regional Material in EDocket (RME) ID Number R02–OAR–2004–NJ–0004 by one of the following methods:

Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

1. Agency Web site: *http://docket.epa.gov/rmepub/* Regional Material in EDocket (RME), EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Once in the system, select ''quick search,'' then key in the appropriate RME Docket identification number. Follow the on-line instructions for submitting comments.

2. E-mail: *Werner.Raymond@epa.gov.*

3. Fax: (212) 637–3901.

4. Mail: ''RME ID Number R02–OAR–2004–NJ–0004'', Raymond Werner, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007–1866.

5. Hand Delivery or Courier. Deliver your comments to: Raymond Werner, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007–1866. 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 Federal holidays.

A copy of the New Jersey submittal is available at the following addresses for inspection during normal business hours:

Environmental Protection Agency, Region 2 Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866.

New Jersey Department of Environmental Protection, Office of Air Quality Management, Bureau of Air Quality Planning, 401 East State Street, CN418, Trenton, New Jersey 08625.

FOR FURTHER INFORMATION CONTACT: Paul R. Truchan, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–3711.

SUPPLEMENTARY INFORMATION:

I. What Is Required by the Clean Air Act and How Does It Apply to New Jersey?

Section 182 of the Clean Air Act (Act) specifies the required State Implementation Plan (SIP) submissions and requirements for areas classified as nonattainment for ozone and when these submissions and requirements are to be submitted to EPA by the states. The specific requirements vary depending upon the severity of the ozone problem. The New York-Northern New Jersey-Long Island and Philadelphia-Trenton nonattainment areas are nonattainment areas classified as a severe. Under section 182, severe ozone nonattainment areas were required to submit demonstrations of how they would attain the 1-hour ozone standard. On December 16, 1999 (64 FR 70380), EPA proposed approval of New Jersey's 1-hour ozone attainment demonstration SIP for the New Jersey portion of the New York-Northern New Jersey-Long Island nonattainment area and the New Jersey portion of the Philadelphia-Trenton nonattainment area. In that rulemaking, EPA identified an emission reduction shortfall associated with New Jersey's 1-hour ozone attainment demonstration SIPs, and required New Jersey to address the shortfalls. In a related matter, the Ozone Transport Commission (OTC) developed control measures into model rules for a number of source categories and estimated emission reduction benefits from implementing these model rules. These model rules were designed for use by states in developing their own regulations to achieve additional emission reductions to close emission shortfalls.

On February 4, 2002 (67 FR 5152), EPA approved New Jersey's 1-hour ozone attainment demonstration SIPs. This approval included an enforceable commitment submitted by New Jersey to adopt additional control measures to close the shortfalls identified by EPA for attainment of the 1-hour ozone standard.

II. What Was Included in New Jersey's Submittal?

On June 22, 2004, Bradley M. Campbell, Commissioner, New Jersey Department of Environmental Protection (NJDEP), submitted to EPA a revision to the SIP which included an adopted revision to subchapter 24, ''Prevention of Air Pollution From Consumer Products,'' which contained two control programs. The two control programs are consumer products and portable fuel container spillage control. This SIP revision will provide volatile organic compound (VOC) emission reductions to address, in part, the shortfall identified by EPA when New Jersey's one-hour ozone attainment demonstrations were approved. New Jersey used the OTC model rules as guidelines to develop its rules.

III. Was Subchapter 24 Previously Aproved by EPA?

On May 2, 1997 as part of the New Jersey SIP EPA previously approved subchapter 24 (62 FR 24036) which included the innovative product exemption as a method of compliance and the option of variances. The innovative product exemption and variance provision was fully discussed in the proposed approval (January 21, 1997, 62 FR 2984). As part of the SIP revision, New Jersey commited to forwarding all innovative product exemptions and variances that the State accepts to EPA, Region 2, in order for EPA to be able to determine compliance with the New Jersey SIP.

IV. What Are the Requirements for ''Consumer Products'' ?

The revised Subchapter 24 now regulates 45 separate consumer product categories and applies statewide. It requires that, on or after January 1, 2005, no person shall sell, supply, offer for sale, or manufacture consumer products which contain VOCs in excess of the VOC content limits specified by New Jersey for those products. Subchapter 24 includes specific exemptions, as well as registration and product labeling requirements, recordkeeping and reporting requirements, and test methods and procedures.

Consumer products that are sold in New Jersey for shipment and use outside of the State of New Jersey are exempt from the VOC content limits, and administrative and testing requirements of Subchapter 24. This exemption reflects the intent to regulate only the manufacture and distribution of consumer products that actually emit VOCs into New Jersey's air and not to interfere in the transportation of goods that are destined for use outside of the State.

In addition, subchapter 24 contains provisions for accepting innovative products exemptions (IPEs), alternative compliance plans (ACPs), and variances that have been approved by the California Air Resources Board (CARB) or other states with adopted consumer product regulations based on the Ozone Transport Commission (OTC) ''Model Rule for Consumer Products'' dated November 29, 2001.

The Subchapter 24 IPE and ACP provisions provide alternatives to complying with the VOC content limits specified in the Table 1—VOC Content Limits For Chemically Formulated Consumer Products of Subchapter 24. The IPE provisions require a manufacturer to demonstrate that due to some characteristics of the formulation, design, delivery system or other factor, VOC emissions resulting from the use of the innovative product would be less than the emissions resulting from the use of a representative product that meets the VOC content standard. The ACP provisions specify a method for averaging the emissions from several consumer products manufactured by the same company such that the total emissions from the products included in the plan will have emissions equal to or less than the sum of emissions from products that actually complied with the individual product emission limitations. The variance provision allows for a temporary exemption based on an extraordinary economic hardship that is beyond the reasonable control of the manufacturer of the regulated consumer product.

The State provisions specify the required documentation that must be submitted and the conditions under which New Jersey will recognize a IPE, ACP or variance that was granted by CARB or another state with equivalent provisions. The IPE, ACP or variance can become effective in New Jersey for the period of time that the approved IPE, ACP or variance remains in effect, provided that all the consumer products within the IPE, ACP or variance are regulated by Subchapter 24.

Paragraph 24.7(b)(2) of subchapter 24 provides for alternate test methods for consumer products provided that the alternate method is at least as accurate, precise, and appropriate as the test methods included in Subchapter 24 and that the alternate test method is first approved by both the NJDEP and the EPA.

V. What Are the Requirements for ''Portable Fuel Containers and Spill Proof Spouts''?

Subchapter 24 (sections 24.8–24.12) also reduces refueling emissions from those equipment and engines in the off-road categories that are predominantly refueled with portable fuel containers. Subchapter 24 applies to any person who sells, supplies, offers for sale, or manufactures for sale in New Jersey portable fuel container(s) or spout(s) or both for use in New Jersey. Subchapter 24 includes exemptions; administrative requirements which include date coding and labeling; recordkeeping and reporting requirements; a manufacturer warranty requirement; and test methods and procedures.

Subchapter 24 establishes performance standards applicable on or after January 1, 2005, which are divided into two sections. One standard specifically addresses spill-proof systems and the other addresses spill-proof spouts for use in portable fuel containers. Included are performance standards for automatic shut off, automatic closure, container openings, fuel flow rates and fill levels. Subchapter 24 also includes a permeation rate for spill-proof systems only.

Portable fuel containers or spouts or both portable fuel containers and spouts manufactured before January 1, 2005 may continue to be sold until January 1, 2006 provided the date of manufacture or a date-code representing the date of manufacture is clearly displayed on the product.

Subchapter 24 also establishes IPE provisions which allow for alternatives to complying with the performance standards specified in subchapter 24 and a variance provision for situations where there is extraordinary economic hardships. Also as in the case for consumer products, the portable fuel container provisions provide for accepting IPE or variances that have been granted by CARB or another state with equivalent provisions. The IPE or variance can become effective in New Jersey for the period of time that the approved IPE or variance remains in effect in the state which originally granted the IPE or variance.

Paragraph 24.11(c) of subchapter 24 provides for alternate test methods for portable fuel containers provided that the alternate method is at least as accurate, precise, and appropriate as the test methods included in subchapter 24 and that the alternate test method is first approved by both the NJDEP and the EPA.

VI. What Is EPA's Conclusion?

EPA has evaluated New Jersey's submittal for consistency with the Act, EPA regulations, and EPA policy. EPA has determined that the revisions made to subchapter 24 ''Prevention of Air Pollution From Consumer Products'' of title 7, Chapter 27 of the New Jersey Administrative Codes, meet the SIP revision requirements of the Act with the following exception. While the provisions related to variances, IPE and ACP pursuant to subchapter 24, ''Consumer Products'' are acceptable, each specific application of those provisions will not be recognized as meeting Federal requirements until it is approved by EPA as a SIP revision. Therefore, EPA is proposing to approve the regulation as part of the New Jersey SIP with the exception that any specific application of provisions associated with variances, IPE and ACP, must be submitted as SIP revisions.

VII. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This proposed action merely proposes to approve state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule proposes to approve pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This proposed rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely proposes to approve a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Act. This proposed rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Act. In this context, in the absence of a prior existing requirement for the state to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401—7671q.

Dated: November 30, 2004.

George Pavlou,

Acting Regional Administrator, Region 2.

[FR Doc. 04–27170 Filed 12–9–04; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General

42 CFR Part 1001

Solicitation of New Safe Harbors and Special Fraud Alerts

AGENCY: Office of Inspector General (OIG), HHS.

ACTION: Notice of intent to develop regulations.

SUMMARY: In accordance with section 205 of the Health Insurance Portability and Accountability Act (HIPAA) of 1996, this annual notice solicits proposals and recommendations for developing new and modifying existing safe harbor provisions under the Federal and State health care programs' anti-kickback statute (section 1128B(b) of the Social Security Act), as well as developing new OIG Special Fraud Alerts.

DATES: To assure consideration, public comments must be delivered to the address provided below by no later than 5 p.m. on February 8, 2005.

ADDRESSES: Please mail or deliver your written comments to the following address: Office of Inspector General, Department of Health and Human Services, Attention: OIG–91–N, Room 5246, Cohen Building, 330 Independence Avenue, SW., Washington, DC 20201.

We do not accept comments by facsimile (FAX) transmission. In commenting, please refer to file code OIG–91–N. Comments received timely will be available for public inspection as they are received, generally beginning approximately three weeks after publication of a document, in Room 5541 of the Office of Inspector General at 330 Independence Avenue, SW., Washington, DC, on Monday through Friday of each week from 8 a.m. to 4:30 p.m.

FOR FURTHER INFORMATION CONTACT: Joel Schaer, (202) 619–0089, OIG Regulations Officer.

SUPPLEMENTARY INFORMATION:

I. Background

A. The OIG Safe Harbor Provisions

Section 1128B(b) of the Social Security Act (the Act) (42 U.S.C. 1320a–7b(b)) provides criminal penalties for individuals or entities that knowingly and willfully offer, pay, solicit or receive remuneration in order to induce or reward business reimbursable under the Federal health care programs. The offense is classified as a felony and is punishable by fines of up to $25,000 and imprisonment for up to 5 years. The OIG may also impose civil money penalties, in accordance with section 1128A(a)(7) of the Act (42 U.S.C. 1320a–7a(a)(7)), or exclusion from the Federal health care programs, in accordance with section 1128(b)(7) of the Act (42 U.S.C. 1320a–7(b)(7)).

Since the statute on its face is so broad, concern has been expressed for many years that some relatively innocuous commercial arrangements may be subject to criminal prosecution or administrative sanction. In response to the above concern, the Medicare and Medicaid Patient and Program Protection Act of 1987, section 14 of Public Law 100–93, specifically required the development and promulgation of regulations, the so-called ''safe harbor'' provisions, specifying various payment and business practices which, although potentially capable of inducing referrals of business reimbursable under the Federal health care programs, would not be treated as criminal offenses under the anti-kickback statute and would not serve as a basis for administrative sanctions. The OIG safe harbor provisions have been developed ''to limit the reach of the statute somewhat by permitting certain non-abusive arrangements, while encouraging beneficial and innocuous arrangements''

(56 FR 35952, July 29, 1991). Health care providers and others may voluntarily seek to comply with these provisions so that they have the assurance that their business practices will not be subject to any enforcement action under the anti-kickback statute or related administrative authorities.

To date, OIG has developed and codified in 42 CFR 1001.952 a total of 22 final safe harbors that describe practices that are sheltered from liability.

B. OIG Special Fraud Alerts

The OIG has also periodically issued Special Fraud Alerts to give continuing guidance to health care providers with respect to practices OIG finds potentially fraudulent or abusive. The Special Fraud Alerts encourage industry compliance by giving providers guidance that can be applied to their own practices. The OIG Special Fraud Alerts are intended for extensive distribution directly to the health care provider community, as well as to those charged with administering the Federal health care programs.

In developing these Special Fraud Alerts, OIG has relied on a number of sources and has consulted directly with experts in the subject field, including those within OIG, other agencies of the Department, other Federal and State agencies, and those in the health care industry. To date, OIG has issued 12 individual Special Fraud Alerts.

C. Section 205 of Public Law 104–191

Section 205 of Public Law 104–191 requires the Department to develop and publish an annual notice in the **Federal Register** formally soliciting proposals for modifying existing safe harbors to the anti-kickback statute and for developing new safe harbors and Special Fraud Alerts.

In developing safe harbors for a criminal statute, OIG is required to engage in a thorough review of the range of factual circumstances that may fall within the proposed safe harbor subject area so as to uncover potential opportunities for fraud and abuse. Only then can OIG determine, in consultation with the Department of Justice, whether it can effectively develop regulatory limitations and controls that will permit beneficial and innocuous arrangements within a subject area while, at the same time, protecting the Federal health care programs and their beneficiaries from abusive practices.

II. Solicitation of Additional New Recommendations and Proposals

In accordance with the requirements of section 205 of Public Law 104–191, OIG last published a **Federal Register** solicitation notice for developing new safe harbors and Special Fraud Alerts on December 12, 2003 (68 FR 69366). As required under section 205, a status report of the public comments received in response to that notice is set forth in Appendix G to the OIG's Semiannual Report covering the period April 1, 2004 through September, 30, 2004.[1] The OIG is not seeking additional public comment on the proposals listed in Appendix G at this time. Rather, this notice seeks additional recommendations regarding the development of proposed or modified safe harbor regulations and new Special Fraud Alerts beyond those summarized in Appendix G to the OIG Semiannual Report referenced above.

Criteria for Modifying and Establishing Safe Harbor Provisions

In accordance with section 205 of HIPAA, we will consider a number of factors in reviewing proposals for new or modified safe harbor provisions, such as the extent to which the proposals would affect an increase or decrease in—

- Access to health care services;
- The quality of services;
- Patient freedom of choice among health care providers;
- Competition among health care providers;
- The cost to Federal health care programs;
- The potential overutilization of the health care services; and
- The ability of health care facilities to provide services in medically underserved areas or to medically underserved populations.

In addition, we will also take into consideration other factors, including, for example, the existence (or nonexistence) of any potential financial benefit to health care professionals or providers that may take into account their decisions whether to (1) order a health care item or service, or (2) arrange for a referral of health care items or services to a particular practitioner or provider.

Criteria for Developing Special Fraud Alerts

In determining whether to issue additional Special Fraud Alerts, we will also consider whether, and to what extent, the practices that would be identified in a new Special Fraud Alert may result in any of the consequences set forth above, as well as the volume and frequency of the conduct that would be identified in the Special Fraud Alert.

A detailed explanation of justifications for, or empirical data supporting, a suggestion for a safe harbor or Special Fraud Alert would be helpful and should, if possible, be included in any response to this solicitation.

Dated: November 24, 2004.

Daniel R. Levinson,

Acting Inspector General.

[FR Doc. 04–27117 Filed 12–9–04; 8:45 am]

BILLING CODE 4150–04–P

[1] The OIG Semiannual Report can be accessed through the OIG Web site at *http://oig.hhs.gov/publications/semiannual.html.*

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

49 CFR Part 1507

[Docket No. TSA–2004–19845]

RIN 1652–AA34

Privacy Act of 1974: Implementation of Exemptions

AGENCY: Transportation Security Administration (TSA), DHS.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: TSA proposes to exempt Transportation Security Intelligence Service (TSIS) Operations Files (DHS/TSA 011) from several provisions of the Privacy Act; to add 5 U.S.C. 552a(k)(1) as an authority to exempt the Personnel Background Investigation File System (DHS/TSA 004) from the provisions previously claimed for that system; and to add 5 U.S.C. 552a(j)(2) as an authority to exempt the Transportation Security Enforcement Record System (DHS/TSA 001) and the Internal Investigation Record System (DHS/TSA 005) from the provisions previously claimed for those two systems, to now include subsection (e)(3). Public comment is invited.

DATES: Submit comments by January 10, 2005.

ADDRESSES: You must identify the TSA docket number when you submit comments to this rulemaking, using any one of the following methods:

Comments Filed Electronically: You may submit comments through the docket Web site at *http://dms.dot.gov.* Please be aware that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

You may review the applicable Privacy Act Statement published in the **Federal Register** on April 11, 2000 (65 FR 19477), or you may visit *http://dms.dot.gov.*

You also may submit comments through the Federal eRulemaking portal at *http://www.regulations.gov.*

Comments Submitted by Mail, Fax, or In Person: Address or deliver your written, signed comments to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001; Fax: 202–493–2251.

Reviewing Comments in the Docket: You may review the public docket containing comments in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Dockets Office is located on the plaza level of the NASSIF Building at the Department of Transportation address above. Also, you may review public dockets on the Internet at *http://dms.dot.gov.*

See **SUPPLEMENTARY INFORMATION** for format and other information about comment submissions.

FOR FURTHER INFORMATION CONTACT: Lisa S. Dean, Privacy Officer, Office of Transportation Security Policy, TSA–9, 601 S. 12th Street, Arlington, VA 22202–4220; telephone (571) 227–3947; facsimile (571) 227–2555.

SUPPLEMENTARY INFORMATION:

Comments Invited

TSA invites interested persons 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. See **ADDRESSES** above for information on where to submit comments.

With each comment, please include your name and address, identify the docket number TSA–2004–19845 at the beginning of your comments, and give the reason for each comment. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. You may submit comments and material electronically, in person, or by mail as provided under ADDRESSES, but please submit your comments and material by only one means. If you submit comments by mail or delivery, submit them in two copies, in an unbound format, no larger than 8.5 by 11 inches, suitable for copying and electronic filing.

If you want the TSA to acknowledge receipt of your comments on this rulemaking, include with your comments a self-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it to you.

Except for comments containing confidential information and SSI, we will file in the public docket all comments we receive, as well as a report summarizing each substantive public contact with TSA personnel concerning this rulemaking. The docket is available for public inspection before and after the comment closing date.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late to the extent practicable. We may change this rulemaking in light of the comments we receive.

Availability of Rulemaking Document

You can get an electronic copy using the Internet by—

(1) Searching the Department of Transportation's electronic Docket Management System (DMS) Web page (*http://dms.dot.gov/search*);

(2) Accessing the Government Printing Office's Web page at *http://www.access.gpo.gov/su_docs/aces/aces140.html*; or

(3) Visiting the TSA's Law and Policy Web page at *http://www.tsa.dot.gov/public/index.jsp.*

In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Make sure to identify the docket number of this rulemaking.

Summary of Proposed Rule

In conjunction with the establishment of a new system of records, Transportation Security Intelligence Service (TSIS) Operations Files (DHS/TSA 011), TSA proposes to exempt portions of the system from several provisions of the Privacy Act; the exemptions are claimed in accordance with the reasons explained below. The purpose of this system is to maintain records on intelligence, counterintelligence, transportation security, and information systems security matters as they relate to TSA's mission of protecting the nation's transportation systems. TSA also proposes to add 5 U.S.C. 552a(k)(1) as an authority to exempt the Personnel Background Investigation File System (DHS/TSA 004) from the provisions previously claimed for this system that allows TSA to maintain investigative and background records used to make suitability and eligibility determinations for employment. See 68 FR 49410, Aug. 18, 2003. The system is exempt from provisions of the Privacy Act in accordance with the reasons explained below. Finally, TSA proposes to add 5 U.S.C. 552a(j)(2) as an authority to exempt the Transportation Security Enforcement Record System (DHS/TSA 001) and the Internal Investigation Record System (DHS/TSA 005) from the provisions previously claimed for those two systems and to now include subsection (e)(3) of the Privacy Act. See 68 FR 49410, Aug. 18, 2003. The systems are exempt from provisions of the Privacy Act in accordance with the reasons explained below. DHS/TSA 001 serves as an enforcement docket system while DHS/TSA 005 is maintained to facilitate the management of investigations into allegations or appearances of misconduct by current and former TSA employees or contractors and is being modified to cover investigations of security-related incidents and reviews of TSA programs and operations.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that TSA consider the impact of paperwork and other information collection burdens imposed on the public. We have determined that there are no current or new information collection requirements associated with this proposed rule.

Analysis of Regulatory Impacts

This proposal is not a ''significant regulatory action'' within the meaning of Executive Order 12886. Because the economic impact should be minimal, further regulatory evaluation is not necessary. Moreover, I certify that this proposal would not have a significant economic impact on a substantial number of small entities, because the reporting requirements themselves are not changed and because it applies only to information on individuals.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), (Pub. L. 104–4, 109 Stat. 48), requires Federal agencies to assess the effects of certain regulatory actions on State, local, and tribal governments, and the private sector. UMRA requires a written statement of economic and regulatory alternatives for proposed and final rules that contain Federal mandates. A ''Federal mandate'' is a new or additional enforceable duty, imposed on any State, local, or tribal government, or the private sector. If any Federal mandate causes those entities to spend, in aggregate, $100 million or more in any one year the UMRA analysis is required. This proposal would not

impose Federal mandates on any State, local, or tribal government or the private sector.

Executive Order 13132, Federalism

TSA has analyzed this proposed rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action 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, and therefore would not have federalism implications.

Environmental Analysis

TSA has reviewed this action for purposes of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347) and has determined that this action will not have a significant effect on the human environment.

Energy Impact

The energy impact of this document has been assessed in accordance with the Energy Policy and Conservation Act (EPCA) Public Law 94–163, as amended (42 U.S.C. 6362). We have determined that this rulemaking is not a major regulatory action under the provisions of the EPCA.

List of Subjects in 49 CFR Part 1507

Privacy.

The Proposed Amendment

In consideration of the foregoing, the Transportation Security Administration proposes to amend part 1507 of chapter XII, title 49 of the Code of Federal Regulations, as follows:

PART 1507—PRIVACY ACT—EXEMPTIONS

1. The authority citation continues to read as follows:

Authority: 49 U.S.C. 114(1)(1), 5 U.S.C. 552a(k).

2. Amend § 1507.3 by revising paragraphs (a), (c), and (d), and by adding a new paragraph (j) to read as follows:

§ 1507.3 Exemptions.

(a) *Transportation Security Enforcement Record System (DHS/TSA 001).* The Transportation Security Enforcement Record System (TSERS) (DHS/TSA 001) enables TSA to maintain a system of records related to the screening of passengers and property and they may be used to identify, review, analyze, investigate, and prosecute violations or potential violations of criminal statutes and transportation security laws. Pursuant to exemptions (j)(2), (k)(1), and (k)(2) of the Privacy Act, DHS/TSA 001 is exempt from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(3), (e)(4)(G), (H) and (I), and (f). Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation and reveal investigative interest on the part of TSA as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to transportation security law enforcement efforts and efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation and avoid detection or apprehension, which undermines the entire system.

(2) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation and reveal investigative interest on the part of TSA as well as the recipient agency. Access to the records would permit the individual who is the subject of a record to impede the investigation and avoid detection or apprehension. Amendment of the records would interfere with ongoing investigations and law enforcement activities and impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. The information contained in the system may also include properly classified information, the release of which would pose a threat to national defense and/or foreign policy. In addition, permitting access and amendment to such information also could disclose security-sensitive information that could be detrimental to transportation security.

(3) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of transportation security laws, the accuracy of information obtained or introduced, occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective enforcement of transportation security laws, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(4) From subsections (e)(4)(G), (H), and (I) (Agency Requirements), and (f) (Agency Rules), because this system is exempt from the access provisions of subsection (d).

(5) From subsection (e)(3) (Privacy Act Statement) because disclosing the authority, purpose, routine uses, and potential consequences of not providing information could reveal the investigative interests of TSA, as well as the nature and scope of an investigation, the disclosure of which could enable individuals to circumvent agency regulations or statutes.

* * * * *

(c) *Personnel Background Investigation File System (DHS/TSA 004).* The Personnel Background Investigation File System (PBIFS) (DHS/TSA 004) enables TSA to maintain investigative and background material used to make suitability and eligibility determinations regarding current and former TSA employees, applicants for TSA employment, and TSA contract employees. Pursuant to exemptions (k)(1) and (k)(5) of the Privacy Act, the Personnel Background Investigation File System is exempt from 5 U.S.C. 552a(c)(3) (Accounting for Disclosures) and (d) (Access to Records). Exemptions from the particular subsections are justified because this system contains investigatory material compiled solely for determining suitability, eligibility, and qualifications for Federal civilian employment. To the extent that the disclosure of material would reveal any classified material or the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence, the applicability of exemption (k)(5) will be required to honor promises of confidentiality should the data subject request access to or amendment of the record, or access to the accounting of disclosures of the record, while (k)(1) will be required to protect any classified information that may be in this system.

(d) *Internal Investigation Record System (DHS/TSA 005).* The Internal Investigation Record System (IIRS) (DHS/TSA 005) contains records of internal investigations for all modes of transportation for which TSA has security-related duties. This system covers information regarding investigations of allegations or appearances of misconduct of current or former TSA employees or contractors

and provides support for any adverse action that may occur as a result of the findings of the investigation. It is being modified to cover investigations of security-related incidents and reviews of TSA programs and operations. Pursuant to exemptions (j)(2), (k)(1), and (k)(2) of the Privacy Act, DHS/TSA 005 is exempt from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(3), (e)(4)(G), (H) and (I), and (f). Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could reveal investigative interest on the part of the recipient agency that obtained the record pursuant to a routine use. Disclosure of the accounting could therefore present a serious impediment to law enforcement efforts on the part of the recipient agency, as the individual who is the subject of a record would learn of third-agency investigative interests and thereby avoid detection or apprehension.

(2) From subsection (d) (Access to Records) because access to the records contained in this system could reveal investigative techniques and procedures of the investigators, as well as the nature and scope of the investigation, the disclosure of which could enable individuals to circumvent agency regulations or statutes. The information contained in the system might include properly classified information, the release of which would pose a threat to national defense and/or foreign policy. In addition, permitting access and amendment to such information could reveal sensitive security information protected pursuant to 49 U.S.C. 114(s), the disclosure of which could be detrimental to the security of transportation.

(3) From subsection (e)(1) (Relevancy and Necessity of Information) because third agency records obtained or made available to TSA during the course of an investigation may occasionally contain information that is not strictly relevant or necessary to a specific investigation. In the interests of administering an effective and comprehensive investigation program, it is appropriate and necessary for TSA to retain all such information that may aid in that process.

(4) From subsections (e)(4)(G), (H) and (I) (Agency Requirements), and (f) (Agency Rules), because this system is exempt from the access provisions of subsection (d).

(5) From subsection (e)(3) (Privacy Act Statement) because disclosing the authority, purpose, routine uses, and potential consequences of not providing information could reveal the targets or interests of the investigating office, as well as the nature and scope of an investigation, the disclosure of which could enable individuals to circumvent agency regulations or statutes.

* * * * *

(j) *Transportation Security Intelligence Service (TSIS) Operations Files.* Transportation Security Intelligence Service Operations Files (TSIS) (DHS/TSA 011) enables TSA to maintain a system of records related to intelligence gathering activities used to identify, review, analyze, investigate, and prevent violations or potential violations of transportation security laws. This system also contains records relating to determinations about individuals' qualifications, eligibility, or suitability for access to classified information. Pursuant to exemptions (j)(2), (k)(1), (k)(2), and (k)(5) of the Privacy Act, DHS/TSA 011 is exempt from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f). Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of intelligence gathering operations on the part of the Transportation Security Administration as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to transportation security law enforcement efforts and efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede operations and avoid detection or apprehension, which undermines the entire system. Disclosure of the accounting may also reveal the existence of information that is classified or security-sensitive, the release of which would be detrimental to the security of transportation.

(2) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of intelligence gathering operations and reveal investigative interest on the part of the Transportation Security Administration. Access to the records would permit the individual who is the subject of a record to impede operations and possibly avoid detection or apprehension. Amendment of the records would interfere with ongoing intelligence and law enforcement activities and impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. The information contained in the system may also include properly classified information, the release of which would pose a threat to national defense and/or foreign policy. In addition, permitting access and amendment to such information also could disclose security-sensitive information that could be detrimental to transportation security if released. This system may also include information necessary to make a determination as to an individual's qualifications, eligibility, or suitability for access to classified information, the release of which would reveal the identity of a source who received an express or implied assurance that their identity would not be revealed to the subject of the record.

(3) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of gathering and analyzing information about potential threats to transportation security, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific operation. In the interests of transportation security, it is appropriate to retain all information that may aid in identifying threats to transportation security and establishing other patterns of unlawful activity.

(4) From subsections (e)(4)(G), (H) and (I) (Agency Requirements), and (f) (Agency Rules), because this system is exempt from the access and amendment provisions of subsection (d).

Issued in Arlington, Virginia, on December 3, 2004.

Lisa S. Dean,

Privacy Officer.

[FR Doc. 04–27097 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

Service Regulations Committee Meeting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: The Fish and Wildlife Service (hereinafter Service) will conduct an open meeting on January 27, 2005, to identify and discuss preliminary issues concerning the 2005–06 migratory bird hunting regulations.

DATES: The meeting will be held January 27, 2005.

ADDRESSES: The Service Regulations Committee will meet at the Arlington

Square Building, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 200 A/B, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: Brian Millsap, Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, ms MBSP–4107–ARLSQ, 1849 C Street, NW., Washington, DC 20240, (703) 358–1714.

SUPPLEMENTARY INFORMATION: Representatives from the Service, the Service's Migratory Bird Regulations Committee, and Flyway Council Consultants will meet on January 27, 2005, at 8:30 a.m. to identify preliminary issues concerning the 2005–06 migratory bird hunting regulations for discussion and review by the Flyway Councils at their March meetings.

In accordance with Departmental policy regarding meetings of the Service Regulations Committee attended by any person outside the Department, these meetings are open to public observation. Members of the public may submit written comments on the matters discussed to the Director.

Dated: November 27, 2004.

Paul R. Schmidt,

Assistant Director, Migratory Birds, U.S. Fish and Wildlife Service.

[FR Doc. 04–27074 Filed 12–9–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 041203341–4341–01; I.D. 072304B]

RIN 0648–AR86

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Quota Specifications, General Category Effort Controls, and Catch-and-Release Provision

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes initial 2004 fishing year specifications for the Atlantic bluefin tuna (BFT) fishery to set BFT quotas for each of the established domestic fishing categories and to set General category effort controls. NMFS also proposes to establish a catch-and-release provision for recreational and commercial BFT handgear vessels during a respective quota category closure. This action is necessary to implement recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT), as required by the Atlantic Tunas Convention Act (ATCA), and to achieve domestic management objectives under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). NMFS will hold public hearings to receive comments on these proposed actions.

DATES: Written comments must be received on or before January 6, 2005.

The public hearings dates are:

1. December 27, 2004, from 2 p.m. to 4 p.m. in Silver Spring, MD.

2. December 28, 2004, from 3 p.m. to 4:30 p.m. in Gloucester, MA.

ADDRESSES: Comments may be submitted through any of the following methods:

- Email: *04BFTSPECS@noaa.gov*.
- Federal e-Rulemaking Portal: *http://www.regulations.gov*.
- Mail: Brad McHale, Highly Migratory Species Management Division, Office of Sustainable Fisheries (F/SF1), NMFS, One Blackburn Dr., Gloucester, MA 01930.
- Fax: 978–281–9340.

The public hearing locations are:

1. NOAA Science Center, 1301 East-West Highway, Silver Spring, MD 20910.

2. NOAA/NMFS Northeast Region Downstairs Conference Room, 1 Blackburn Drive Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Brad McHale at (978) 281–9260.

SUPPLEMENTARY INFORMATION: Atlantic tunas are managed under the dual authority of the Magnuson-Stevens Act and ATCA. ATCA authorizes the Secretary of Commerce (Secretary) to promulgate regulations, as may be necessary and appropriate, to implement ICCAT recommendations. The authority to issue regulations under the Magnuson-Stevens Act and ATCA has been delegated from the Secretary to the Assistant Administrator for Fisheries, NOAA (AA).

Background

On May 28, 1998, NMFS published in the **Federal Register** (64 FR 29090) final regulations, effective July 1, 1999, implementing the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (HMS FMP) that were adopted and made available to the public in April 1999.

In November 2002, ICCAT recommended a Total Allowable Catch (TAC) of BFT for the United States in the western Atlantic management area of 1,489.6 metric tons (mt), effective beginning in 2003 and continuing in subsequent fishing years until revised by ICCAT. Also in the 2002 recommendation, ICCAT allocated 25 mt annually to account for incidental catch of BFT by pelagic longline fisheries directed on other species ''in the vicinity of the management boundary area.'' This area was defined in the 2003 BFT annual specification rulemaking process as the Northeast Distant statistical area (NED) (68 FR 56783, October 2, 2003). The TAC of 1,489.6 mt is inclusive of the annual 25 mt pelagic longline set-aside in the NED. The initial specifications within this proposed rule are published in accordance with the HMS FMP and are necessary to implement the 2002 ICCAT quota recommendation, as required by ATCA, and to achieve domestic management objectives under the Magnuson-Stevens Act.

This proposed rule would (1) establish initial quota specifications consistent with the BFT rebuilding program as set forth in the HMS FMP by allocating the 2002 ICCAT-recommended quota for the 2004 fishing year (June 1, 2004 - May 31, 2005); (2) establish the General category effort controls, including time-period subquotas and restricted fishing days (RFDs), for the 2004 fishing season; and (3) establish a catch-and-release provision for recreational and commercial handgear vessels once their respective quota categories have been closed.

After consideration of public comment, NMFS will issue final initial quota specifications and effort controls and publish them in the **Federal Register**, along with NMFS' response to those comments. The specifications and effort controls may subsequently be adjusted during the course of the fishing year, consistent with the provisions of the HMS FMP, and will be published in the **Federal Register**.

NMFS acknowledges that a number of other issues regarding the domestic management of BFT have been discussed over the prior year, including a Petition for Rulemaking, at the 2003 HMS Advisory Panel (AP) meeting held in Silver Spring, MD and at public scoping hearings relating to Amendment 2 of the HMS FMP. Some of these issues have been addressed in separate rulemakings. For instance, at the end of 2003, a final rule was published (68 FR 74504, December 24, 2003) that (1) extended the General category season from December 31 to January 31, (2) established a Harpoon category end date of November 15 (or when the quota is

reached, whichever comes first), (3) adjusted the Harpoon category tolerance limits for large medium BFT, and (4) adjusted the Purse seine category opening date and large medium BFT tolerance limits. Some additional issues may be addressed in Amendment 2 to the HMS FMP or in other future rulemaking. These issues may include, but are not limited to, adjustment of domestic quota allocation percentages and General category time-period subquotas and addressing concerns raised in the Petition for Rulemaking submitted by the North Carolina Department of Marine Fisheries (see Notice of Receipt of Petition, 67 FR 69502, November 18, 2002).

NMFS has prepared a draft Environmental Assessment (EA), Regulatory Impact Review (RIR), and an Initial Regulatory Flexibility Analysis (IRFA) which present and analyze anticipated environmental, social, and economic impacts of several alternatives for each of the three major issues contained in this proposed rule. The complete list of alternatives and their analysis is provided in the draft EA/RIR/IRFA, and is not repeated here in its entirety. A copy of the draft EA/RIR/IRFA prepared for this proposed rule is available from NMFS (see **ADDRESSES**).

Domestic Quota Allocation

The HMS FMP and its implementing regulations established baseline percentage quota shares for the domestic fishing categories. These percentage shares were based on allocation procedures that NMFS developed over several years. The baseline percentage quota shares established in the HMS FMP for fishing years beginning June 1, 1999, to the present are as follows: General category – 47.1 percent; Harpoon category – 3.9 percent; Purse seine category – 18.6 percent; Angling category – 19.7 percent; Longline category – 8.1 percent; Trap category – 0.1 percent; and Reserve category – 2.5 percent. The 2002 ICCAT-recommended U.S. BFT quota of 1,464.6 mt, not including the annual 25 mt set aside for pelagic longline vessels, would be allocated in accordance with these percentages. However, in addition to the 2002 ICCAT quota recommendation, quota allocations are adjusted based on overharvest or underharvest from prior fishing year's activity and on U.S. data on dead discards as they relate to the ICCAT dead discard allowance. Each of these adjustments is discussed below and then applied to the results of the above percentage shares to determine the 2004 fishing year proposed initial quota specifications.

The 2003 Underharvest/Overharvest

The current ICCAT BFT quota recommendation allows, and U.S. regulations require, the addition or subtraction, as appropriate, of any underharvest or overharvest in a fishing year to the following fishing year, provided that the total of the adjusted category quotas does not result in overharvest of the total annual BFT quota and remains consistent with all applicable ICCAT recommendations, including restrictions on landings of school BFT. Therefore, NMFS proposes to adjust the 2004 fishing year quota specifications for the BFT fishery to account for underharvest or overharvest in the 2003 fishing year, which in turn were adjusted due to revised information on 2002 fishing year underharvests and overharvests.

Overall U.S. landings figures for the 2002 and 2003 fishing years are still preliminary and may be updated before the 2004 fishing year specifications are finalized. Should adjustments to the final initial 2004 BFT quota specifications be required based on final 2002 and/or 2003 BFT landing figures, NMFS will publish the adjustments in the **Federal Register**. For the 2003 fishing year, NMFS has preliminarily determined that General category landings were higher than the adjusted General category quota by approximately 30.8 mt; that Harpoon category landings were less than the adjusted Harpoon category quota by approximately 24.3 mt; that Longline category landings were less than the adjusted Longline category quota by approximately 27.6 mt; that 2003 Angling category landing estimates, inclusive of revised 2002 fishing year Angling category landing estimates, were in excess of the adjusted Angling category quota by approximately 440.7 mt; and that Purse seine category landings were less than the adjusted Purse seine category quota by approximately 117.0 mt. Regulations at 50 CFR 635.27(a)(9)(i) require that Purse seine category underharvests or overharvests be subtracted from or added to each individual vessel's quota allocation, as appropriate. Based on the estimated amount of Reserve that NMFS maintains for the landing of BFT taken during ongoing scientific research projects and/or potential overharvests in certain categories, NMFS estimates that 209.8 mt of Reserve remains from the 2003 fishing year. This remaining Reserve quota will be used to partially address the Angling category overharvest. For categories with under or overharvests from the 2003 fishing year, these initial specifications will subtract the overharvest from, or add the underharvest to, that quota category for the 2004 fishing year.

Dead Discards

As part of the BFT rebuilding program, ICCAT recommends an allowance for dead discards. The U.S. dead discard allowance is 68 mt. The estimate for the 2003 calendar year was used as a proxy to calculate the amount to be added to, or subtracted from, the U.S. BFT landings quota for 2004. The 2003 calendar year preliminary estimate of U.S. dead discards, as reported per the longline discards calculated from logbook tallies, adjusted as warranted when observer counts in quarterly/geographic stratum exceeded logbook reports, totaled 52.4 mt. Estimates of dead discards from other gear types and fishing sectors that do not use the pelagic longline vessel logbook are unavailable at this time, and thus, are not included in this calculation. As U.S. fishing activity is estimated to have resulted in fewer dead discards than its allowance, the ICCAT recommendation and U.S. regulations state that the United States may add one half of the difference between the amount of dead discards and the allowance (i.e., 68.0 mt 52.4 mt = 15.6 mt, 15.6 mt/2 = 7.8 mt) to its total allowed landings for the following fishing year, to individual fishing categories, or to the Reserve category. NMFS proposes to allocate the 7.8 mt to the Reserve category quota to assist in covering potential overharvests from the previous fishing years.

The 2002 calendar year preliminary dead discard estimate, as reported in pelagic longline vessel logbooks and published in 2003 Final Initial Quota Specifications (68 FR 56783, October 2, 2003), totaled 38.0 mt. This preliminary estimate has been revised using the longline discards calculated from logbook tallies, adjusted as warranted when observer counts in stratum exceeded logbook reports. The revised 2002 calendar year dead discard estimate is 41.6 mt.

2004 Proposed Initial Quota Specifications

In accordance with the 2002 ICCAT quota recommendation, the ICCAT recommendation regarding the dead discard allowance, the HMS FMP percentage shares for each of the domestic categories, and regulations regarding annual adjustments at § 635.27(a)(9)(ii), NMFS proposes initial quota specifications for the 2004 fishing year as follows: General category – 659.0 mt; Harpoon category – 81.4 mt; Purse Seine category – 389.4 mt; Angling category – 65.5 mt; Longline category –

171.2 mt; and Trap category – 2.3 mt. Additionally, 36.6 mt would be allocated to the Reserve category for inseason adjustments, including providing for a late season General category fishery, or allocated to cover scientific research collection and potential overharvest in any category except the Purse seine category.

Based on the above proposed initial specifications, the Angling category quota of 65.5 mt would be further subdivided as follows: School BFT 21.0 mt, with 8.1 mt to the northern area (north of 39°18′ N. latitude), 9.1 mt to the southern area (south of 39°18′ N. latitude), plus 3.8 mt held in reserve; large school/small medium BFT – 42.7 mt, with 20.2 mt to the northern area and 22.5 mt to the southern area; and large medium/giant BFT – 1.8 mt, with 0.6 mt to the northern area and 1.2 mt to the southern area.

The 2002 ICCAT recommendation includes an annual 25 mt set-aside quota to account for bycatch of BFT related to directed longline fisheries in the vicinity of the management area boundary and referred to as the NED hereafter. This set-aside quota is in addition to the overall incidental longline quota to be subdivided in accordance to the North/South allocation percentages mentioned below. Thus, the proposed Longline category quota of 171.2 mt would be subdivided as follows: 58.2 mt to pelagic longline vessels landing BFT north of 31° N. latitude and 63.8 mt to pelagic longline vessels landing BFT south of 31° N. latitude, and 49.2 mt (24.2 mt from 2003 + 25.0 mt for 2004) to account for bycatch of BFT related to directed pelagic longline fisheries in the NED. The bycatch allocation by ICCAT for pelagic longline vessels in the NED would be allocated to the Longline north subcategory. Accounting for landings under this additional quota would be maintained separately from other landings under the Longline north subcategory. Finally, regulations regarding BFT target catch requirements for pelagic longline vessels within the NED do not apply until the landings equal the available quota (§ 635.23(f)(3)). After the available quota has been landed target catch requirements at § 635.23(f)(1) will then apply.

General Category Effort Controls

For the last several years, NMFS has implemented General category time-period subquotas to increase the likelihood that fishing would continue throughout the entire General category season. The subquotas are consistent with the objectives of the HMS FMP and are designed to address concerns regarding the allocation of fishing opportunities, to assist with distribution and achievement of optimum yield, to allow for a late season fishery, and to improve market conditions and scientific monitoring.

The regulations implementing the HMS FMP divide the annual General category quota into three time-period subquotas as follows: 60 percent for June-August, 30 percent for September, and 10 percent for October-January. These percentages would be applied to the adjusted 2004 coastwide quota for the General category of 659.0 mt, minus 10.0 mt reserved for the New York Bight set aside fishery. Therefore, of the available 649.0 mt coastwide quota, 389.4 mt would be available in the period beginning June 1 and ending August 31, 2004; 194.7 mt would be available in the period beginning September 1 and ending September 30, 2004; and 64.9 mt would be available in the period beginning October 1, 2004 and ending January 31, 2005.

In addition to time-period subquotas, NMFS also has implemented General category RFDs to extend the General category fishing season. The RFDs are designed to address the same issues addressed by time-period subquotas and provide additional fine scale inseason flexibility. For the 2004 fishing year, NMFS proposes a series of solid blocks of RFDs to extend the General category for as long as possible through the October through January time-period.

Therefore, NMFS proposes that persons aboard vessels permitted in the General category would be prohibited from fishing, including catch-and-release and tag-and-release, for BFT of all sizes on the following days: all Fridays, Saturdays, and Sundays through January 31, 2005, inclusive, while the fishery is open. These proposed RFDs would improve distribution of fishing opportunities without increasing BFT mortality.

Catch-and-Release Provision

Prior to 1998, ICCAT designated quotas for BFT harvested in the western Atlantic management area as ''scientific monitoring quotas.'' Under this designation, after a quota category had closed, NMFS required vessels fishing for BFT to tag-and-release all BFT as a means to collect further scientific monitoring data. In 1998, ICCAT established a rebuilding plan for western Atlantic BFT and no longer referred to BFT quotas as ''scientific monitoring quotas.''

Currently, permitted recreational and commercial BFT handgear vessel owner/operators are required to tag-and-release all BFT that are caught after their respective quota categories have been closed. Therefore, vessel owner/operators are also required to obtain, possess and utilize an approved tagging kit onboard their vessel while engaged in directed BFT fishing after a closure has taken place.

Over the last few years, NMFS has received comments from the public that vessel owner/operators are not comfortable in tagging-and-releasing BFT due to a combination of their inexperience, and concerns regarding unintentional injury and mortality of a BFT. NMFS also has concerns that the current regulations may lead to unnecessary post-release mortality associated with anglers, who are inexperienced with proper tagging techniques and may improperly place the tag on the BFT, unintentionally killing or injuring the fish. Other commenters have stated that, on occasion, substantial time delays can be experienced in obtaining an approved tagging kit, thus limiting their ability to go fishing for BFT.

Therefore, NMFS proposes to allow vessels participating in the BFT recreational and commercial handgear fisheries to practice catch-and-release after a quota category has been closed. This proposal would also allow vessel owner/operators to tag-and-release BFT, but would not require them to do so.

Classification

This proposed rule is published under the authority of the Magnuson-Stevens Act and ATCA. The Assistant Administrator for Fisheries (AA) has preliminarily determined that the regulations contained in this proposed rule are necessary to implement the recommendations of ICCAT and to manage the domestic Atlantic HMS fisheries.

The purpose of this proposed action is to: (1) implement the 2002 ICCAT recommendation regarding the BFT quota, by proposing 2004 specifications for the BFT fishery that allocates the quota among domestic fishing categories, including 25 mt of BFT quota to the Longline category, (2) implement General category effort controls, and (3) implement a catch-and-release provision for recreational and commercial BFT handgear vessels.

NMFS has prepared a RIR and an IRFA that examine the impacts of the selected alternatives discussed previously in this rulemaking. The analysis for the IRFA assesses the impacts of the various alternatives on the vessels that participate in the BFT fisheries, all of which are considered small entities. For the quota allocation alternatives, NMFS has estimated the

average impact of the alternatives on individual categories and the vessels within those categories. As mentioned above, the 2002 ICCAT recommendation increased the BFT quota allocation to 1,489.6 mt. This increase, in comparison to pre–2002 levels, includes 77.6 mt to be redistributed to the domestic fishing categories based on the allocation percentages established in the HMS FMP, as well as a set-aside quota of 25 mt to account for incidental catch of BFT related to directed pelagic longline fisheries in the NED. In 2003, preliminary annual gross revenues from the commercial BFT fishery were approximately $11.5 million. There are approximately 10,914 vessels that are permitted to land and sell BFT under four BFT quota categories. The four quota categories and their preliminary 2003 gross revenues are General ($7,476,461), Harpoon ($772,810), Purse Seine ($2,546,236), and Incidental Longline ($635,498). Note that all dollars have been converted to 1996 dollars using the Consumer Price Index Conversion Factors for comparison purposes. The analysis for the IRFA assumes that all category vessels have similar catch and gross revenues. While this assumption may not be entirely valid, the analyses are sufficient to show the relative impact of the various preferred alternatives on vessels.

For the allocation of BFT quota among domestic fishing categories, three alternatives were considered: no action, a preferred alternative that would allocate the ICCAT-recommended quota to domestic categories in accordance with the 2002 ICCAT recommendation and the HMS FMP, and a slight variation of the preferred alternative, that includes a 25–mt limit on the amount of quota that can accumulate from year-to-year within the pelagic longline quota set-aside in the NED.

The no action alternative would not be consistent with the purpose and need for this action, ATCA, and the HMS FMP. It would maintain U.S. BFT quota levels at a scale and distribution similar to the 2002 fishing year and would deny fishermen additional fishing opportunities as recommended by the ICCAT, an estimated $1,000,000 in potential, additional gross revenues. The 2002 ICCAT quota recommendation specified a 1,489.6 mt total quota for the United States, a 102.6 mt increase from pre–2002 quota levels. Under ATCA, the United States is obligated to implement ICCAT-approved recommendations. The preferred alternative would increase the overall quota by 77.6 mt resulting in an approximate increase in gross revenues of $750,000, and would also create a set-aside quota of 25 mt to account for incidental harvest of BFT in the NED by pelagic longline vessels, resulting in a potential increase in gross revenues of $250,000. Unharvested quota from this set aside would be allowed to roll from one fishing year to the next. The preferred alternative is expected to have positive economic impacts for fishermen, because of the modest increase in quota. Under the slight variation of the preferred alternative, the annual specification process would limit the NED set-aside to 25 mt and would not take into account any unharvested set-aside quota from the prior fishing year. Unharvested quota would not be rolled over from the previous fishing year, nor would it be transferred or allocated to other domestic fishing categories. This alternative is also expected to have overall positive economic impacts for fishermen due to the increase in gross revenues associate with the 77.6 mt quota increase.

For the General category effort controls, two alternatives were considered: The preferred alternative to designate RFDs according to a schedule published in the initial BFT specifications and the no action alternative (no RFDs published with the initial specifications, but implemented during the season as needed). In the past, when catch rates have been high, series of solid blocks of RFDs, the preferred alternative, has had positive economic consequences by avoiding market gluts and extending the season as late as possible. Implementing RFDs to assist a late season fishery would have positive economic impacts to those south Atlantic fishermen, but could have potentially negative economic impacts to those northern area fishermen who would have otherwise caught and sold fish earlier in the season. However, these adverse impacts would be slightly mitigated if northern area fishermen are willing to travel south late in the season. Overall, extending the season as late as possible would enhance the likelihood of increasing participation by southern area fishermen and access to the fishery over a greater range of the fish migration.

The no action alternative, would not implement any RFDs with publication of the initial specifications but rather would use inseason management authority established in the HMS FMP to implement RFDs during the season should catch rates increase. This alternative is based on a season of low catch rates and would have positive economic consequences if slow catch rates were to persist. Overall, the season would regulate itself and fishermen could choose when to fish or not based on their own preferences. However, even with low catch rates and no RFDs, it is unlikely that there will be enough quota in the General category to sustain a late season commercial handgear fishery off south Atlantic states especially now that the General category is extended through January. Thus, if the 2004 season should be similar to the 2003 fishery, there may be negative economic impacts to fishermen in southern states unless inseason management actions (similar to those in 2003, i.e., inseason transfers) are taken to directly address these concerns and potential impacts.

For the catch-and-release provision, NMFS considered three alternatives: No action (maintain the tag-and-release requirement once a handgear quota category has been closed), disallow all fishing for BFT once a handgear quota category has been closed, and the preferred alternative to allow vessels to catch-and-release BFT once a handgear quota category has been closed.

Although NMFS believes that recreational HMS fisheries have a large influence on the economies of coastal communities, even when vessels are engaged in tag-and-release or catch-and-release fishing, NMFS has little current information on the costs and expenditures of anglers or the businesses that rely on them. Based on conversations with representatives of the handgear sectors of the BFT fishery, NMFS has assessed that the no action alternative would have slightly negative economic impacts. This assessment is attributed to vessel owner/operators, who are not comfortable tagging BFT, or those owner/operators who are unable to obtain a tagging kit in a timely fashion, not taking trips to pursue BFT. The second alternative would have even greater negative economic impacts by prohibiting vessels from taking trips targeting BFT after a quota is attained. The preferred alternative would have positive economic impacts on those associated with the BFT handgear fishery. This alternative, would positively impact numerous economic aspects of the BFT handgear fishery due to the willingness of more vessel owner/operators to actively take trips targeting BFT after a closure has taken place. This alternative would also allow for the tagging of BFT, but would not require owner/operators to do so.

None of the proposed alternatives in this document would result in additional reporting, recordkeeping, compliance, or monitoring requirements for the public. This proposed rule has also been determined not to duplicate,

overlap, or conflict with any other Federal rules.

NMFS prepared a draft EA for this proposed rule, and the AA has preliminarily concluded that there would be no significant impact on the human environment if this proposed rule were implemented. The EA presents analyses of the anticipated impacts of these proposed regulations and the alternatives considered. A copy of the EA and other analytical documents prepared for this proposed rule, are available from NMFS via the Federal e-Rulemaking Portal (see **ADDRESSES**).

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

This proposed rule contains no new collection-of-information requirements subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). Notwithstanding any other provisions 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.

On September 7, 2000, NOAA Fisheries reinitiated formal consultation for all HMS commercial fisheries under section 7 of the Endangered Species Act (ESA). A Biological Opinion (BiOp) issued June 14, 2001, concluded that continued operation of the Atlantic pelagic longline fishery is likely to jeopardize the continued existence of endangered and threatened sea turtle species under NOAA Fisheries jurisdiction. NOAA Fisheries has implemented the reasonable and prudent alternatives required by this BiOp. This BiOp also concluded that the continued operation of the purse seine and handgear fisheries may adversely affect, but is not likely to jeopardize, the continued existence of any endangered or threatened species under NOAA Fisheries jurisdiction. NOAA Fisheries has implemented the reasonable and prudent alternative (RPA) required by this BiOp.

Subsequently, based on the management measures in several proposed rules, a new BiOp on the Atlantic pelagic longline fishery was issued on June 1, 2004. The 2004 BiOp found that the continued operation of the fishery was not likely to jeopardize the continued existence of loggerhead, green, hawksbill, Kemp's ridley, or olive ridley sea turtles, but was likely to jeopardize the continued existence of leatherback sea turtles. The 2004 BiOp identified RPAs necessary to avoid jeopardizing leatherbacks, and listed the Reasonable and Prudent Measures (RPMs) and terms and conditions necessary to authorize continued take as part of the revised incidental take statement. On July 6, 2004, NOAA Fisheries published a final rule (69 FR 40734) implementing additional sea turtle bycatch and bycatch mortality mitigation measures for all Atlantic vessels with pelagic longline gear onboard. NOAA Fisheries is implementing the other RPMs in compliance with the 2004 BiOp. On August 12, 2004, NOAA Fisheries published an Advance Notice of Proposed Rulemaking (69 FR 49858) to request comments on potential regulatory changes to further reduce bycatch and bycatch mortality of sea turtles, as well as comments on the feasibility of framework mechanisms to address unanticipated increases in sea turtle interactions and mortalities, should they occur. NOAA Fisheries will undertake additional rulemaking and non-regulatory actions, as required, to implement any management measures that are required under the 2004 BiOp. The majority of the measures that will be implemented by this current rule are not expected to have adverse impacts. However, the 2002 ICCAT recommendation increased the BFT quota which may result in a slight increase in effort which could potentially increase the number of protected species interactions. Due to current restrictions on the BFT fishery and more specifically the pelagic longline fishery, NOAA Fisheries does not expect this slight increase in effort to alter current fishing patterns.

The area in which this proposed action is planned has been identified as Essential Fish Habitat (EFH) for species managed by the New England Fishery Management Council, the Mid-Atlantic Fishery Management Council, the South Atlantic Fishery Management Council, the Gulf of Mexico Fishery Management Council, the Caribbean Fishery Management Council, and the HMS Management Division of the Office of Sustainable Fisheries at NMFS. It is not anticipated that this action will have any adverse impacts to EFH and, therefore, no consultation is required.

NMFS has determined that the list of actions in this proposed rule are consistent to the maximum extent practicable with the enforceable policies of the coastal states in the Atlantic, Gulf of Mexico, and Caribbean that have Federally approved coastal zone management programs under the Coastal Zone Management Act (CZMA). The proposed rule establishing quota specifications and effort controls will be submitted to the responsible state agencies for their review under section 307 of the CZMA.

List of Subjects in 50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Statistics, Treaties.

Dated: December 6, 2004.

Rebecca J. Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 635 is proposed to be amended as follows:

PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

1. The authority citation for part 635 continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.*; 16 U.S.C. 1801 *et seq.*

2. In § 635.23, paragraphs (a)(2) and (a)(4) are revised to read as follows:

§ 635.23 Retention limits for BFT.

* * * * *

(a) * * *

(2) On an RFD, no person aboard a vessel that has been issued a General category Atlantic Tunas permit may fish for, possess, retain, land, or sell a BFT of any size class, and catch-and-release or tag-and-release fishing for BFT under § 635.26 is not authorized from such vessel. On days other than RFDs, and when the General category is open, one large medium or giant BFT may be caught and landed from such vessel per day. NMFS will annually publish a schedule of RFDs in the **Federal Register**.

* * * * *

(4) To provide for maximum utilization of the quota for BFT, NMFS may increase or decrease the daily retention limit of large medium and giant BFT over a range from zero (on RFDs) to a maximum of three per vessel. Such increase or decrease will be based on a review of dealer reports, daily landing trends, availability of the species on the fishing grounds, and any other relevant factors. NMFS will adjust the daily retention limit specified in paragraph (a)(2) of this section by filing with the Office of the **Federal Register** for publication notification of the adjustment. Such adjustment will not be effective until at least 3 calendar days after notification is filed with the Office of the **Federal Register** for publication, except that previously designated RFDs may be waived effective upon closure of

the General category fishery so that persons aboard vessels permitted in the General category may conduct catch-and-release or tag-and-release fishing for BFT under § 635.26.

* * * * *

3. In § 635.26, paragraph (a)(1) is revised to read as follows:

§ 635.26 Catch and release.

(a) * * *

(1) Notwithstanding the other provisions of this part, a person aboard a vessel issued a permit under this part, other than a person aboard a vessel permitted in the General category on a designated RFD, may fish with rod and reel or handline gear for BFT under a catch-and-release or tag-and-release program. When fishing under a tag-and-release program, vessel owner/operators should use tags issued or approved by NMFS. If a BFT is tagged, the tag information, including information on any previously applied tag remaining on the fish, must be reported to NMFS. All BFT caught under the catch-and-release or tag-and-release programs must be returned to the sea immediately with a minimum of injury.

* * * * *

[FR Doc. 04–27166 Filed 12–7–04; 8:45 pm]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 69, No. 237
Friday, December 10, 2004

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

Forest Service

Black-tailed Prairie Dog Conservation and Management on the Nebraska National Forest and Associated Units

AGENCY: Forest Service, USDA.

ACTION: Correction—to add USDA, Animal Plant Health Inspection Service—Wildlife Services (APHIS—WS), and the State of South Dakota as formal Cooperating Agencies with the Nebraska National Forest and Associated Units in the Notice of Intent to prepare an Environmental Impact Statement (EIS). Add e-mail address for electronic comments.

SUMMARY: The Forest Service published a document in the **Federal Register** on November 1, 2004, providing notice that the Nebraska National Forest and Associated Units was intending to prepare an Environmental Impact Statement regarding the conservation and management of the black-tailed prairie dog. The document failed to note that the USDA, APHIS—WS and the State of South Dakota are formally designated Cooperating Agencies with the Forest Service in the preparation of the environnmental impact statement.

FOR FURTHER INFORMATION CONTACT: William Perry, 605–279–2125.

Correction

In the **Federal Register** of November 1, 2004 (Volume 69, Number 210), on page 63351 prior to the subheading ''Scoping,'' insert a subheading ''Cooperating Agencies.'' Following the subheading ''Cooperating Agencies'' insert the following—''USDA, Animal Plant Health Inspection Service—Wildlife Service (APHIS—WS) and the State of South Dakota have been granted cooperating agency status for the purpose of cooperating and coordinating with the Forest Service in providing relevant research and information to be used in the development of EIS alternatives and implementation of management plan direction'' Under the subheading ''Responsible Official,'' (page 63351) following the address add ''E-mail comments to: *comments-rocky-mountain-nebraska@fs.fed.us*''

Dated: November 22, 2004.

Donald J. Bright,

Forest Supervisor, Nebraska National Forest and Associated Units.

[FR Doc. 04–27079 Filed 12–9–04; 8:45 am]

BILLING CODE 3410–11–M

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletion

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to and deletions from procurement list.

SUMMARY: The Committee is proposing to add to the Procurement List products and a service to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and to delete a service previously furnished by such agencies.

Comments Must be Received on or Before: January 9, 2005.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, (703) 603–7740.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice for each product or service will be required to procure the products and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and service to the Government.

2. If approved, the action will result in authorizing small entities to furnish the products and service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and service proposed for addition to the Procurement List. Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following products and service are proposed for addition to Procurement List for production by the nonprofit agencies listed:

Products

Product/NSN: Cap, Baseball, Navy, 8415–01–487–5148.
NPA: National Center for Employment of the Disabled, El Paso, Texas.
Contracting Activity: Defense Supply Center Philadelphia, Philadelphia, Pennsylvania.
Product/NSN: Eraser, Whiteboard, 7510–01–316–6213.
Product/NSN: Kit, Dry Erase Marker (12), 7520–01–365–6126.
Product/NSN: Kit, Dry Erase Marker (6), 7520–01–352–7321.
NPA: Dallas Lighthouse for the Blind, Inc., Dallas, Texas.
Contracting Activity: Office Supplies & Paper Products Acquisition Center, New York, NY.
Product/NSN: Vegetable Oil (Domestic) 10% of USDA Requirement, 8945–00–NSH–0002.
NPA: Advocacy and Resources Corporation, Cookeville, Tennessee.
Contracting Activity: USDA, Farm Service Agency, Washington, DC.

Service

Service Type/Location: Mailroom Operation,

ServiceSource, Alexandria, VA (Prime Contractor) at the following location for the Nonprofit Agencies identified: Internal Revenue Service Mailroom, 4050 Alpha Road, Dallas, Texas.
NPA: Dallas Lighthouse for the Blind, Inc., Dallas, Texas.
Contracting Activity: U.S. Treasury, IRS Headquarters, Oxon Hill, Maryland.

Deletion

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action may result in additional reporting, recordkeeping or other compliance requirements for small entities.
2. If approved, the action may result in authorizing small entities to furnish the service to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the service proposed for deletion from the Procurement List.

End of Certification

The following service is proposed for deletion from the Procurement List:

Service

Service Type/Location: Food Service Attendant, Mississippi Air National Guard, Building 129, Dining Facility, Jackson, Mississippi.
NPA: Goodwill Industries of Mississippi, Inc., Ridgeland, Mississippi.
Contracting Activity: Mississippi Air National Guard, Jackson, Mississippi.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 04–27155 Filed 12–9–04; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase from People Who Are Blind or Severely Disabled.

ACTION: Additions to and deletions from procurement list.

SUMMARY: This action adds to the Procurement List products and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes from the Procurement List services previously furnished by such agencies.

EFFECTIVE DATE: January 9, 2005.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, (703) 603–7740.

SUPPLEMENTARY INFORMATION:

Additions

On October 8, and October 15, 2004, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (69 FR 60351 and 61202) of proposed additions to the Procurement List.

The following comments pertain to Battery, Nonrechargeable, Lithium.

Comments were received from the current contractor for this lithium battery. The contractor asked that the current contract be allowed to run its term before the Committee's nonprofit agency begins performance. The contractor noted that the lithium battery accounts for nearly all sales under the contract and a sizeable part of the contractor's battery sales to the Government, which is the largest consumer of the battery. The contractor noted that sales of the battery have skyrocketed due to the current hostilities, so losing the contract would cause the contractor to lose its revenue expectations for this battery.

Addition of this battery to the Procurement List will not cause a premature termination of the current contract, as Procurement List additions do not affect contracts awarded prior to the effective date of the addition or options exercised under those contracts. 41 CFR 51–5.3(c). In assessing impact of a Procurement List addition on a current contractor, the Committee looks at the total sales of that contractor, including related corporations, as well as previous impacts on the contractor and the contractor's history of providing the product in question. 41 CFR 51–2.4(a)(4). The current contractor is a very large business, and the loss of the contract for this lithium battery represents a very small part of the contractor's total sales. Because the competitive procurement system does not guarantee that any contractor will receive subsequent contracts for a product, the Committee does not consider a loss of revenue expectations alone to constitute severe adverse impact on a contractor. Because this contractor has provided this battery to the Government for almost a decade, the Committee has given some weight to this sales history, but in light of the very small percentage of the contractor's sales which this battery and other recent impacts represent, the Committee does not believe this addition to the Procurement List will have a severe adverse impact on the contractor.

The following material pertains to all of the items being added to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the products and services and impact of the additions on the current or most recent contractors, the Committee has determined that the products and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and services to the Government.
2. The action will result in authorizing small entities to furnish the products and services to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and services proposed for addition to the Procurement List.

End of Certification

Accordingly, the following products and services are added to the Procurement List:

Products

Product/NSN: Battery Nonrechargeable, Lithium, 6135–01–351–1131.
NPA: Eastern Carolina Vocational Center, Inc., Greenville, North Carolina.
Contracting Activity: Defense Supply Center Richmond, Richmond, Virginia.

Product/NSN: Cups, Hot and Cold Drink, 7350–00–281–3211 (Cold Drink), 7350–00–641–4517 (Hot Drink), 7350–00–641–4519 (Hot Drink), 7350–00–641–4523 (Cold Drink), 7350–00–641–4576 (Hot Drink), 7350–00–641–4587 (Cold Drink), 7350–00–641–4589 (Cold Drink), 7350–00–641–4590 (Cold Drink), 7350–00–641–4591 (Cold Drink), 7350–00–641–4592 (Cold Drink), 7350–00–641–4593 (Cold Drink).
NPA: The Lighthouse for the Blind in New Orleans, New Orleans, Louisiana.

Contract Activity: GSA, Southwest Supply Center, Fort Worth, Texas.

Product/NSN: Gloves, Chemical Protective, 8415–01–509–2898, 8415–01–509–2902, 8415–01–509–2904, 8415–01–509–2905, 8415–01–509–2916.

Product/NSN: Socks, Chemical Protective, 8415–01–509–2875, 8415–01–509–2877, 8415–01–509–2879, 8415–01–509–2882, 8415–01–509–2883.

NPA: Industrial Opportunities, Inc., Marble, North Carolina.

Contract Activity: Defense Supply Center Philadelphia, Philadelphia, Pennsylvania.

Services

Service Type/Location: Base Supply Center, Fort Eustis, Virginia.

NPA: Virginia Industries for the Blind, Charlottesville, Virginia.

Contracting Activity: Army Contracting Agency/NRCC Installation Division, Fort Eustis, VA.

Service Type/Location: Food Service and Food Service Attendant, 131st Fighter Wing, Air National Guard Unit—Lambert Air Base, St. Louis, Missouri.

NPA: Challenge Unlimited, Inc., Alton, Illinois.

Contracting Activity: Missouri Air National Guard, Bridgeton, Missouri.

Service Type/Location: Housekeeping Services, Camp Edwards Billeting, Camp Edwards, Massachusetts.

NPA: Nauset, Inc., Hyannis, Massachusetts.

Contracting Activity: Massachusetts Army National Guard, Camp Edwards, Massachusetts.

Deletion

On March 26, 2004, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (69 FR 15787) of proposed deletion to the Procurement List. After consideration of the relevant matter presented, the Committee has determined that the service listed below is no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action may result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the service deleted from the Procurement List.

End of Certification

Accordingly, the following service is deleted from the Procurement List:

Service

Service Type/Location: Janitorial/Custodial, U.S. Army Reserve Center (Midland), Midland, Texas.

NPA: None currently authorized.

Contracting Activity: Department of the Army.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 04–27156 Filed 12–9–04; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 56–2004]

Foreign-Trade Zone 259—International Falls, MN; Application for Subzone Status, Arctic Cat, Inc. (All-Terrain Vehicle Engines and Snowmobiles) Thief River Falls, MN

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Koochiching Economic Development Authority, grantee of FTZ 259, requesting special-purpose subzone status for the all-terrain vehicle engine and snowmobile manufacturing facilities of Arctic Cat, Inc. (ACI), located in Thief River Falls, Minnesota. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on December 3, 2004.

The proposed subzone would be comprised of four separate sites: *Site 1* (77 acres/517,000 sq.ft., manufacturing plant)—601 Brooks Avenue, Thief River Falls (Pennington County), Minnesota; *Site 2* (3 acres/60,000 sq. ft., manufacturing plant)—817 Lowell Drive, Thief River Falls, located immediately to the south of Site 1; *Site 3* (60 acres, company test track)—Greenwood Street West between County Route 75 and State Route 32, located across Greenwood Street to the south of Site 2; and, *Site 4* (20,000 sq.ft., warehouse)—''Hartz Warehouse'', 120 Arnold Avenue South, located about 1,000 feet to the east of Site 1. The facilities (1,200 employees) are used to manufacture all-terrain vehicles (ATV) and snowmobiles, assemble ATV engines, and to distribute U.S. and foreign-made ATVs, snowmobiles, related parts and branded accessories for export and the U.S. market. The manufacturing process at the facilities involves machining, painting, assembly, and testing. ACI proposes to assemble ATV engines and snowmobiles under FTZ procedures. The facilities can produce between 30,000 to 65,000 snowmobiles and 20,000 to 55,000 ATV engines annually, which are assembled from domestic and foreign-origin components. Components purchased from abroad (representing approximately 65% of total material cost) include: spark-ignition engines, articles of rubber (o-rings, seals, drive/V-belts, hoses, dampers/plugs/covers), strips, roller chain, fasteners (screws, nuts, washers, bolts, clips, studs, pins), clamps, oil strainers, crankshafts, balancers, pistons, camshafts, cylinder heads, starter motors, remote starters, water pumps, oil pumps, valves, shafts (drive, counter, secondary), bushings, pulleys, universal joints, sprockets, transmissions, gears, gear drives, axles, hubs, flywheels, rotors, idlers, electronic control units, ignition coils, spark plugs, voltage regulators, resistors, fuses, capacitors, relays, circuit boards, circuit protectors/breakers, stators, diodes, generators, transformers, wiring harnesses, magnets, solenoids, sensors, A/C condensers, electrical terminals/junction boxes/sockets, drive sheaves, parts of transmissions, clutches, CDI (capacitive discharge) units, bearings (ball, spherical, needle, tapered roller shaft; subject to ADD/CVD-must be admitted under privileged foreign status), articles of plastic (fittings, caps, decals, strips, sheets, knobs, seals, washer, o-rings, v-belts), tires, steel and alloy tube/pipe/wire/coil hooks, springs (leaf, helical), aluminum stampings, titanium tubes/bars/rods, locks, keys, hinges, castors, mountings, turbochargers, aluminum heat exchangers and parts, winches, batteries, lighting equipment, horns, alarms, block heaters, LCD screens, body stampings, bumpers, brake parts, shock absorbers, wheels, radiators, mufflers, steering parts, trailers, gauges, oxygen sensors, odometers, speedometers, meters, and thermostats (duty rate range: free—15.0%). FTZ procedures would exempt ACI from Customs duty payments on the foreign components used in export production. On its domestic sales and exports to NAFTA markets, the company would be able to choose the duty rates that apply to ATV engines and snowmobiles (duty free, 2.5%) for the foreign-sourced components noted above. The application indicates that subzone status would help improve the facilities' international competitiveness.

In accordance with the Board's regulations, a member of the FTZ Staff

has been designated examiner to investigate the application and report to the Board.

Public comment on the application is invited from interested parties. Submissions (original and three copies) shall be addressed to the Board's Executive Secretary at the following addresses:

1. Submissions via Express/Package Delivery Services: Foreign-Trade Zones Board, U.S. Department of Commerce, Franklin Court Building—4100W, 1099 14th Street, NW., Washington, DC 20005; or,

2. Submissions via the U.S. Postal Service: Foreign-Trade Zones Board, U.S. Department of Commerce, FCB–4100W, 1401 Constitution Ave., NW., Washington, DC 20230.

The closing period for their receipt is February 8, 2005. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to February 23, 2005).

A copy of the application will be available for public inspection at the Office of the Foreign-Trade Zones Board's Executive Secretary at address No.1 listed above and at the Office of the Port Director, U.S. Customs and Border Protection, 112 W. Stutsman Street, Pembina, North Dakota 58271.

Dated: December 3, 2004.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 04–27183 Filed 12–9–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 110104A]

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Construction and Operation of Offshore Oil and Gas Facilities in the Beaufort Sea

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

ACTION: Notice of issuance of a letter of authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, and implementing regulations, notice is hereby given that NMFS has issued a letter of authorization (LOA) to BP Exploration (Alaska), Inc. (BP) to take marine mammals incidental to the production of offshore oil and gas at the Northstar development in the Beaufort Sea off Alaska.

DATES: This LOA is effective from December 6, 2004, through May 25, 2005.

ADDRESSES: A copy of BP's letter, a list of monitoring reports, and/or the LOA may be obtained by writing to the Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910, or by telephoning one of the contacts listed here.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Hollingshead (301) 713–2055, ext. 128, or Bradley Smith (907) 271–5006.

SUPPLEMENTARY INFORMATION: Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs NMFS to allow, on 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 by NMFS and regulations are issued. Under the MMPA, the term ''take'' means to harass, hunt, capture, or kill or to attempt to harass, hunt, capture or kill marine mammals.

Permission may be granted for periods up to 5 years if NMFS finds, after notice and opportunity for public comment, that the taking will have a negligible impact on the species or stock(s) of marine mammals, and will not have an unmitigable adverse impact on the availability of the species or stock(s) of marine mammals for subsistence uses. In addition, NMFS must prescribe regulations setting forth the permissible methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat, and on the availability of the species for subsistence uses. The regulations also must include requirements pertaining to the monitoring and reporting of such taking. Regulations governing the taking of marine mammals incidental to construction and operation of the offshore oil and gas facility at Northstar in the Beaufort Sea were published and made effective on May 25, 2000 (65 FR 34014), and remain in effect until May 25, 2005. These regulations include mitigation, monitoring, and reporting requirements.

Summary of Request

On October 19, 2004, NMFS received a request from BP for a renewal of an LOA issued on September 18, 2000 (65 FR 58265, September 28, 2000) and reissued on December 14, 2001 (66 FR 65923, December 21, 2001), December 9, 2002 (67 FR 77750, December 19, 2002) and December 4, 2003 (68 FR 68874, December 10, 2003) for the taking of marine mammals incidental to oil production operations at Northstar, under section 101(a)(5)(A) of the MMPA. This latest request (BP, 2004) contains information in compliance with 50 CFR 216.209, which updates information provided in BP's original application for takings incidental to construction and operations at Northstar. The 2003/2004 LOA for the taking of marine mammals incidental to oil production at the Northstar facility will expire on December 3, 2004. This current LOA is effective through May 25, 2005, when the implementing regulations expire. A request for LOAs after May 25, 2005 is the subject of a separate rulemaking action (see 69 FR 56995, September 23, 2004).

Background

BP is currently producing crude oil from the Nortstar facility in the U.S. Beaufort Sea and is injecting the natural gas into the formations. Northstar includes a gravel island work surface to support the main facilities required for drilling and oil production, and two pipelines connecting the island to the existing infrastructure in Prudhoe Bay. One pipeline transports crude oil to shore, and the other transports natural gas to the island for field injection. Oil production began in late 2001 and is ongoing. Activities under the LOA will include: (1) winter ice-road construction, (2) winter ice road traffic, (3) Northstar oil production activities, (4) environmental compliance monitoring, and (5) helicopter, hovercraft, tugboat and barge transportation of personnel, equipment and supplies.

Impacts on marine mammals at the Northstar facility may occur through noise from tugs, barges, helicopters and hovercraft traffic, and drilling and other noise sources on the island facility. Impacts may also result if there is an oil spill resulting from production. While noise impacts on marine mammals will be low (activities on Northstar Island will make less noise than that from standard jack-up rigs, a concrete island drilling structure, or seismic activity), bowhead whales will likely hear the noise at distances up to 10 km (6.2 mi) from the island. In addition, there may be some harassment, injury, or mortality of ringed seals during winter ice-road construction. In 2000 (65 FR 58265, September 28, 2000) and 2001 (66 FR 65923, December 21, 2001), NMFS estimated that noise impacts may result in Level B harassment of approximately 765 bowheads (i.e., the LOA authorizes up to 765 bowheads annually, with a

maximum of 1,533 in 2 out of 5 seasons, and a total of 3,585 in 5 years), 5 gray whales and 91 beluga whales. However, since this LOA is effective only through May 25, 2004, no bowhead, gray or beluga whales are expected to be harassed.

Year-round operations at Northstar may result in the harassment of up to approximately 191 ringed seals, 10 bearded seals, and 5 spotted seals being harassed and the incidental mortality of up to 5 ringed seal pups. No take is authorized for an oil spill. NMFS and BP believe that these estimates remain conservative since, for example, monitoring between November, 2001 and October, 2002 indicate that approximately 110 ringed seals, 1 bearded seal and 10–20 beluga whales were present in the area and potentially may have been affected (Moulton et al., 2003). MacLean and Williams (2003) and Moulton et al. (2003) indicate that Northstar production probably had little or no effect on most of the seals and no seals were injured or killed by activities along the ice road or operations at Northstar during the 2002/2003 or 2003/2004 ice-covered seasons.

Monitoring and Reporting

Monitoring and reporting requirements contained in the Northstar regulations (50 CFR 216.206) and described in the **Federal Register** (65 FR 34014, May 25, 2000). Additional information was provided on December 21, 2001 (66 FR 65923), when NMFS issued an LOA to BP for oil production at Northstar. Monitoring reports are submitted annually as required by the regulations, and the LOA, and plans and reports are peer-reviewed as required regulations. A list of these reports is available upon request (see **ADDRESSES**). Recent peer-review meetings were held in June 2003, in Seattle, WA and in August, 2004 in Anchorage, AK. The August, 2004 meeting confirmed continued efforts begun in 2003 to convene an independent technical peer-review committee under the auspices of the North Slope Borough's Science Advisory Committee. The next open-water peer-review meeting is planned for May, 2005 in Anchorage, AK. In accordance with the original marine mammal monitoring plan, BP plans to continue monitoring in the winter/early spring 2005 for those tasks that have not been completed.

Determinations

Accordingly, NMFS issued an LOA to BPXA on December 6, 2004, authorizing the taking of marine mammals incidental to oil production operations at the Northstar offshore oil and gas facility in state and federal waters in the U.S. Beaufort Sea until May 25, 2005. Issuance is based on findings, described in the preamble to the final rule (65 FR 34014, May 25, 2000), that the activities described in the LOA will result in the taking of no more than small numbers of ringed seals, and possibly bearded seals and spotted seals, and that the total taking will have a negligible impact on these marine mammal stocks and would not have an unmitigable adverse impact on the availability of these species or stocks for taking for subsistence uses. NMFS also prescribed the means for effecting the least practicable adverse impact on these stocks. As the results from the monitoring program carried out since 1999 have indicated that the determinations made in 2000 and 2001 were not in error, the estimated levels of incidental harassment have not been exceeded, and as the activity that was reviewed in 2001 (oil production activities) has not changed, these determinations remain valid.

Dated: December 6, 2004.

Laurie K. Allen,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 04–27180 Filed 12–9–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 102204B]

Endangered Species; File No. 1418

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

ACTION: Issuance of permit amendment.

SUMMARY: Notice is hereby given that Lawrence D. Wood, Marinelife Center of Juno Beach, 14200 U.S. Hwy. 1, Juno Beach, FL, 33408 has been issued a modification to scientific research Permit No. 1418.

ADDRESSES: The modification and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; and

Southeast Region, NMFS, 9721 Executive Center Drive North, St. Petersburg, FL 33702–2432; phone (727)570–5301; fax (727)570–5320.

FOR FURTHER INFORMATION CONTACT: Patrick Opay or Amy Sloan, (301)713–2289.

SUPPLEMENTARY INFORMATION: On September 9, 2004, notice was published in the **Federal Register** (69 FR 54649) that a modification of Permit No. 1418, issued January 14, 2004 (69 FR 2118), had been requested by the above-named individual. The requested modification has been granted under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

The modification authorizes Mr. Wood to sample blood for sex determinations from the 75 hawksbill (Eretmochelys imbricata) sea turtles he is already authorized to annually capture under the existing permit.

Issuance of this modification, as required by the ESA was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of the endangered species which is the subject of this permit, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: December 6, 2004.

Stephen L. Leathery,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 04–27179 Filed 12–9–04; 8:45 am]

BILLING CODE 3510–22–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Solicitation of Public Comments on Request for Textile and Apparel Safeguard Action on Imports from China

December 6, 2004.

AGENCY: The Committee for the Implementation of Textile Agreements (the Committee)

ACTION: Solicitation of public comments concerning a request for safeguard action on imports from China of men's and boys' wool trousers (Category 447).

SUMMARY: The Committee has received a request from the National Council of Textile Organizations, the National Textile Association, the American Manufacturing Trade Action Coalition, SEAMS, and UNITE HERE! (Requestors) asking the Committee to limit imports from China of men's and boys' wool trousers in accordance with the textile

and apparel safeguard provision of the Working Party on the Accession of China to the World Trade Organization (the Accession Agreement). The Committee hereby solicits public comments on this request.

FOR FURTHER INFORMATION CONTACT: Jay Dowling, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-4058.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agriculture Act of 1956, as amended; Executive Order 11651, as amended.

Background

The textile and apparel safeguard provision of the Accession Agreement provides for the United States and other members of the World Trade Organization that believe imports of Chinese origin textile and apparel products are, due to market disruption, threatening to impede the orderly development of trade in these products to request consultations with China with a view to easing or avoiding the disruption. Pursuant to this provision, if the United States requests consultations with China, it must, at the time of the request, provide China with a detailed factual statement showing ''(1) the existence or threat of market disruption; and (2) the role of products of Chinese origin in that disruption.'' Beginning on the date that it receives such a request, China must restrict its shipments to the United States to a level no greater than 7.5 percent (6 percent for wool product categories) above the amount entered during the first 12 months of the most recent 14 months preceding the request. If exports from China exceed that amount, the United States may enforce the restriction.

The Committee has published procedures (the Procedures) it follows in considering requests for Accession Agreement textile and apparel safeguard actions (68 FR 27787, May 21, 2003; 68 FR 49440, August 18, 2003), including the information that must be included in such requests in order for the Committee to consider them.

On November 12, 2004, the Requestors asked the Committee to impose an Accession Agreement textile and apparel safeguard action on imports from China of men's and boys' wool trousers (Category 447) on the ground that an anticipated increase in imports of men's and boys' wool trousers after January 1, 2005, threatens to disrupt the U.S. market for men's and boys' wool trousers. The request is available at **http://otexa.ita.doc.gov/Safeguard__intro.htm**. In light of the considerations set forth in the Procedures, the Committee has determined that the Requestors have provided the information necessary for the Committee to consider the request.

The Committee is soliciting public comments on the request, in particular with regard to whether there is a threat of disruption to the U.S. market for men's and boys' wool trousers and, if so, the role of Chinese-origin men's and boys' wool trousers in that disruption. To this end, the Committee seeks relevant information addressing factors such as the following, which may be relevant in the particular circumstances of this case, involving a product under a quota that will be removed on January 1, 2005: (1) Whether imports of men's and boys' wool trousers from China are entering, or are expected to enter, the United States at prices that are substantially below prices of the like or directly competitive U.S. product, and whether those imports are likely to have a significant depressing or suppressing effect on domestic prices of the like or directly competitive U.S. product or are likely to increase demand for further imports from China; (2) Whether exports of Chinese-origin men's and boys' wool trousers to the United States are likely to increase substantially and imminently (due to existing unused production capacity, to capacity that can easily be shifted from the production of other products to the production of men's and boys' wool trousers, or to an imminent and substantial increase in production capacity or investment in production capacity), taking into account the availability of other markets to absorb any additional exports; (3) Whether Chinese-origin men's and boys' wool trousers that are presently sold in the Chinese market or in third-country markets will be diverted to the U.S. market in the imminent future (for example, due to more favorable pricing in the U.S. market or to existing or imminent import restraints into third country markets); (4) The level and the extent of any recent change in inventories of men's and boys' wool trousers in China or in U.S. bonded warehouses; (5) Whether conditions of the domestic industry of the like or directly competitive product demonstrate that m!arket disruption is likely (as may be evident from any anticipated factory closures or decline in investment in the production of men's and boys' wool trousers, and whether actual or anticipated imports of Chinese-origin men's and boys' wool trousers are likely to affect the development and production efforts of the U.S. men's and boys' wool trousers industry; and (6) Whether U.S. managers, retailers, purchasers, importers, or other market participants have recognized Chinese producers of men's and boys' wool trousers as potential suppliers (for example, through pre-qualification procedures or framework agreements).

Comments may be submitted by any interested person. Comments must be received no later than January 10, 2005. Interested persons are invited to submit ten copies of such comments to the Chairman, Committee for the Implementation of Textile Agreements, Room 3001A, U.S. Department of Commerce, 14th and Constitution Avenue N.W., Washington, DC 20230.

The Committee will protect any business confidential information that is marked ''business confidential'' from disclosure to the full extent permitted by law. To the extent that business confidential information is provided, two copies of a non-confidential version must also be provided in which business confidential information is summarized or, if necessary, deleted. Comments received, with the exception of information marked ''business confidential'', will be available for inspection between Monday - Friday, 8:30 a.m and 5:30 p.m in the Trade Reference and Assistance Center Help Desk, Suite 800M, USA Trade Information Center, Ronald Reagan Building, 1300 Pennsylvania Avenue, NW, Washington, DC, (202) 482-3433.

The Committee will make a determination within 60 calendar days of the close of the comment period as to whether the United States will request consultations with China. If the Committee is unable to make a determination within 60 calendar days, it will cause to be published a notice in the Federal Register, including the date by which it will make a determination. If the Committee makes a negative determination, it will cause this determination and the reasons therefore to be published in the Federal Register. If the Committee makes an affirmative determination that imports of Chinese-origin men's and boys' wool trousers threaten to disrupt the U.S. market, the United States will request consultations with China with a view to easing or avoiding the disruption.

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 04–27181 Filed 12–9–04; 8:45 am]

BILLING CODE 3510–DS

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Proposed Information Collection; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the ''Corporation''), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, the Corporation is soliciting comments concerning its proposed data collection instrument entitled: Field Network Pilot Study Report Form. Copies of the proposed information collection request may be obtained by contacting the office listed below in the **ADDRESSES** section of this notice.

DATES: Comments on this notice must be received by February 8, 2005, to be assured of consideration.

ADDRESSES: You may submit written input to the Corporation by any of the following methods:

(1) Electronically through the Corporation's e-mail address system to Kimberly Spring at *KSpring@cns.gov.*

(2) By fax to 202–565–2785, Attention Ms. Kimberly Spring.

(3) By mail sent to: Corporation for National and Community Service, Department of Research and Policy Development, 8th Floor, Attn: Ms. Kimberly Spring, 1201 New York Avenue, NW., Washington, DC 20525.

(4) By hand delivery or by courier to the Corporation's mailroom at Room 6010 at the mail address given in paragraph (3) above, between 9 a.m. and 4 p.m. Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kimberly Spring at (202) 606–5000, ext. 543, by e-mail at *KSpring@cns.gov.*

SUPPLEMENTARY INFORMATION: The Corporation is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Propose ways to enhance the quality, utility and clarity of the information to be collected; and
- Propose ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Background: The Corporation has contracted with the Nelson A. Rockefeller Institute of Government to carry out a Field Network Pilot Study to learn how the Corporation's goals and requirements regarding capacity building and performance measurement are affecting the AmeriCorps program and the nonprofit organizations where AmeriCorps members serve. The Pilot Study will consider how grantee and subgrantee organizations are selected; how the Corporation communicates with grantees and subgrantees; how local contexts and available funding opportunities vary from state to state; and how the Corporation's goals and requirements fit into the context of the grantees' and subgrantees' own policies and the many diverse responsibilities they face.

The Field Network Pilot Study Report Form will be used to assess the impact of the Corporation's policies around capacity building and the performance measurement initiative. Independent, local field researchers will be employed in collecting the information. During the data-gathering phase of the Pilot Study, the researchers will refer to background information about the Corporation, its programs, and the Field Network method.

Current Action: The Corporation seeks public comment on the Report Form questions, the introductory statement, and the accompanying background package.

Type of Review: New.

Agency: Corporation for National and Community Service.

Title: Field Network Pilot Study Report Form.

OMB Number: None.

Agency Number: N/A.

Affected Public: Non-profit Institutions; State, Local or Tribal Government.

Total Respondents: 84.

Frequency: Annually.

Average Time Per Response: 3 hours.

Estimated Total Burden Hours: 252.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: December 6, 2004.

Robert T. Grimm, Jr.,

Director, Research and Policy Development.

[FR Doc. 04–27146 Filed 12–9–04; 8:45 am]

BILLING CODE 6050–$$–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Information Collection; Submission for OMB Review; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the ''Corporation''), has submitted a public information collection request (ICR) entitled Study of Volunteers' Experience in the VISTA Program to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995, Pub. L. 104–13, (44 U.S.C. Chapter 35). Copies of this ICR, with applicable supporting documentation, may be obtained by calling the Corporation for National and Community Service, Kelly Arey at (202) 606–5000, ext. 197. Individuals who use a telecommunications device for the deaf (TTY–TDD) may call (202) 565–2799 between 8:30 a.m. and 5 p.m. eastern time, Monday through Friday.

DATES: Comments must be received on or before January 10, 2005.

ADDRESSES: Comments may be submitted, identified by the title of the information collection activity, by any of the following two methods:

(1) By fax to: (202) 395–6974, Attention: Ms. Katherine Astrich, OMB Desk Officer for the Corporation for National and Community Service; and

(2) Electronically by e-mail to: *Katherine_T._Astrich@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: The OMB is particularly interested in comments which:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Propose ways to enhance the quality, utility, and clarity of the information to be collected; and

• Propose ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

Comments

A 60-day public comment Notice was published in the **Federal Register** on July 29, 2004. This comment period ended September 27, 2004. No comments were received from this Notice.

Description: The Corporation for National and Community Service is strongly committed to evaluating the effectiveness of its programs. VISTA is our country's longest continually operating domestic service program, with over 130,000 participants enrolling since its inception in 1965. Since 1994 the program has been administered by the Corporation as part of AmeriCorps. VISTA participants work in communities to build local capacity to advance economic development in low-income neighborhoods across the United States. The study will examine the long-term impacts VISTA service has on participants' civic attitudes, life decisions, goals, values, and enduring habits of civic engagement.

The objective of this study is to explore the long-term impacts of VISTA participation from 1965–1994 on the lives of participants to a comparison group who enrolled in VISTA during the same time period and completed the VISTA orientation but who did not actually serve in the program (or served less than one month). To meet these objectives, a sample of VISTA participants and near-participants will be drawn from the roster of individuals enrolling in VISTA from 1965 to 1993. In addition to collecting information on the outcomes specified above, data on respondent demographics and pre-VISTA experiences will be collected. The inclusion of a comparison group of near-participants will provide insight into the outcomes realized by VISTA participants who completed their term of service.

This study will gather data using phone surveys and in-person interviews. The phone surveys will provide largely quantitative information, while the in-person interviews will allow for the collection of highly detailed and more qualitative descriptions of the life courses charted by VISTA participants and near-participants.

Type of Review: New Information Collection.

Agency: Corporation for National and Community Service.

Title: Study of Volunteers' Experience in the VISTA Program.

OMB Number: None.

Agency Number: None.

Affected Public: Individuals and households.

Total Respondents: 1400.

Frequency: Once.

Average Time Per Response: 43 minutes (telephone survey: average of 35 minutes per respondent; the in-person interview: average 3 hours per respondent).

Estimated Total Burden Hours: 997 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Dated: November 29, 2004.

Robert Grimm,

Director, Office of Research and Policy Development.

[FR Doc. 04–27147 Filed 12–9–04; 8:45 am]

BILLING CODE 6050–$$–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Approval of an Information Collection Currently Approved Through Emergency Clearance; Submission for OMB review; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the ''Corporation''), has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13), (44 U.S.C. Chapter 35). Copies of the ICR, with applicable supporting documentation, may be obtained by calling the Corporation for National and Community Service, Kimberly Spring, ext. 543. Individuals who use a telecommunications device for the deaf (TTY–TDD) may call (202) 565–2799 between 8:30 a.m. and 5 p.m. eastern time, Monday through Friday.

Comments should be sent to the Office of Information and Regulatory Affairs, Attn: Ms. Katherine Astrich, OMB Desk Officer for the Corporation for National and Community Service, Office of Management and Budget, Room 10235, Washington, DC, 20503, (202) 395–4718, within 30 days from the date of this publication in the **Federal Register**.

The initial 60-day **Federal Register** notice for the Next Generation Grants Concept Paper and Application Instructions was published on June 9, 2004. The comment period for this notice has elapsed.

SUPPLEMENTARY INFORMATION: 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 Corporation, 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;

• Propose ways to enhance the quality, utility, and clarity of the information to be collected; and

• Propose ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

Type of Review: Currently approved through emergency clearance.

Agency: Corporation for National and Community Service.

Title: Next Generation Grants Concept Paper and Application Instructions.

OMB Number: 3045–0087.

Frequency: Annually.

Affected Public: Non-profit organizations and institutions; State, Local or Tribal Government.

Number of Respondents: 400 for the Concept Paper Instructions; 40 for the Application Instructions.

Estimated Time Per Respondent: Ten hours for each set of instructions.

Total Burden Hours: 4400 hours (4000 for Concept Paper Instructions and 400 for Application Instructions).

Total Burden Cost (capital/startup): N/A.

Total Annual Cost (operating/maintaining systems or purchasing services): None.

Dated: December 3, 2004.

Robert Grimm,

Director, Department of Research and Policy Development.

[FR Doc. 04–27148 Filed 12–9–04; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 05–05]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense if publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. J. Hurd, DSCA/OPS–ADMIN, (703) 604–6575.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 05–05 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: December 6, 2004.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–M

DEFENSE SECURITY COOPERATION AGENCY

WASHINGTON, DC 20301-2800

16 NOV 2004

In reply refer to:
I-04/009141

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515-6501

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 05-05, concerning the Department of the Navy's proposed Letter(s) of Offer and Acceptance to Pakistan for defense articles and services estimated to cost $155 million. Soon after this letter is delivered to your office, we plan to notify the news media.

Sincerely,

Richard J. Millies
Deputy Director

Enclosures:
1. **Transmittal No. 05-05**
2. **Policy Justification**
3. **Sensitivity of Technology**

Same ltr to: House Committee on International Relations
Senate Committee on Foreign Relations
House Committee on Armed Services
Senate Committee on Armed Services
House Committee on Appropriations
Senate Committee on Appropriations

Transmittal No. 05-05

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser: Pakistan**

(ii) **Total Estimated Value:**

Major Defense Equipment*	**$113 million**
Other	**$ 42 million**
TOTAL	**$155 million**

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase: six PHALANX Close-In Weapon Systems (CIWS), upgrade of six PHALANX CIWS Block 0 to Block 1B, spare and repair parts, modification kits, supply and support equipment, personnel training and training equipment, publications and technical data, U.S. Government and contractor engineering and logistics services and other related elements of logistics support.**

(iv) **Military Department: Navy (GCU and LCK)**

(v) **Prior Related Cases, if any: none**

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: none**

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: See Annex attached.**

(viii) **Date Report Delivered to Congress:** 16 NOV 2004

* **as defined in Section 47(6) of the Arms Export Control Act.**

POLICY JUSTIFICATION

Pakistan – PHALANX Close-In Weapon Systems

The Government of Pakistan has requested a possible sale for six PHALANX Close-In Weapon Systems (CIWS), upgrade of six PHALANX CIWS Block 0 to Block 1B, spare and repair parts, modification kits, supply and support equipment, personnel training and training equipment, publications and technical data, U.S. Government and contractor engineering and logistics services and other related elements of logistics support. The estimated cost is $155 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country that continues to be a key ally in the global war on terrorism.

The proposed sale will provide Pakistani surface ships with a highly lethal defense capability against inbound aircraft, missiles, and fast moving surface craft. The modernization of the CIWS will enhance the capabilities of the Pakistani Navy and support its regional influence. It will further allow Pakistan to ensure the viability of their existing CIWSs by facilitating the upgrade of the current Block 0 system that are being phased out and becoming unsupportable by U.S. Navy logistic systems. Upgrading of the current system into the Block configuration that the U.S. Navy operates from will also reduce Pakistani logistical costs and will also reduce overall operating expenses.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be The Raytheon Company of Tucson, Arizona. There are no known offset agreements proposed in connection with this potential sale.

There will be U.S. Government and contractor representatives for one-week intervals twice annually to participate in program management and technical reviews to Pakistan.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 05-05

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex Item No. vii

(vii) Sensitivity of Technology:

1. The PHALANX Close-in Weapons System (CIWS) MK 15 Block 1B is a self defense weapons system which provides Naval surface forces with a capability to engage high speed inbound air contacts. Additionally, the Block 1B allows for engagement of high-speed surface contacts. The highest classification of any data and/or items associated with this proposed refurbishment/sale including publications, documentation, operations, supply and training is Confidential.

2. The refurbishment/sale of the PHALANX Close-in Weapons System (CIWS) MK 15 Block 1B under this proposed case will result in the transfer of sensitive technological information to Pakistan. Both classified and unclassified defense equipment and technical data will be involved. The CIWS MK15 BLK 1B crystals and the Operational and Maintenance Procedures are classified Confidential. Equipment and documentation to be provided will include: MK 15 BLK1B mounts, gun barrels, PASS equipment and tapes, support and test equipment, General Purpose Electronic Test Equipment, and publications.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. 04–27125 Filed 12–9–04; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 05–07]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. J. Hurd, DSCA/OPS–ADMIN, (703) 604–6575.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 05–07 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: December 6, 2004.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–M

DEFENSE SECURITY COOPERATION AGENCY

WASHINGTON, DC 20301-2800

16 NOV 2004

In reply refer to:
I-04/008459

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515-6501

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 05-07, concerning the Department of the Navy's proposed Letter(s) of Offer and Acceptance to Pakistan for defense articles and services estimated to cost $970 million. Soon after this letter is delivered to your office, we plan to notify the news media.

Sincerely,

Richard J. Millies
Deputy Director

Enclosures:
1. **Transmittal No. 05-07**
2. **Policy Justification**
3. **Sensitivity of Technology**

Same ltr to: House Committee on International Relations
Senate Committee on Foreign Relations
House Committee on Armed Services
Senate Committee on Armed Services
House Committee on Appropriations
Senate Committee on Appropriations

Transmittal No. 05-07

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser: Pakistan**

(ii) **Total Estimated Value:**

Major Defense Equipment*	**$658 million**
Other	**$312 million**
TOTAL	**$970 million**

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase: eight P-3C aircraft with T-56 engines, communications equipment, training devices, medical services, support and test equipment, engineering technical services, supply support, operation and maintenance training, documentation, spare/repair parts, publications, documentation, personnel training, training equipment, contractor technical and logistics personnel services, and other related support elements.**

(iv) **Military Department: Navy (SAZ)**

(v) **Prior Related Cases, if any: FMS case SAL - $212 million - 21Jul88**

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: none**

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: See Annex attached**

(viii) **Date Report Delivered to Congress:** 16 NOV 2004

*** as defined in Section 47(6) of the Arms Export Control Act.**

POLICY JUSTIFICATION

Pakistan – P-3C Aircraft

The Government of Pakistan has requested a possible sale for eight P-3C aircraft with T-56 engines, communications equipment, training devices, medical services, support and test equipment, engineering technical services, supply support, operation and maintenance training, documentation, spare/repair parts, publications, documentation, personnel training, training equipment, contractor technical and logistics personnel services, and other related support elements. The estimated cost is $970 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country that has been and continues to be an important force for economic progress in South Asia and the global war on terrorism. The command-and-control capabilities of these aircraft will improve Pakistan's ability to restrict the littoral movement of terrorists along Pakistan's southern border and ensure Pakistan's overall ability to maintain integrity of their borders.

Pakistan intends to use the proposed purchase to develop a long needed fleet of maritime and border surveillance aircraft. The addition of these aircraft will provide Pakistan with search surveillance, and control capability in support of maritime interdiction operations and increase their ability to support the U.S. Operation Enduring Freedom Operations; anti-ship and anti-submarine warfare capabilities; and a control capability over land against transnational terrorists and narcotics smugglers. The modernization will enhance the capabilities of the Pakistani Navy and support its regional influence and meet its legitimate self-defense needs. Pakistan is capable of absorbing and maintaining these additional aircraft in its inventory.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be Lockheed Martin Company of Greenville, South Carolina. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require the assignment of several U.S. Government and contractor representatives for two-week intervals twice annually to participate in training, program management and technical review.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 05-07

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex
Item No. vii

(vii) Sensitivity of Technology:

1. The P-3C "ORION" is a land-based, long-range, four-engine turboprop (T-56 engine), anti-submarine and maritime surveillance aircraft. Originally designed as an anti-submarine warfare patrol aircraft, the P-3C's mission has evolved to include surveillance of the battle space, either at sea or over land. The avionics system is integrated by a digital computer that supports all of the tactical displays, monitors and then automatically launches ordnance. In addition, the system coordinates navigation information and accepts sensor data inputs for tactical display and storage. The P-3C can carry a mixed payload of weapons internally and on wing pylons. Some of the publications, tactical equipment performance specifications, operational capabilities, and vulnerability to countermeasures are classified Secret. The classified information that will be provided consists only of that necessary for Pakistan to operate, maintain, and overhaul the P-3C airframe, T-56 engines, some of the installed avionics, and data management system software. Certain tactical systems will be returned to the original equipment manufacturer for repair, due to technology sensitivity. The P-3C, the Tactical Support Center (TSC) and the Mobile Operations Command Center (MOCC) include the following classified components: aircraft data management system, communications, and tactical systems, aircraft, TSC and MOCC software and aircraft, TSC and MOCC software documentation. The proposed sale is expected to provide classified equipment and documentation classified up to Secret. The classified information to be provided consists of that which is necessary for the operation, maintenance, and repair (through intermediate level) of the data link terminal, installed systems, and related software.

2. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software, the information could be used to develop countermeasures, which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. 04–27126 Filed 12–9–04; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 05–06]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security cooperation Agency.

ACTION: Notice.

SUMMARY: Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. J. Hurd, DSCA/OPS–ADMIN, (703) 604–6575.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 05–06 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: December 6, 2004.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer Department of Defense.

BILLING CODE 5001–06–M

DEFENSE SECURITY COOPERATION AGENCY

WASHINGTON, DC 20301-2800

16 NOV 2004
In reply refer to:
I-04/007892

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515-6501

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 05-06, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance to Pakistan for defense articles and services estimated to cost $82 million. Soon after this letter is delivered to your office, we plan to notify the news media.

Sincerely,

Richard J. Millies
Deputy Director

Enclosures:
1. **Transmittal No. 05-06**
2. **Policy Justification**
3. **Sensitivity of Technology**

Same ltr to: House Committee on International Relations
Senate Committee on Foreign Relations
House Committee on Armed Services
Senate Committee on Armed Services
House Committee on Appropriations
Senate Committee on Appropriations

Transmittal No. 05-06

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser: Pakistan**

(ii) **Total Estimated Value:**

Major Defense Equipment*	**$81 million**
Other	**$ 1 million**
TOTAL	**$82 million**

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase: 2,000 TOW-2A missiles, 14 TOW-2A Fly-to-Buy missiles, spare and repair parts, technical support, support equipment, personnel training and training equipment, technical data and publications, U.S. Government and contractor engineering and logistics support services, and other related elements of logistics support.**

(iv) **Military Department: Army (VZR)**

(v) **Prior Related Cases, if any:**
FMS case VIC - $ 9 million - 30Jun88
FMS case VFU - $19 million - 30Jun86

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: none**

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: See Annex attached**

(viii) **Date Report Delivered to Congress:** 16 NOV 2004

*** as defined in Section 47(6) of the Arms Export Control Act.**

POLICY JUSTIFICATION

Pakistan - TOW-2A Anti-Armor Guided Missiles

The Government of Pakistan has requested a possible sale of 2,000 TOW-2A missiles, 14 TOW-2A Fly-to-Buy missiles, spare and repair parts, technical support, support equipment, personnel training and training equipment, technical data and publications, U.S. Government and contractor engineering and logistics support services, and other related elements of logistics support. The estimated cost is $82 million.

This proposed sale will contribute to furthering the foreign policy and national security of the United States by helping a friendly country provide for its own legitimate self-defense needs and to enable Pakistan to support U.S. operations against terrorist activity along its porous borders. In addition, these missiles have most recently been employed in several global war on terrorism operations in the tribal areas of Pakistan and have allowed - when coupled with Cobra attack helicopters - the Government of Pakistan to employ new tactics, techniques and procedures that have proven highly effective against terrorists.

Pakistan will augment its land forces with these TOW-2A anti-armor guided missiles. Pakistan will use these missiles to increase its military defensive posture and will have no difficulty absorbing these additional missiles into its armed forces. Pakistan's existing inventory of TOW missiles will soon begin to be affected by its specified shelf life. While TOW missiles can be employed beyond their shelf life, system reliability and safety are eroded. Pakistan continues to expended TOW missiles in both training exercises and combat operations.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be Raytheon Company in Tucson, Arizona. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to Pakistan.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 05-06

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex Item No. vii

(vii) Sensitivity of Technology:

1. The TOW-2A (Tube-Launched, Optical-Tracked, Wire-Guided) missile is a heavy anti-tank weapon system, consisting of a launcher and a missile. The gunner defines the aim point by maintaining the sight cross hairs on the target. The launcher automatically steers the missile along the line-of-sight toward the aim point via a pair of wires that physically link the missile and the launcher. The TOW-2A configuration is the only direct attack version of the TOW family of missiles capable of defeating modern threat targets. It consists of a single main warhead and a standoff probe. The probe contains a precursor charge that detonates upon contact with the target for pre-emptive removal of reactive armor. The main charge is detonated by a subsequent timed interval or by contact with the target.

2. The TOW-2A Weapon System hardware and documentation provided with this proposed sale are Unclassified. However, sensitive technology is contained within the system itself. This sensitivity is primarily in the software programs, which instruct the system how to operate in the presence of countermeasures. Programs are contained in the system in the form of microprocessors with only Read out Memory maps being available, which do not provide the software program itself. The overall hardware is also considered sensitive in that the modulation frequency and infrared wavelengths could be useful in attempted countermeasure development. The benefits to be derived from this proposed sale outweigh the potential damage that could result if sensitive technology were revealed to unauthorized persons.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. 04–27127 Filed 12–9–04; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 05–09]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. J. Hurd, DSCA/OPS–ADMIN, (703) 604–6575.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 05–09 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: December 6, 2004.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–M

DEFENSE SECURITY COOPERATION AGENCY

WASHINGTON, DC 20301-2800

17 NOV 2004

In reply refer to:
I-04/011339

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515-6501

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 05-09, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance to United Arab Emirates for defense articles and services estimated to cost $135 million. Soon after this letter is delivered to your office, we plan to notify the news media.

Sincerely,

Richard J. Millies
Deputy Director

Enclosures:
1. Transmittal No. 05-09
2. Policy Justification
3. Sensitivity of Technology

Same ltr to: House Committee on International Relations
Senate Committee on Foreign Relations
House Committee on Armed Services
Senate Committee on Armed Services
House Committee on Appropriations
Senate Committee on Appropriations

Transmittal No. 05-09

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended (U)

(i) **Prospective Purchaser: United Arab Emirates**

(ii) **Total Estimated Value:**

Major Defense Equipment*	$127 million
Other	$ 8 million
TOTAL	$135 million

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase: 1,000 JAVELIN anti-tank missile systems consisting of 100 JAVELIN command launch units and 1,000 JAVELIN missile rounds, simulators, trainers, support equipment, spare and repair parts, publications and technical data, personnel training and equipment, U.S. Government and contractor engineering and logistics personnel services, a Quality Assurance Team, and other related elements of logistics support.**

(iv) **Military Department: Army (ZUB)**

(v) **Prior Related Cases, if any: none**

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: none**

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: See Annex attached**

(viii) **Date Report Delivered to Congress: 17 NOV 2004**

*** as defined in Section 47(6) of the Arms Export Control Act.**

POLICY JUSTIFICATION

United Arab Emirates – JAVELIN Anti-tank Missile Systems

The Government of United Arab Emirates (UAE) has requested a possible sale of 1,000 JAVELIN anti-tank missile systems consisting of 100 JAVELIN command launch units and 1,000 JAVELIN missile rounds, simulators, trainers, support equipment, spare and repair parts, publications and technical data, personnel training and equipment, U.S. Government and contractor engineering and logistics personnel services, a Quality Assurance Team, and other related elements of logistics support. The estimated cost is $135 million.

This proposed sale will contribute to the foreign policy and national security of the United States (U.S.) by helping to improve the security of a friendly country that has been and continues to be an important force for political stability and economic progress in the Middle East.

The UAE will use these JAVELIN anti-tank missile systems to enhance its direct fire capability for infantry, cavalry and commando units against armored vehicles, buildings and field fortifications. These systems will provide UAE with a strong man-portable, direct fire capability. United Arab Emirates will have no difficulty absorbing these systems into its armed forces.

The desert warfare missions of the infantry and light armored forces of the UAE require the protection afforded by the capabilities of the JAVELIN system. The UAE land forces are small, well-rounded forces that are multi-mission oriented. JAVELIN will provide the forces with a credible anti-armor defense that is critical to success in the open desert. The proposed sale of JAVELIN is consistent with the UAE's ongoing efforts to modernize its armed forces and the presence of the weapon in the land forces' inventory will provide yet another inroad for enhancing U.S. and UAE military interoperability.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be JAVELIN Joint Venture (Raytheon and Lockheed Martin) of Orlando, Florida. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require the assignment of a U.S. Government Quality Assurance Team consisting of two U.S. Government and one contractor representatives to UAE for one week to assist in the delivery and deployment of the missiles.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 05-09

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex
Item No. vii

(vii) Sensitivity of Technology:

1. The JAVELIN anti-tank missile system provides a man-portable, medium anti-tank capability to infantry, scouts, and combat engineers. JAVELIN is comprised of two major tactical components; a reusable Command Launch Unit (CLU) and a missile sealed in a disposable launch tube assembly. The CLU incorporates an integrated day/night sight and provides target engagement capability in adverse weather and countermeasure environments. The CLU may also be used in the stand-alone mode for battlefield surveillance and target detection. JAVELIN's key technical feature is the use of fire-and-forget technology that allows the gunner to fire and immediately take cover. Additional special features are the top attack and/or direct fire modes (for targets under cover), integrated day/night sight, advanced tandem warhead, imaging infrared seeker, target lock-on before launch, and soft launch from enclosures or covered fighting positions. If the software was compromised, it could result in a loss of sensitive technology, revealing the performance capabilities of the JAVELIN Missile System. Reverse engineering of the software would require a substantial effort. While the JAVELIN system is Unclassified, Secret disclosure is required in order to employ, operate, and train on the system.

2. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. 04–27128 Filed 12–9–04; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board

AGENCY: Department of Defense.

ACTION: Notice of Advisory Committee Meeting.

SUMMARY: The Defense Science Board Task Force on Force Protection in Urban and Unconventional Environments will meet in closed session on December 14–16, 2004, at SAI, 3601 Wilson Boulevard, Arlington, VA. This Task Force will review and evaluate force protection capabilities in urban and unconventional environments and provide recommendations to effect change to the future Joint Force.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition, Technology & Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. Specifically, the Task Force's foci will be to evaluate force protection in the context of post major combat operations that have been conducted in Iraq and Afghanistan. In the operations, loss of national treasure—military and civilian, U.S. and other nations—has resulted from actions executed by non-state and rogue actors. The threat and capabilities these insurgent, terrorist and criminal actions present post a most serious challenge to our ability to achieve unified action.

In accordance with Section 10(d) of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C. App. 2), it has been determined

that these Defense Science Board Task Force meetings concern matters listed in 5 U.S.C. 552b(c)(1) and that, accordingly, these meetings will be closed to the public.

Due to scheduling difficulties, there is insufficient time to provide timely notice required by Section 10(a)(2) of the Federal Advisory Committee Act and Subsection 101–6.1015(b) of the GSA Final Rule on Federal Advisory Committee Management, 41 CFR part 101–6, which further requires publication at least 15 calendar days prior to the meeting.

Dated: December 6, 2004.

Jeannette Owings-Ballard,

OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 04–27120 Filed 12–9–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board

AGENCY: Department of Defense.

ACTION: Notice of Advisory Committee meeting.

SUMMARY: The Defense Science Board Task Force on Management Oversight of Acquisition Organizations will meeting closed session on December 17, 2004, at SAIC, 4001 N. Fairfax Drive, Arlington, VA. This Task Force will review the contracting and acquisition of several organizations. Two organizations will provide classified programs (SOCOM and MDA). The military departments will provide actual examples of acquisitions using source selection data to include proprietary information. The inclusion of classified and proprietary information does not lend itself to an open meeting.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition, Technology & Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings, the Defense Science Board Task Force will assess whether all major acquisition organizations within the Department have adequate management and oversight processes, including what changes might be necessary to implement such process where needed. The task force will also review whether simplification of the acquisition structure could improve both efficiency and oversight.

In accordance with Section 10(d) of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C. App. 2), it has been determined that these Defense Science Board Task Force meetings concern matters listed in 5 U.S.C. 552b(c)(1) and that, accordingly, these meetings will be closed to the public.

Dated: December 6, 2004.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–27121 Filed 12–9–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board

AGENCY: Department of Defense.

ACTION: Notice of Advisory Committee Meeting.

SUMMARY: The Defense Science Board Task Force on Mobility will meet in closed session on January 12, 2005, in Arlington, VA. This Task Force will identify the acquisition issues in improving our strategic mobility capabilities.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition, Technology & Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. At this meeting, the Defense Science Board Task Force will review: The part transport plays in our present-day military capability—the technical strengths and weakness the operational opportunities and constraints; the possible advantage of better alignment of current assets with those in production and those to be delivered in the very near future; how basing and deployment strategies—CONUS-basing, repositioning (ashore or afloat), and seabasing—drive our mobility effectiveness; the possible advantages available from new transport technologies and systems whose expected IOC dates are either short term (~12 years) or, separately, the long term (~25 years).

In accordance with Section 10(d) of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C. App. 2), it has been determined that this Defense Science Board Task Force meeting concerns matters listed in 5 U.S.C. 552b(c)(1) and that, accordingly, the meeting will be closed to the public.

Dated: December 6, 2004.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–27122 Filed 12–9–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board

AGENCY: Department of Defense.

ACTION: Notice of Advisory Committee Meeting.

SUMMARY: The Defense Science Board Task Force on Munitions system Reliability will meet in closed session on December 22, 2004, at SAIC, 4001 N. Fairfax Drive, Arlington, VA. This Task Force will review the efforts thus far to improve the reliability of munitions systems and identify additional steps to be taken to reduce the amount of unexploded ordnance resulting from munitions failures. The Taks Force will: conduct a methodologically sound assessment of the failure rates of U.S. munitions in actual combat use; review ongoing efforts to reduce the amount of unexploded ordnance resulting from munitions systems failures, and evaluate whether there are ways to improve or accelerate these efforts; and identify other feasible measures the U.S. can take to reduce the threat that failed munitions pose to friendly forces and noncombatants.

The mission of the Defense Science board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition, Technology & Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings, the Defense Science Board Task Force will: conduct a methodologically sound assessment of the failure rates of U.S. munitions in actual combat use; review ongoing efforts to reduce the amount of unexploded ordnance resulting from munitions systems failures, and evaluate whether there are ways to improve or accelerate these efforts; and identify other feasible measures the U.S. can take to reduce the threat that failed munitions pose to friendly forces and noncombatants.

In accordance with Section 10(d) of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C. App. 2) it has been determined that these Defense Science Board Task Force meetings concern matters listed in 5 U.S.C. 552b(c)(1) and that,

accordingly, these meetings will be closed to the public.

Dated: December 6, 2004.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–27123 Filed 12–9–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board

AGENCY: Department of Defense.

ACTION: Notice of Advisory Committee meeting.

SUMMARY: The Defense Science Board Task Force on Global Positioning System will meet in closed session on January 13, 2005, at Strategic Analysis Inc., 3601 Wilson Boulevard, Arlington, VA. The Task Force will review a range of issues dealing with Galileo (or some other future radio navigation satellite system) and provide recommendations to address these issues.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition, Technology & Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings, the Defense Science Board Task Force will address: Provision of capabilities and services within GPS to ensure its viability in commercial markets; the impact on frequency spectrum use, signal waveforms and power management; access and denial issues throughout the spectrum of conflict; possible alternatives to a global radio navigation system including the development of small compact timing devices and/or navigation units; and vulnerabilities and upgrade strategies for all global radio navigation satellite systems (GRNSS). In addition, the Task Force will assess areas in which DoD should seek strong partnering relationships outside DoD, both within government and industry. It will recommend research and development areas that are uniquely in DoD interest and might not be accomplished by the private sector.

In accordance with Section 10(d) of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C. App. II), it has been determined that these Defense Science Board Task Force meetings concern matters listed in 5 U.S.C. 552b(c)(1) and that, accordingly, these meetings will be closed to the public.

Dated: December 6, 2004.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–27124 Filed 12–9–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, DoD.

ACTION: Notice to add a system of records.

SUMMARY: The Office of the Secretary of Defense proposes to add a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on January 10, 2005, unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to OSD Privacy Act Coordinator, Records Management Section, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

FOR FURTHER INFORMATION CONTACT: Ms. Juanita Irvin at (703) 601–4722, extension 110.

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 above.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, were submitted on November 24, 2004, to the House Committee on 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: Dated December 6, 2004.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

DPR 30

SYSTEM NAME:

Department of Defense Readiness Reporting System (DRRS).

SYSTEM LOCATION:

Office of the Secretary of Defense, Office of the Under Secretary of Defense for Personnel and Readiness, Director of Readiness, Programming and Assessment, 4000 Defense Pentagon, Washington, DC 20301–4000.

Military Major Commands of the U.S. Air Force, U.S. Army, U.S. Navy and U.S. Marine Corps. For a complete list of mailing addresses, contact the system manager.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All active duty, National Guard, and Reserve Military service members of the Air Force, Navy, Army, Marine Corps, and approved foreign military personnel assigned/attached to a readiness reporting unit under the auspices of Department of Defense Readiness Reporting guidelines and procedures.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system will display record/information pertaining to readiness-related decision making data that measures capability ot accomplish assigned missions at all DoD levels to include human resource status information on amount required authorized and assigned and limited individual personnel readiness data to include by name/Social Security Number, employer, rank/grade, duty status, and skill specialty. Data related to an individual is as follows:

Readiness resource data (rank/grade, duty status, skill specialty, and deployability) and related reason codes for readiness posture can be acquired and displayed for an individual. DDRS will never display full Social Security Numbers for system users.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 117, Readiness Reporting Sytem: Establishment; Reporting to Congressional Committees; 10 U.S.C. 113, Secretary to Defense; DoD Directive 5149.2, Senior Readiness Oversight Council; DoD Directive 7730.65, Department of Defense Readiness Reporting System; and E.O. 9397 (SSN).

PURPOSE(S):

The Defense Readiness Reporting System (DRRS) provides the means to manage and report the readiness of the Department of Defense and its subordinate Components to execute the National Military Strategy as assigned by the Secretary of Defense in the Defense Planning Guidance, Contingency Planning Guidance, Theater Security Cooperation Guidance, and the Unified Command Plan. DRRS builds upon the processes and readiness

assessment tools used in the Department of Defense to establish a capabilities-based, adaptive, near real-time readiness reporting system.

All DoD Components will use the DRRS information to identify critical readiness deficiencies, develop strategies for rectifying these deficiencies, and ensure they are addressed in appropriate program/budget planning or other DoD management systems.

The major subsystems of the Defense Readiness Reporting System include:

(a) The Enhanced Status of Resources and Training System (ESORTS) is an automated, near real-time readiness reporting system that provides resource standards and current readiness status for operational forces and defense support organizations in terms of their ability to perform their mission essential tasks. ESORTS allows users electronic access into multiple readiness community data sources using ESORT tools to view readiness-reporting data in a uniform fashion from any readiness data source.

(b) The Planning and Assessment Tools Suite (PATS) provides the capability to assess plans using real unit data gathered from ESORTS; test feasibility form forces, logistics, and other aspects and assesses the ability to execute multiple plans under the National Military Strategy; and supports rapid, adaptive planning in response to contingencies.

DDRS will employ Networks and Information Integration (NII) approved web-servicing techniques to acquire and share DRRS readiness information. DRRS will obtain readiness related personnel data from the Army Human Resource Center's Integrated Total Army Personnel Database (ITAPDB), Air Force's Military Personnel Data System (MilPDS), Navy's Type Command Readiness Management System (TRMS) and Marine Corps' Marine Corps Total Force System (MCTFS).

DRRS readiness assessment process are supported by web service agents that gather information from primary source data in the net-centric environment and perform analysis and web service notification. Data sources expose their readiness related data to DRRS by mapping their data to the DRRS Readiness Markup Language (RML) specification and expose it as a Web service. In this case, a Web service is a self-contained, modular unit of software application logic. Using the RML, data source providers can share their data directly with DRRS/ESORTS users in a consistent and meaningful way not tied to any one specific software platform. Once data source providers expose their selected data using Web services, the data can be repurposed for other approved readiness and DoD-wide uses. DRRS will operate in a Secret Internet Protocol Network (SIPRNet) environment where exposure will be limited to appropriately cleared personnel.

DDRS will permit commanders to obtain pertinent readiness data personnel assigned/attached to their units.

ROUTINE USERS OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may be disclosed outside the DoD as 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 OSD compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic storage medium.

RETRIEVABILITY:

Retrieved by individual's name and Social Security Number.

SAFEGUARDS:

Access to the Defense Readiness Reporting System is limited to authorized and appropriately cleared personnel as determined by the system manager. Defense Readiness Reporting System information/records are maintained in a controlled facility. Physical entry is restricted by use of locks, guards, and is accessible only to authorized, cleared personnel. Access to information/records is limited to person(s) responsible for servicing the record in performance of their official duties and who are properly screened and cleared for need-to-know. Access to computerized data is restricted by passwords, which are changed periodically.

RETENTION AND DISPOSAL:

Disposition pending (treat records as permanent until the National Archives and Records Administration has approved the retention and disposition schedule).

SYSTEM MANAGER(S) AND ADDRESS:

Director of Readiness, Programming and Assessment, Office of the Secretary of Defense, Office of the Under Secretary Defense for Personnel and Readiness, 4000 Defense Pentagon, Washington, DC 20301–4000.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the local commander. For a complete list of mailing addresses, contact the system manager.

Individual should provide their full name, Social Security Number, and military status or other information verifiable from the record itself.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the local commander. For a complete list of mailing addresses, contact the system manager.

Individual should provide their full name, Social Security Number, and military status or other information verifiable from the record itself.

CONTESTING RECORD PROCEDURES:

The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are published in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information is obtained from DoD Staff, field installations and automated data systems for personnel and training.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 04–27129 Filed 12–9–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Department of the Air Force

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice to Alter a System of Records

SUMMARY: The Department of the Air Force is altering a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on January 10, 2005, unless comments are received which result in a contrary determination.

ADDRESSES: Send comments to the Air Force Privacy Act Manager, Office of the Chief Information Officer, AF–CIO/P, 1155 Air Force Pentagon, Washington, DC 20330–1155.

FOR FURTHER INFORMATION CONTACT: Mrs. Anne Rollins at (703) 696–6280.

SUPPLEMENTARY INFORMATION: The Department of the Air Force systems of records notices 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 above.

The proposed system report, as required by 5 U.S.C. 522a(r) of the Privacy Act of 1974, as amended, was submitted on November 24, 2004, to the House Committee on 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: December 6, 2004.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

F051 AF JA F

SYSTEM NAME:

Courts-Martial and Article 15 Records (June 11, 1997, 62 FR 31793).

CHANGES:

* * * * *

Routine uses of records maintained in the system, including categories of users and the purposes of such uses: Add a new paragraph ''To victims and witnesses of a crime for the purposes of providing information consistent with the requirements of the Victim and Witness Assistance Program and the Victims' Rights and Restitution Act of 1990 regarding the investigation and disposition of an offense.''

* * * * *

F051 AF JA F

SYSTEM NAME:

Courts-Martial and Article 15 Records.

SYSTEM LOCATION:

Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420;

Headquarters Air Force Personnel Center, 550 C Street W, Randolph Air Force Base, TX 78150–4703;

National Personnel Records Center, Military Personnel Records, 9700 Page Boulevard, St. Louis, MO 63132–5100;

Washington National Records Center, Washington, DC 20409–0002; and

Air Force major commands, major subordinate commands headquarters, and at all levels down to and including Air Force installations. Official mailing addresses are published as an appendix to the Air Force's compilation of systems of records notices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All persons subject to the Uniform Code of Military Justice (10 U.S.C. 802) who are tried by courts-martial or upon whom Article 15 punishment is imposed.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records of trial by courts-martial and records of Article 15 punishment and documents received or prepared in anticipation of judicial and non-judicial proceedings.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 815(g), Commanding officer's non-judicial punishment; 854, Record of Trial; 865, Disposition of records after review by the convening authority; and E.O. 9397.

PURPOSE(S):

Records of trial by courts-martial are used for review by the appellate and other authorities.

Portions of the record in every case are used in evaluating the individual's overall performance and inclusion in the military master personnel record; if conviction results, a record thereof can be introduced at a subsequent courts-martial trial involving the same individual; also used as source documents for collection of statistical information.

Article 15 records are used for review of legal sufficiency and action on appeals or applications for correction of military records filed before appropriate Air Force authorities; used to formulate responses to inquiries concerning individual cases made by the Congress, the President, the Department of Defense, the individual involved or other persons or agencies with a legitimate interest in the Article 15 action; used by Air Force personnel authorities in evaluating the individual's overall performance and inclusion in the individual's military master personnel record; may be used for introduction at a subsequent courts-martial trial involving the same individual; used as source documents for collection of statistical information by The Judge Advocate General.

Documents received or prepared in anticipation of judicial and non-judicial Uniform Code of Military Justice proceedings are used by prosecuting attorneys for the government to analyze evidence; to prepare for examination of witnesses; to prepare for argument before courts, magistrates, and investigating officers, and to advise commanders. Documents may be required after trial when appellate or reviewing authorities make post-trials inquiries or order new trials.

ROUTE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records, or information contained therein, may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

Records form this system may be disclosed to the Department of Veteran Affairs, the Department of Justice, the Department of State, and federal courts for determination of rights and entitlements of individuals concerned or the government.

The records may also be disclosed to a governmental board or agency or health care professional society or organization if such record or document is needed to perform licensing or professional standards monitoring related to credentialed health care practitioners or licensed non-credentialed health care personnel who are or were members of the United States Air Force, and to medical institutions or organizations wherein such member has applied for or been granted authority or employment to provide health care services if such record or document is needed to assess the professional qualifications of such member.

To victims and witnesses of a crime for the purposes of providing information consistent with the requirements of the Victim and Witness Assistance Program and the Victims' Rights and Restitution Act of 1990 regarding the investigation and disposition of an offense.

The DoD 'Blanket Routine Uses' set forth at the beginning of the Air Force's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Maintained in file folders, and in computers and computer output products.

RETRIEVABILITY:

Retrieved by name, Social Security Number, Military Service Number, or by other searchable data fields.

SAFEGUARDS:

Records are accessed by custodian of the record system and person(s) who are properly screened and cleared for need-to-know. Records are stored in vaults and locked rooms or cabinets. Records are protected by guards, and controlled by personnel screening and by visitor registers. Those in computer storage devices are protected by computer system software.

RETENTION AND DISPOSAL:

Courts-martial records are retained in office files for 2 years following date of final action and then retired as permanent. General and special courts-martial records are retired to the Washington National Records Center, Washington, DC 20409–0002.

Summary courts-martial and Article 15 records are retained in office files for 1 year or until no longer needed, whichever is sooner, and then retired as permanent.

Summary courts-martial and Article 15 records are forwarded to the Air Force Personnel Center for filing in the individual's permanent master personnel record.

Documents received or prepared in anticipation of judicial and non-judicial Uniform Code of Military Justice proceedings are maintained in office files until convictions are final or until no longer needed then destroyed. Records are destroyed by tearing into pieces, shredding, pulping, macerating or burning.

SYSTEM MANAGER(S) AND ADDRESS:

Judge Advocate General, Headquarters United States Air Force, 1420 air Force Pentagon, Washington, DC 20330–1420;

Chief, Military Personnel Records Division, Directorate of Personnel Data Systems, Headquarters Air Force Personnel Center, 550 C Street W, Randolph Air Force Base, TX 78150–4703; and

The Staff Judge Advocate at all levels of command and at Air Force installations. Official mailing addresses are published as an appendix to the Air Force's compilation of systems of records notices.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the appropriate System manager above.

Individual should provide full name, Social Security Number, service number if different than Social Security Number, unit of assignment, date of trial and type of court, if known, or date punishment imposed in the case of Article 15 action.

RECORD ACCESS PROCEDURES:

Individuals seeking to access records about themselves contained in this system of records should address written inquiries to the appropriate System manger above.

Individual should provide full name, Social Security Number, service number if different than Social Security Number, unit of assignment, date of trial and type of court, if known, or date punishment imposed in the case of Article 15 action. Requester may visit the office of the system manager. Requester must present valid identification card or driver's license.

CONTESTING RECORD PROCEDURES:

The Air Force rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Air Force Instruction 33–332; 32 CFR part 806b; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information from almost any source can be included if it is relevant and material to the Article 15 or courts-martial proceedings.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Portions of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency that performs as its principle function any activity pertaining to the enforcement of criminal laws from the following subsections of 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (H) and (I), (e)(5), (e)(8), (f), and (g).

Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2).

However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f). **Note:** When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

An exemption rule for this record system has been promulgated in accordance with the requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and published in 32 CFR part 806c. For additional information contact the system manager.

[FR Doc. 04–27130 Filed 12–9–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 8, 2005.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) title; (3) summary of the collection; (4) description of the need for, and proposed use of, the information; (5) respondents and frequency of collection; and (6) reporting and/or recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used

in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: December 7, 2004.

Angela C. Arrington,

Leader, Information Management Case Services Team Regulatory Information Management Services, Office of the Chief Information Officer.

Office of Postsecondary Education

Type of Review: Reinstatement.

Title: Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP) Application for Partnership Grants.

Frequency: One-time.

Affected Public: State, local, or tribal gov't, SEAs or LEAs; not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 1,000.

Burden Hours: 40,000.

Abstract: The purpose of this information collection is to allow Partnerships to apply for funding under the Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP) program. The information collected in the GEAR UP application package allows the Department to make determinations as to whether potential applicants are eligible for GEAR UP funding and to allow field readers to score and rank applications for the Department to make funding determinations.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 2647. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to (202) 245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Joseph Schubart at his e-mail address *Joe.Schubart@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E4–3596 Filed 12–9–04; 8:45 am]

BILLING CODE 4000–01–P

ELECTION ASSISTANCE COMMISSION

Sunshine Act Notice

AGENCY: United States Election Assistance Commission.

ACTION: Notice of public meeting agenda (amended).

DATES AND TIME: Tuesday, December 14, 2004, 10 a.m.–12 noon.

PLACE: U.S. Election Assistance Commission, 1225 New York Ave., NW., Suite 1100, Washington, DC 20005, (Metro Stop: Metro Center).

AGENDA: The Commission will receive updates and reports on the following: Title II Requirements Payments; Budget Update; EAC's 2005 HAVA Implementation Action Plan including specific discussion on the Development and Establishment of Statewide Voter Registration Databases; Other Programmatic Updates and Administrative Matters.

FOR FURTHER INFORMATION CONTACT: Bryan Whitener, Telephone: (202) 566–3100.

DeForest B. Soaries, Jr.,

Chairman, U.S. Election Assistance Commission.

[FR Doc. 04–27247 Filed 12–8–04; 11:00 am]

BILLING CODE 6820–YN–M

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: U.S. Department of Energy.

ACTION: Notice and Request for Comments.

SUMMARY: The Department of Energy (DOE), pursuant to the Paperwork Reduction Act of 1995, intends to extend for three years, an information collection package with the Office of Management and Budget (OMB) used by the Department to exercise management oversight and control over contractors including management and operating (M&O) contractors operating DOE's facilities. This information is used by the Department to perform management oversight regarding implementation of applicable statutory, regulatory and contractual requirements and obligations. The collection is critical to ensure that the Government has sufficient information to judge the degree to which contractors are meeting requirements, that public funds are spent in an efficient and effective manner and that fraud, waste and abuse are avoided.

Comments are invited on: (a) Whether the extended collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before February 8, 2005. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Written comments may be sent to: Richard Langston, ME–61, Procurement Policy Analyst, Office of Procurement and Assistance Policy, Office of Procurement and Assistance Management, U.S. Department of Energy, 1000 Independence Ave, SW., Washington, DC 20585, or by fax at 202–287–1345 or by e-mail at *richard.langston@hq.doe.gov* and to Sharon Evelin, Acting Director, Records Management Division, IM–11/ Germantown Bldg., Office of the Chief Information Officer, U.S. Department of Energy, 1000 Independence Ave, SW., Washington, DC 10585–1290, or by fax at 301–903–9061 or by e-mail at *sharon.evelin@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Richard Langston at the address listed above.

SUPPLEMENTARY INFORMATION: This package contains: (1) *OMB No.:* 1910–4100; (2) *Package Title:* Procurement; (3) *Type of Review:* renewal; (4) *Purpose:* This information is required by the Department to ensure that DOE contracts including management and operation contractors operating DOE facilities are managed efficiently and effectively and to exercise management oversight of DOE contractors; (5) *Respondents:* 3,811; (6) *Estimated Number of Burden Hours:* 1,086,529.

Statutory Authority: Department of Energy Organization Act, Pub. L. 95–91, as amended.

Issued in Washington, DC, on December 2, 2004.

Sharon Evelin,

Acting Director, Records Management Division, Office of the Chief Information Officer.

[FR Doc. 04–27143 Filed 12–9–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER98–4421–005, *et al.*]

Consumers Energy Company, et al.; Electric Rate and Corporate Filings

December 3, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Consumers Energy Company, CMS Energy Resource Management , Grayling Generating Station Limited Partnership, Genesee Power Station Limited Partnership, CMS Generation Michigan Power, L.L.C., Dearborn Industrial Generation, L.L.C.

[Docket Nos. ER98–4421–005, ER96–2350–025, ER96–2350–025, ER99–791–003, ER99–806–002, ER99–3677–004, and ER01–570–005]

Take notice that on December 1, 2004, Consumers Energy Company (Consumers), CMS Energy Resource Management Company (CMS ERM), Grayling Generating Station Limited Partnership (Grayling) Genesee Power Station Limited Partnership (Genesee), CMS Generation Michigan Power, L.L.C. (Michigan Power), and Dearborn Industrial Generation, L.L.C. (DIG) (collectively, Applicants) tendered for filing their response to the Commission Letter Order, issued October 29, 2004. Applicants also state that they have attached replacement pages 10 and 11 of Appendix A, which accurately reflects the data presented in Exhibit 4a of their November 18 Filing.

Comment Date: 5 p.m. eastern time on December 13, 2004.

2. Devon Power LLC

[Docket Nos. ER03–563–044 and EL04–102–004]

Take notice that on November 29, 2004, Devon Power LLC submitted copies of local scarcity pricing for ISO New England, Inc., in compliance with the June 2 Order issued by the Commission in Docket Nos. ER03–563–030 and EL04–102–000.

Comment Date: 5 p.m. Eastern Time on December 20, 2004.

3. Devon Power LLC

[Docket Nos. ER03–563–045 and EL04–102–005]

Take notice that on November 29, 2004, Devon Power, LLC submitted a report updating progress made in the siting within the New England control area, with particular emphasis on progress within Designated Congested Areas for ISO New England Inc., in compliance with the Commission's order issued June 2, 2004, 107 FERC ¶ 61,240 (2004).

Comment Date: 5 p.m. eastern time on December 20, 2004.

4. Midwest Independent Transmission System Operator, Inc., Public Utilities With Grandfathered Agreements in the Midwest ISO Region

[Docket Nos. ER04–691–011 and EL04–104–010]

Take notice that on December 1, 2004, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted a compliance filing pursuant to the Commission's August 6, 2004 order, *Midwest Independent Transmission System Operator, Inc.,* et al., 108 FERC ¶ 61,163 (2004). The compliance filing contains: (1) Tariff language establishing procedures for the Midwest ISO to correct prices in the event of temporary market or system operational problems; (2) a detailed plan for cutover to decentralized power system operations in the event of a failure of Day 2 market operations; (3) a report on the progress made toward achieving a trading deadline of 1100 EST for the Day-Ahead Energy Market; and (4) an independently evaluated plan for verifying the commercial operations readiness of the Midwest ISO Day 2 Energy Markets. The Midwest ISO requests an effective date of March 1, 2005, for the tariff pages submitted.

The Midwest ISO has requested waiver of the service requirements set forth in 18 CFR 385.2010. The Midwest ISO states that it has electronically served a copy of this filing, with attachments, upon all Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, the Midwest ISO Advisory Committee participants, as well as all state commissions within the region. In addition, the filing has been electronically posted on the Midwest ISO's Web site at *http://www.midwestiso.org* under the heading ''Filings to FERC'' for other interested parties in this matter. The Midwest ISO will provide hard copies to any interested parties upon request.

Comment Date: 5 p.m. eastern time on December 17, 2004.

5. NorthWestern Energy

[Docket No. ER04–1231–000]

Take notice that on November 30, 2004, NorthWestern Corporation, doing business as NorthWestern Energy, (NorthWestern Energy) submitted the Generation Interconnection Agreement between NorthWestern Corporation and NorthWestern Energy, L.L.C., pursuant to section 205 of the Federal Power Act (FPA).

Comment Date: 5 p.m. eastern time on December 21, 2004.

6. Northeast Energy Associates, A Limited Partnership

[Docket No. ER05–236–001]

Take notice that on November 30, 2004, Northeast Energy Associates, a Limited Partnership (Applicant) submitted a supplement to the application for market-based rate authority filed on November 18, 2004.

Applicant states that copies of the filing were served upon the Florida Public Service Commission.

Comment Date: 5 p.m. eastern time on December 21, 2004.

7. Avista Corporation

[Docket No. ER05–271–000]

Take notice that on November 30, 2004, Avista Corporation, (Avista Corp) submitted for filing a Non-conforming Long Term Service Agreement Between Avista Corporation and Public Utility District No. 1 of Pend Oreille County Under Avista Corp's FERC Electric Tariff Volume No. 9 and Avista Corp's FERC Electric Tariff Volume No. 10, Rate Schedule 318, with Public Utility District No. 1 of Pend Oreille County for Dynamic Capacity and Energy Service and Operating Reserves at cost-based rates under Avista Corporation's FERC Electric Tariff Volume No. 10 and Generation Exchange Service under Avista Corporation's FERC Electric Tariff First Revised Volume No. 9. Avista Corp requests an effective date of December 1, 2004.

Avista Corp states that copies of the filing were served upon the Public Utility District No. 1 of Pend Oreille County.

Comment Date: 5 p.m. eastern time on December 21, 2004.

8. New England Power Company

[Docket No. ER05–280–000]

Take notice that on December 1, 2004, New England Power Company (NEP) submitted for filing: (1) A Large Generator Interconnection Agreement between NEP, ISO–NE England, Inc.

(ISO–NE) and Dominion Energy Salem Harbor, LLC; (2) a Large Generator Interconnection Agreement between NEP, ISO–NE and Dominion Energy Brayton Point, LLC; and (3) a Large Generator Interconnection Agreement between NEP, ISO–NE and Dominion Energy Manchester Street, Inc.

NEP states that copies of this filing have been served on the Dominion Companies, ISO–NE, and regulators in the States of Rhode Island and Massachusetts.

Comment Date: 5 p.m. eastern time on December 10, 2004.

9. Georgia Power Company

[Docket No. ER05–282–000]

Take notice that on November 30, 2004, Georgia Power Company, (Georgia Power) filed a Control Area Compact (Agreement). Georgia Power states that the Agreement provides for coordination services between Georgia Power Company, Oglethorpe Power Corporation and Georgia System Operations Corporation, and that jurisdictional services are proposed to begin on February 1, 2005.

Comment Date: 5 p.m. eastern time on December 21, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all parties to this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3590 Filed 12–9–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC05–23–000, et al.]

Metro Energy, L.L.C., et al.; Electric Rate and Corporate Filings

December 2, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Metro Energy, L.L.C.

[Docket Nos. EC05–23–000 and ER01–2317–004]

Take notice that on November 24, 2004, Metro Energy, L.L.C. (Metro Energy), submitted an application pursuant to section 203 of the Federal Power Act for authorization of a disposition of a jurisdictional facility whereby ownership of an ownership interest in Metro Energy held by an indirect, wholly-owned subsidiary of DTE Energy Company (DTE Energy) will be transferred to another indirect, wholly-owned subsidiary of DTE Energy. Metro Energy's states that its sole jurisdictional facility is its market-based rate tariff.

Comment Date: 5 p.m. eastern time on December 15, 2004.

2. Entergy Services, Inc.

[Docket No. ER01–2214–004]

Take notice that on November 29, 2004, Entergy Services, Inc., (Entergy) on behalf of the Entergy Operating Companies, Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc., tendered its compliance filing in response to the Commission's order issued October 28, 2004, in *Entergy Services,* Inc., 109 FERC ¶ 61,095 (2004).

Comment Date: 5 p.m. eastern time on December 20, 2004.

3. California Independent System Operator Corporation

[Docket No. ER03–1102–007]

Take notice that on November 29, 2004, the California Independent System Operator Corporation (ISO) submitted a filing in compliance with the Commission's Order issued in Docket No. ER03–1102–006 on October 28, 2004, 109 FERC ¶ 61,087.

The ISO states that this filing has been served upon all parties on the official service list for the captioned docket. In addition, the ISO has posted this filing on the ISO home page.

Comment Date: 5 p.m. eastern time on December 20, 2004.

4. Southern California Edison Company

[Docket No. ER04–316–004]

Take notice that on November 29, 2004, Southern California Edison Company (SCE), on behalf of Mountainview Power Company, LLC (MVL), submitted a compliance filing pursuant to the Commission's Order on Rehearing issued October 28, 2004, in the above captioned proceeding, 109 FERC ¶ 61,086 (2004).

SCE states that copies of the filing were served on parties on the official service list in the above-captioned proceeding.

Comment Date: 5 p.m. eastern time on December 20, 2004.

5. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER04–458–005]

Take notice that, on November 29, 2004, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted a compliance filing pursuant to the Commission's October 28, 2004, Order, Midwest Independent Transmission System Operator, Inc., 109 FERC ¶ 61,085 (2004). Midwest ISO states that the purpose of this filing is to revise the Midwest ISO's OATT to amend and clarify the application of Attachment X, Large Generator Interconnection Procedures (LGIP) in compliance with the Commission's directives in the October 28 Order.

The Midwest ISO has also requested waiver of the service requirements set forth in 18 CFR 385.2010. The Midwest ISO has electronically served a copy of this filing, with attachments, upon all Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, the Midwest ISO Advisory Committee participants, as well as all state commissions within the region. In addition, the Midwest ISO states that the filing has been electronically posted

on the Midwest ISO's Web site at *http://www.midwestiso.org* under the heading ''Filings to FERC'' for other interested parties in this matter. The Midwest ISO also states that it will provide hard copies to any interested parties upon request.

Comment Date: 5 p.m. eastern time on December 20, 2004.

6. California Independent System Operator Corporation

[Docket No. ER04–835–005]

Take notice that on November 29, 2004, the California Independent System Operator Corporation (ISO) submitted a filing in compliance with the Commission's order issued October 29, 2004, in Docket No. ER04–835–004, 109 FERC ¶ 61,097.

The ISO states that this filing has been served upon all parties on the official service list for Docket No. ER04–835–004. In addition, the ISO states that it has posted this filing on the ISO home page.

Comment Date: 5 p.m. eastern time on December 20, 2004.

7. New England Power Pool

[Docket No. ER05–267–000]

Take notice that on November 30, 2004, the New England Power Pool (NEPOOL) Participants Committee submitted the One Hundred Ninth Agreement Amending New England Power Pool Agreement (109th Agreement) which amends Schedule 11 of the NEPOOL Tariff to add ''Mirant, Kendall Repowering Project'' to the List of Category B Generating Projects. NEPOOL requests an effective date of February 1, 2005.

The NEPOOL Participants Committee states that copies of these materials were sent to the NEPOOL Participants and the New England State governors and regulatory commissions.

Comment Date: 5 p.m. eastern time on December 21, 2004.

8. Midwest Independent Transmission System Operator, Inc.

[Docket No. TS05–7–000]

Take notice that, on November 24, 2004, the Midwest Independent Transmission System Operator, Inc. (''Midwest ISO'') tendered for filing a Request for Waiver of Standards of Conduct and For Expedited Action.

In its submission, the Midwest ISO requests a temporary, partial waiver of its Standards of Conduct to enable market participants to take part in the Midwest ISO's internal operator training in preparation for the commencement of Day 2 operations. The Midwest ISO requests expedited treatment for its Request for Waiver and that the Commission's standard notice and comment period be shortened.

To the extent necessary, the Midwest ISO has also requested waiver of the service requirements set forth in 18 CFR 385.2010. The Midwest ISO has electronically served a copy of this filing, with attachments, upon all Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, the Midwest ISO Advisory Committee participants, as well as all state commissions within the region. In addition, the filing has been electronically posted on the Midwest ISO's website at *http://www.midwestiso.org* under the heading ''Filings to FERC'' for other interested parties in this matter. The Midwest ISO will provide hard copies to any interested parties upon request.

Comment Date: 5 p.m. eastern time on December 9, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all parties to this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3591 Filed 12–9–04; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6658–5]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under Section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act, as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 564–7167.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 2, 2004 (69 FR 17403).

Draft EISs

ERP No. D–AFS–L65468–00 Rating EC2, Pacific Northwest Region Invasive Plant Program, Preventing and Managing Invasive Plants, Implementation, OR, WA, Including Portions of Del Norte and Siskiyou Counties, CA and Portions of Nez Perce, Salmon, Idaho and Adam Counties, ID.

Summary: EPA supports the management and eradication of invasive species. However, EPA expressed concerns with the level of prevention measures to curb the spread of invasives and the use of herbicides in the preferred alternative.

ERP No. D–BLM–L65462–AK Rating EO2, Northeast National Petroleum Reserve Alaska Amended Integrated Activity Plan, To Amend 1998 Northeast Petroleum Reserve, To Consider Opening Portions of the BLM-Administrated Lands, North Slope Borough, AK.

Summary: EPA has environmental objections to the Preferred Alternative, because of potentially significant adverse impacts to fish and caribou calving and inset-relief areas and mitigation corridors in the Teshekpuk Lake Special Area. EPA recommends that the selected alternatives retain the current leasing acreage and surface activity restrictions described in Alternative A and include revised stipulations and mitigation measures that would provide adequate environmental protections for the

Planning Area, including lands within the Teshekpuk Lake and Colville River Special Areas. EPA is also concerned that the Preferred Alternative could have disproportionate adverse effects on minority populations in Alaska, and recommends the BLM address this while completing the Final EIS by working with the Tribes and residents in affected communities especially regarding cultural and subsistence needs.

ERP No. D–COE–H11005–NB Rating LO, Cornhusker Army Ammunition Plant (CHAAP) Land Disposal Industrial Tracts, Proposed Disposal and Reuse of Tracts 32, 33, 34, 35, 36, 47, 61, 62, Hall County, NE.

Summary: EPA does not object to the proposed project.

ERP No. D–FHW–C53005–NJ Rating EC2, Cross Harbor Freight Movement Project, Improve the Movements of Goods Throughout Northern New Jersey and Southern New York, Funding, Kings, Richmond, Queens, New York Counties, NJ.

Summary: EPA expressed concerns regarding an intermodal facility, the impacts to air quality and wetlands, and cumulative effects.

ERP No. D–IBR–K39088–CA Rating EC2, Sacramento River Settlement Contractors (SRSC), To Renew the Settlement Contractors Long-Term Contract Renewal for 145 Contractors, Central Valley Project (CVP), Sacramento River, Shasta, Tehama, Butte, Glenn, Colusa, Sutter, Yolo, Sacramento, Portion of Placer and Solano Counties, CA.

Summary: EPA expressed concerns with the disclosure of environmental impacts as a result of the project and the direct, indirect, and cumulative impacts to water quality due to over allocation of existing water supplies.

Final EISs

ERP No. F–AFS–J65396–WY, Wyoming Range Allotment Complex, To Determine Whether or not to Allow Domestic Sheep Grazing, Bridger-Teton National Forest, Big Piney, Greys River and Jackson Ranger Districts, Sublette, Lincoln and Teton Counties, WY.

Summary: EPA expressed continuing concerns regarding soil loss, and impacts to water quality and native trout habitat in the project area.

ERP No. F–COE–E39064–FL, Programmatic EIS—Florida Keys Water Quality Improvements Program, To Implement Wastewater and Stormwater Improvements, South Florida Water Management District, Monroe County, FL.

Summary: EPA does not object to the proposed project. However, EPA suggested extending the comment period several weeks to accommodate citizens whose property was damaged in recent hurricanes.

ERP No. F–COE–L32012–AK, Unalaska Navigation Improvements Project, Construction of Harbor on Amaknak Island in Aleutian Island Chain, Locally known as ''Little South America, Integrated Feasibility Report, Aleutian Island, AK.

Summary: No formal comment letter was sent to the preparing agency.

ERP No. F–FTA–C40163–NY, Fulton Street Transit Center, Construction and Operation, To Improve Access to and from Lower Manhattan to Serve 12 NYCT Subway Lines, Metropolitan Transportation Authority (MIA), MTA New York City Transit (NYCT), New York, NY.

Summary: The Final EIS addresses all of EPA's concerns.

Dated: December 7, 2004.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 04–27174 Filed 12–9–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6658–4]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7167 or *http://www.epa.gov/compliance/nepa.*

Weekly receipt of Environmental Impact Statements

Filed November 29, 2004 Through December 3, 2004

Pursuant to 40 CFR 1506.9.

EIS No. 040553, DRAFT EIS, FRC, RI, KeySpan Liquefied Natural Gas (LNG) Facility Upgrade Project, Construction and Operation, and Algonquin Gas Transmission Project, Proposal for Site, Construct and Operate a New Natural Gas Pipeline, Coast Guard Permit, U.S. Army COE Section 10 and 404 Permits, Providence County, RI and New England, Comment Period Ends: January 24, 2005, Contact: Thomas Russo (866) 208–3372.

EIS No. 040554, DRAFT EIS, FHW, CO, Programmatic -I–70 Mountain Corridor Tier 1 Project, from Glenwood Springs and C–470 Proposes to Increase Capacity, Improve Accessibility and Mobility, and Decrease Congestion, Colorado, Garfield, Eagle, Summit, Clear Creek and Jefferson Counties, CO, Comment Period Ends: March 10, 2005, Contact: Jean Wallace (720) 963–3015.

EIS No. 040555, DRAFT EIS, NPS, TX, Big Thicket National Preserve Oil and Gas Management Plan, Implementation, Hardin, Jefferson, Orange, Liberty, Tyler, Jasper and Polk Counties, TX, Comment Period Ends: February 8, 2005, Contact: Linda Dansby (505) 988–6095.

EIS No. 040556, FINAL EIS, FHW, MN, IA, Trunk Highway 60 Reconstruction Project, Improvements from 1.8 miles south of the Minnesota-Iowa Border (120th Street) to I–90 north of the City of Worthington, Funding, U.S. Army COE Section 404 and NPDES Permits Issuance, Nobles County, MN and Osceola County, IA, Wait Period Ends: January 10, 2005, Contact: Cheryl Martin (651) 291–6120.

EIS No. 040557, DRAFT EIS, AFS, AK, Tuxekan Island Timber Sale(s) Project, Harvesting Timber, Coast Guard Bridge Permit and U.S. Army COE Section 10 and 404 Permits, Tongass National Forest, Thorne Bay Ranger District, Thorne Bay, AK, Comment Period Ends: January 24, 2005, Contact: Forrest Cole (907) 225–6215.

EIS No. 040558, FINAL EIS, AFS, KY, TN, Land Between the Lakes National Recreation Area, Proposes to Revise TVA's 1994 Natural Resources Management Plan, to Develop an Land Management Resource Plan or Area Plan, Gold Pond, Trigg and Lyon Counties, KY and Stewart County, TN, Wait Period Ends: January 10, 2005, Contact: Robert T. Jacobs (404) 347–4177. This document is available on the Internet at: *http://www.lbl.org.*

EIS No. 040559, DRAFT EIS, FHW, TN, TN–397 (Mack Hatcher Parkway Extension) Construction from US–31 (TN–6, Columbia Avenue) South of Franklin to US–341 (TN–106, Hillsboro Road) North of Franklin, Williamson County and the City of Franklin, TN, Comment Period Ends: February 17, 2005, Contact: Brian Brasher (615) 781–5763.

EIS No. 040560, FINAL EIS, AFS, MT, West Side Reservoir Post-Fire Project, Proposed Implementation of Timber Salvage and Access Management Treatments, Flathead National Forest, Hungry Horse and Spotted Bear Ranger Districts, Flathead County, MT, Wait Period Ends: January 10, 2005, Contact: Bryan Donner (406) 863–5408.

EIS No. 040561, DRAFT EIS, NRC, CT, GENERIC —License Renewal of Nuclear Plants for the Millstone Power Station, Units 2 and 3, Supplement 22 to NUREG–1437,

Implementation, New London County, CT, Comment Period Ends: March 02, 2005, Contact: Richard L. Emch, Jr. (301) 415–1590.

EIS No. 040562, DRAFT EIS, BOP, WV, Southern West Virginia Proposed Federal Correctional Institution, Four Alternatives Sites in Southern West Virginia: Boone County, Mingo County, Nicholas County, and McDowell County, WV, Comment Period Ends: January 24, 2005, Contact: Pamela J. Chandler (202) 514–6470.

EIS No. 040563, DRAFT EIS, NRC, AL, Generic—License Renewal of Nuclear Plants for Browns Ferry, Unit 1, 2 and 3 (TAC Nos. MC7168, MC1769, and MC1770), Supplement 21 to NUREG–1437, Implementation, Athens, AL, Comment Period Ends: March 2, 2005, Contact: Dr. Michael Masnik (301) 415–1191.

EIS No. 040564, FINAL EIS, NRC, AL, Generic—License Renewal of Nuclear Plants for Browns Ferry, Unit 1, 2 and 3 (TAC Nos. MC7168, MC1769, and MC1770), Supplement 21 to NUREG–1437, Implementation, Athens, AL, Wait Period Ends: January 10, 2005, Contact: Michael L. Erk (605) 745–4107.

EIS No. 040565, DRAFT EIS, IBR, CA, Central Valley Project, San Luis Unit Long-Term Water Service Contract Renewal, West San Joaquin Division, Cities of Avenal, Coalinga and Huron, Fresno, King and Merced Counties, CA, Comment Period Ends: January 24, 2005, Contact: Joe Thompson (559) 487–5179.

EIS No. 040566, FINAL EIS, IBR, CA, Mendota Pool 10-Year Exchange Agreements, Water Provision to Irrigable Lands, Central Valley Project Improvement Act (CVPIA), Fresno and Madera Counties, CA, Wait Period Ends: January 10, 2005, Contact: David Young (559) 487–5127.

Amended Notices

EIS No. 040436, DRAFT EIS, AFS, SD, WY, Black Hills National Forest Land and Resource Management Plan Phase II Amendment, Proposal to Amend the 1997 Land and Resource Management Plan, Custer, Fall River, Lawrence, Meade, and Pennington Counties, SD and Crook and Weston Counties, WY, Comment Period Ends: January 14, 2005, Contact: Jeff Ulrich (605) 673–9200. Revision of **Federal Register** Notice Published on 9/17/04: CEQ Comment Period Ending 12/15/2004 has been Extended to 1/14/2005.

EIS No. 040479, REVISED DRAFT EIS, CBP, AZ, Programmatic EIS—Office of Border Patrol Operational Activities within the Border Areas of the Tucson and Yuma Sectors, Expansion of Operations of Technology-Based Systems, Completion and Maintenance of Approved Infrastructure, Cochise, Pima, Santa Cruz and Yuma Counties, AZ, Comment Period Ends: January 29, 2005, Contact: Mark Doles (817) 886–6499. Revision of **Federal Register** Notice Published on 10/15/2004: CEQ Comment Period Ending on 11/29/2004 has been Extended to 1/29/2005.

EIS No. 040504, DRAFT EIS, SFW, CA, Coachella Valley Multiple Species Habitat Conservation Plan (MSHCP), Santa Rosa and San Jacinto Mountains Trails Plan, Issuance of Incidental Take Permits, Riverside County, CA, Comment Period Ends: February 03, 2005, Contact: Julie Concannon (503) 231–6747. Revision of **Federal Register** Notice Published on 11/05/2004: CEQ Comment Period Ending 12/20/2004 Corrected to 2/3/2005.

EIS No. 040542, DRAFT EIS, AFS, OR, Rogue River-Siskiyou National Forest, Special Use Permits for Outfitter and Guide Operations on the Lower Rogue and Lower Illinois Rivers, Gold Beach Ranger District, Rogue River-Siskiyou National Forest, Curry County, OR, Comment Period Ends: January 10, 2005, Contact: Jim Heck (541) 858–2303. Revision of **Federal Register** Notice Published FR 11–26–04 Correction to Web Site Address: *http://www.fs.fed.us/r6/rogue-siskiyou/projects/special-use/outfitter-rogue-illinois-river/rr-deis-11–04–04.pdf*.

EIS No. 040543, FINAL EIS, FHW, MI, MI–59 Livingston County Widening Project between I–96 and U.S. 23, Recommended Alternative was Selected, Right-of-Way Preservation Center Corridor, Funding, NPDES and U.S. Army COE Section 404 Permits Issuance, Livingston County, MI, Wait Period Ends: January 28, 2005, Contact: Abdelmoez Abdalla (517) 702–1820. Revision of **Federal Register** Notice Published on 12/3/2004: CEQ Comment Period Ending 01/03/2005 Corrected to 01/28/2005.

Dated: December 7, 2004.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 04–27175 Filed 12–9–04; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket Nos. 96–45, 98–171 and 97–21; DA 04–3669]

Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Wireline Competition Bureau (Bureau) modifies the deadline for filing revisions to the annual Telecommunications Reporting Worksheet (Worksheet or Form 499–A). In addition, the Bureau updates the Instructions to the Telecommunications Reporting Worksheet, FCC Form 499–A (Instructions). With regard to universal service contributions, several parties (Petitioners) have filed requests for review of decisions by the Universal Service Administrative Company (USAC) rejecting revised Worksheet filings as untimely under USAC's processing guidelines. The Bureau grants such requests and remands them to USAC for consideration as provided in this Order. The Bureau also directs USAC to consider, as provided in this Order, any revised Form 499–A filings that are pending before it on the release date of this Order, or that it receives between the release date of this Order and the effective date of this Order.

DATES: Effective January 10, 2005.

FOR FURTHER INFORMATION CONTACT: Anita Cheng, Assistant Chief, Wireline Competition Bureau, Telecommunications Access Policy Division, (202) 418–7400.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order in CC Docket Nos. 96–45, 98–171, and 97–21 released December 7, 2004. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 Twelfth Street, SW., Washington, DC, 20554.

I. Introduction

1. In this Order, the Wireline Competition Bureau (Bureau) modifies the deadline for filing revisions to the annual Telecommunications Reporting Worksheet (Worksheet or Form 499–A). In addition, we update the Instructions to the Telecommunications Reporting Worksheet, FCC Form 499–A (Instructions), to clarify our intention to reject as untimely any Form 499–A

revised filing not submitted within twelve months of the due date of the original filing in question, if the revision would decrease regulatory fees or contributions to support mechanisms for universal service, interstate Telecommunications Relay Service, number administration, or local number portability. With regard to universal service contributions, several parties (Petitioners) have filed requests for review of decisions by the Universal Service Administrative Company (USAC) rejecting revised Worksheet filings as untimely under USAC's processing guidelines. We grant such requests and remand them to USAC for consideration as provided in this Order. We also direct USAC to consider, as provided in this Order, any revised Form 499–A filings that are pending before it on the release date of this Order, or that it receives between the release date of this Order and the effective date of this Order.

2. Adoption of a firm deadline for filing revisions to the Worksheet will help ensure the stability and sufficiency of the federal universal service fund, as contemplated in section 254(d) of the Communications Act of 1934, as amended (the Act). We also find that a firm deadline for revised Worksheets will improve the integrity of the universal service contribution methodology and promote efficiency in administration of support mechanisms for universal service, interstate Telecommunications Relay Service (TRS), the North American Numbering Plan (NANP) and Local Number Portability (LNP), consistent with the Commission's rules and policies.

II. Discussion

3. In this Order, we modify the Form 499–A Instructions by changing the deadline for contributors to file revised Form 499–As that would result in decreased contribution amounts. We adopt a twelve-month deadline for filing revisions to the Form 499–A which would result in a decreased contribution amount. Accordingly, any revised 499–A that would result in decreased contributions must be submitted by March 31 of the year after the original filing due date. The prior Instructions required revisions within nine months and contemplated the potential for revisions beyond that time period if there was good cause for the delay in filing and an explanation justifying the change. For the reasons described, however, we now find that a firm twelve-month deadline for revisions that would result in reduced contributions will improve administrative efficiency and certainty for the contribution systems for universal service, TRS, NANP, and LNP. We conclude that adoption of a firm deadline for filing such revisions to the Worksheet will help ensure the stability and sufficiency of the federal universal service fund, as contemplated in section 254(d) of the Act, as well as the funds for TRS, NANP, and LNP. In addition, we find that a firm deadline for revised Worksheets will improve the integrity of the universal service contribution methodology and promote efficiency in administration of the universal service support mechanisms, consistent with the Commission's rules and policies. Our actions today will allow USAC and other fund administrators to reduce substantially the need for adjustments regarding a given contribution year, providing certainty to contributors and their customers.

4. In our experience, twelve months is a sufficient period of time for contributors to revise their 499–A filings for the purpose of reducing their contribution obligations. With regard to universal service contributions, as discussed, the quarterly-filed 499–Q contains information about both projected revenue for the upcoming quarter and actual revenue for the past quarter. Each 499–Q filing provides an opportunity to report actual revenue information from the prior quarter. On April 1 of each year, carriers file revenue information for the prior year, which helps to determine whether the revenue information in the prior year's 499–Qs was correct. As a result, the 499–A is an opportunity to correct previously-filed revenue information. With the new deadline for filing revisions to the Form 499–A, carriers will have a window of one entire year in which to determine whether revenues reported and contribution amounts paid the prior year was too high. Thus, any revised 499–A that is filed by the new deadline represents a third opportunity for carriers to review and file revenue information for the prior year. With regard to TRS, NANP, and LNP contributions, contributors still have two opportunities to review and file revenue information (*i.e.*, in the original 499–A filing and the revised 499–A filing). We find that twelve months is ample time for a diligent filer to determine what revenues it earned the prior year. Setting a twelve-month deadline for filing revisions to the 499–A as described herein gives contributors adequate time to discover errors, while providing incentive to submit accurate revenue information in a timely manner. We note that this Order will have minimal impact on the payment of regulatory fees because entities pay regulatory fees within four months of the original April 1 Form 499–A submission, and most entities become aware of any need to file revisions at the time of payment.

5. Form 499–As that are filed after the effective date of this Order will be subject to the twelve-month deadline. Thus, contributors will be required to submit revisions to the Form 499–A within twelve months of the original filing deadline, *i.e.*, March 31 of the subsequent year. Revised Form 499–As that are submitted after the revision deadline will be rejected by USAC as untimely. Because this Order will become effective after the filing deadline for the 2004 Form 499–A (which was April 1, 2004), contributors will be permitted to submit revisions to the 2004 Form 499–A up to twelve months following the effective date of this Order.

6. As explained, several Petitioners have filed requests for review of decisions by the Universal Service Administrative Company (USAC) rejecting revised Worksheet filings as untimely under USAC's processing guidelines. Because the decision we adopt today does not take effect until January 10, 2005, these requests (and any other pending requests filed before the effective date of this Order) are subject to the standard currently in effect. Although this Order adopts USAC's one-year deadline for the stated reasons, we grant the pending requests for review to allow USAC to consider if there was good cause to allow revisions beyond the deadline contained in the Instructions. We remand these requests to USAC and direct USAC to revise universal service contribution obligations as appropriate provided that: (1) the Petitioner has demonstrated good cause for submitting the revision beyond the one-year revision window; and (2) the Petitioner has provided ''an explanation of the cause for the change along with complete documentation showing how the revised figures derive from corporate financial records.'' That is, USAC shall only revise contribution obligations to the extent that the carrier has provided accurate and legitimate reasons for filing late and for revising the obligation, in accordance with the existing Worksheet Instructions. The Petitioners are permitted to supplement their filings to USAC as necessary between the release date of this Order and the effective date of this Order. To the extent that a request for review encompasses issues in addition to revised 499–A issues, we remand to USAC only the portion of the request that deals with revised 499–A filings,

and retain the remainder of the request for disposition by the Bureau or Commission.

7. In addition, we direct USAC to consider any similarly-situated revised 499–A filings that it receives between the release date of this Order and the effective date of this Order and to revise universal service contribution obligations in accordance with the guidelines. In the event that there are pending similarly-situated 499–A revisions that were filed with USAC prior to the release date of this Order, we direct USAC also to consider such filings in accordance with the guidelines. These filers are permitted to supplement their filings to USAC as necessary between the release date of this Order and the effective date of this Order. All filings that are made to USAC in connection with this Order should be captioned, ''ATTN: Form 499–A Revision Order'' and sent to the Universal Service Administrative Company, 2000 L Street, NW., Suite 200, Washington, DC 20036.

8. The Commission will not send a copy of this Order pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

IV. Ordering Clauses

9. Pursuant to authority contained in sections 1, 4, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154, 254, and the authority delegated under 0.91, 0.291, 1.3, and 54.711 of the Commission's rules, 47 CFR 0.91, 0.291, 1.3, and 54.711, this Order shall be effective January 10, 2005.

10. Pursuant to authority contained in sections 1, 4, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154, 254, and the authority delegated under 0.91, 0.291, 1.3, and 54.711 of the Commission's rules, 47 CFR 0.91, 0.291, 1.3, and 54.711, the requests for review of decisions by the Universal Service Administrative Company listed in the Attachment are remanded to the Universal Service Administrative Company for further review.

11. A copy of this Order shall be transmitted to the Universal Service Administrative Company.

Federal Communications Commission.

Jeffrey J. Carlisle,

Chief, Wireline Competition Bureau.

ATTACHMENT—REQUESTS FOR REVIEW OF USAC DECISIONS REJECTING REVISED FORM 499–AS

Petitioner	Date filed
Access One, Inc	November 23, 2004.
Airnex Communications, Inc	December 4, 2003.
Alliance Group Services	October 31, 2001.
ARC Networks, Inc	November 20, 2001.
Bright Personal Communications Services, LLC	February 10, 2003.
Business Discount Plan, Inc	March 3, 2003.
Cooperative Communications, Inc	October 3, 2002.
Crown Communication, Inc	July 23, 2002.
Dial-Thru, Inc	February 17, 2004.
Eagle Communications, Inc	November 26, 2003.
Equant Inc	September 25, 2003.
Eureka Networks f/k/a Eureka Broadband Corporation	September 30, 2004.
GE Business Productivity Solutions, Inc	July 3, 2002.
Griggs County Telephone Company	April 22, 2002.
Morris Communications, Inc	July 12, 2002.
New Hope Telephone Company	July 3, 2002.
SBC Communications, Inc	November 9, 2004.
SES Americom, Inc	October 27, 2003.
Total Communications Services, Inc	September 8, 2003.

[FR Doc. 04–27158 Filed 12–9–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 92–237; DA 04–3830]

Cancellation of the December 10, 2004, Conference Call Meeting of the North American Numbering Council

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: On December 7, 2004, the Commission released a public notice announcing the cancellation of the December 10, 2004, conference call meeting of the North American Numbering Council (NANC). The intended effect of this action is to make the public aware of the cancellation of the NANC's conference call meeting. This notice of the cancellation of the December 10, 2004, NANC conference call meeting is being published in the **Federal Register** less than 15 calendar days prior to the previously scheduled conference call meeting to ensure that the public is made aware of the cancellation of the federal advisory committee's December 10, 2004, conference call meeting as soon as possible.

This statement complies with the General Services Administration Management regulations implementing the Federal Advisory Committee Act. *See* 41 CFR 101–6.1015(b)(2).

ADDRESSES: Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission, The Portals II, 445 12th Street, SW., Suite 5–A420, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Deborah Blue, Special Assistant to the Designated Federal Officer (DFO) at (202) 418–1466 or *Deborah.Blue@fcc.gov*. The fax number is: (202) 418–2345. The TTY number is: (202) 418–0484.

Federal Communications Commission.

Sanford S. Williams,

Attorney, Telecommunications Access Policy Division, Wireline Competition Bureau.

[FR Doc. 04–27280 Filed 12–8–04; 1:18 pm]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notices

DATE AND TIME: Thursday, December 16, 2004, at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be open to the public.

The following item has been added to the Agenda: Treasurers' Policy.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Biersack, Press Officer, telephone (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. 04–27268 Filed 12–8–04; 12:37 pm]

BILLING CODE 6715–01–M

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act Notice

Time and Date: 10 a.m. (e.s.t.), December 20, 2004.

Place: 4th Floor Conference Room, 1250 H Street, NW., Washington, DC.

Status: Parts will be open to the public and parts closed to the public.

Matters To Be Considered:

Parts Open to the Public

1. Approval of the minutes of the November 15, 2004, Board member meeting.

2. Thrift Savings Plan activity report by the Executive Director.

Parts Closed to the Public

3. Procurement.

CONTACT FOR FURTHER INFORMATION: Thomas J. Trabucco, Director, Office of External Affairs, (202) 942–1640.

Dated: December 8, 2004.

Elizabeth S. Woodruff,

Secretary to the Board, Federal Retirement Thrift Investment Board.

[FR Doc. 04–27302 Filed 12–8–04; 3:19 pm]

BILLING CODE 6760–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: OS–0937–0191]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Office of the Secretary.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

#1 Type of Information Collection Request: Reinstatement, without change, of a previously approved collection for which approval has expired;

Title of Information Collection: Application packets for Real Property for Public Health Purposes;

Form/OMB No.: OS–0937–0191;

Use: State and local governments and nonprofit institutions use these applications to apply for excess/surplus, underutilized/unutilized and off-site government real property. These applications are used to determine if institutions/organizations are eligible to purchase, lease or use property under the provisions of surplus property program;

Frequency: Reporting monthly;

Affected Public: State, local, or tribal governments, not for profit institutions;

Annual Number of Respondents: 22;

Total Annual Responses: 22;

Average Burden Per Response: 200 hours;

Total Annual Hours: 4,400;

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the HHS Web site address at *http://www.hhs.gov/oirm/infocollect/pending/* or e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *naomi.cook@hhs.gov*, or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be mailed within 30 days of this notice directly to the OMB Desk Officer at the address below: OMB Desk Officer: John Kraemer, OMB Human Resources and Housing Branch, Attention: (OMB #0937–0191), New Executive Office Building, Room 10235, Washington DC 20503.

Dated: December 2, 2004.

Robert E. Polson,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. 04–27141 Filed 12–9–04; 8:45 am]

BILLING CODE 4168–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Chronic Fatigue Syndrome Advisory Committee

AGENCY: Department of Health and Human Services, Office of the Secretary.

ACTION: Notice of meeting.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Services is hereby giving notice that the Chronic Fatigue Syndrome Advisory Committee (CFSAC) will hold a meeting. The meeting will be open to the public.

DATES: The meeting will be held on Monday, January 10, 2005, from 9 a.m. to 5 p.m.

ADDRESSES: Department of Health and Human Services, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Room 800, Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Dr. Larry E. Fields, Executive Secretary, Chronic Fatigue Syndrome Advisory Committee, Department of Health and Human Services, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Room 719H, Washington, DC 20201; (202) 690–7694.

SUPPLEMENTARY INFORMATION: CFSAC was established on September 5, 2002 to replace the Chronic Fatigue Syndrome Coordinating Committee. CFSAC was established to advise, consult with, and make recommendations to the Secretary, through the Assistant Secretary for Health, on a broad range of topics including (1) the current state of knowledge and research about the epidemiology and risk factors relating to chronic fatigue syndrome, and identifying potential opportunities in these areas; (2) current and proposed diagnosis and treatment methods for chronic fatigue syndrome; and (3) development and implementation of programs to inform the public, health care professionals, and the biomedical, academic, and research communities about chronic fatigue syndrome advances.

The tentative agenda for this meeting is as follows:

9 a.m.—Chairperson
Call to Order
Request for Roll Call
Introduction and Opening Remarks
Approval of the Minutes of September 27, 2004
Discussion

9:20 a.m.—Executive Secretary
Roll Call
Summary of Public Comments
Membership Terms, Operational and

Other Matters
Discussion
9:30 a.m.—Invited Speakers
Peter Rowe, MD
Professor, Johns Hopkins Children's Center
General Pediatrics and Adolescent Medicine
Chronic Fatigue Syndrome
Discussion
Chelsa Morgan
Florida
CFS: A Dilemma Facing Young People
Discussion
10:30 a.m.—Break
10:45 a.m.—Invited Speakers
Betty McConnell
New Jersey Chronic Fatigue Syndrome, Inc.
CFS: Pediatric Education
Discussion
American Academy of Pediatrics (Invited)
CFS: The AAP Perspective
Discussion
11:30 a.m.—Public Comment
12 noon—Lunch Break
1 p.m.—Ex Officio Member Updates
Discussion
Recommendations Update
Discussion
Subcommittee Updates
Disabilities: Lyle Lieberman, Chair
Education: Dr. Robert Patarca, Chair
Research: Dr. Nahid Mohagheghpour, Chair
Discussion
2:45 p.m.—Break
3 p.m.—New and Other CFS-related Matters
4 p.m.—Public Comment
4:30 p.m.—Wrap-up
5 p.m.—Adjournment

Public attendance at the meeting is limited to space available. Individuals must provide a photo ID for entry into the meeting. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the designated contact person. Members of the public will have the opportunity to provide comments at the meeting. Pre-registration is required for public comment by December 27, 2004. Any individual who wishes to participate in the public comment session should call the telephone number listed in the contact information to register. Public comment will be limited to five minutes per speaker. Any members of the public who wish to have printed material distributed to CFSAC members should submit materials to the Executive Secretary, CFSAC, whose contact information is listed above prior to close of business December 27, 2004.

Dated: November 24, 2004.

Larry E. Fields,

Executive Secretary, Chronic Fatigue Syndrome Advisory Committee.

[FR Doc. 04–27118 Filed 12–9–04; 8:45 am]

BILLING CODE 4150–28–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[Document Identifier: CMS–10115, CMS–10123 & 10124, CMS–R–211, CMS–2552, and CMS–10048]

Agency Information Collection Activities: Proposed Collection; Comment Request.

AGENCY: Centers for Medicare and Medicaid Services.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare and Medicaid Services (CMS) (formerly known as the Health Care Financing Administration (HCFA)), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Federal Funding of Emergency Health Services (Section 1011): Enrollment Application; *Use:* These information collections will allow hospitals and other providers to enroll to receive payment for Section 1011 claim submissions. Section 1011 provides $250 million per year for fiscal years 2005–2008 for payments to eligible providers for emergency health services provided to undocumented aliens and other specified aliens; Form *Number:* CMS–10115 (OMB#: 0938–0929); *Frequency:* Other: as needed; *Affected Public:* Business or other for-profit, Not-for-profit institutions, and State, Local or Tribal Govt.; *Number of Respondents:* 62,500; *Total Annual Responses:* 62,500; *Total Annual Hours:* 31,250.

2. *Type of Information Collection Request:* New Collection; *Title of Information Collection:* Expedited Review Notices and Supporting Regulations contained in 42 CFR Sections 405.1200 and 405.1202; *Use:* These notices are used to inform beneficiaries that their provider services will end, and to provide beneficiaries who request an expedited determination with detailed information of why the services should end; *Form Numbers:* CMS–10123 & 10124 (OMB#: 0938–NEW); *Frequency:* On occasion; *Affected Public:* Individuals or Households, Business or other for-profit, and Not-for-profit institutions; *Number of Respondents:* 4,200,000; *Total Annual Responses:* 4,200,000; *Total Annual Hours:* 379,400.

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Model Application Template for State Child Health Plan Under Title XXI of the Social Security Act, State Children's Health Insurance Program, and Model Application Template and Instructions; *Use:* States are required to submit Title XXI plans and amendments for approval by the Secretary pursuant to section 2102 of the Social Security Act in order to receive funds for initiating and expanding health insurance coverage for uninsured children. The model application template is used to assist States in submitting a State Child Health Plan and amendments to that plan; *Form Number:* CMS–R–211 (OMB#: 0938–0707); *Frequency:* Quarterly and Annually; *Affected Public:* State, Local or Tribal Govt.; *Number of Respondents:* 40; *Total Annual Responses:* 40; *Total Annual Hours:* 3,200.

4. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Hospital and Health Care Complexes Cost Report and Supporting Regulations in 42 CFR 413.20 and 413.24; *Use:* This form is completed by Hospitals and Health Care Complexes participating in the Medicare program. Hospitals and Health Care Complexes use this form to report the health care costs for services they provide. The information reported on this form is used by CMS to determine the amount of reimbursable costs for services rendered to Medicare beneficiaries. The revisions to this form contain the provisions for implementing section 422 of the MMA. Section 422 deals with the calculation of GME and IME payments for redistribution of

unused resident slots; *Form Number:* CMS–2552–96 (OMB# 0938–0050); *Frequency:* Annually; *Affected Public:* Business or other for-profit, Not-for-profit institutions, and State, Local or Tribal Government; *Number of Respondents:* 6,111; *Total Annual Responses:* 6,111; *Total Annual Hours:* 4,046,782.

5. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Application Template for Health Insurance Flexibility and Accountability (HIFA) Section Demonstration Proposal; *Use:* The HIFA Initiative affords states an opportunity to expand coverage to the uninsured under Social Security Act Section 1115 demonstrations authority. States will be able to use Medicaid and State Child Health Insurance Program funds in concert with private insurance options to expand coverage to low-income uninsured individuals with a focus on those with income at or below 200 percent of the Federal poverty level. The model demonstration application will facilitate State efforts in designing programs to cover the uninsured; *Form Number:* CMS–10048 (OMB# 0938–0848); *Frequency:* Other: renewal every 5 yrs.; *Affected Public:* State, Local or Tribal Government; *Number of Respondents:* 10; *Total Annual Responses:* 9; *Total Annual Hours:* 42.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site address at *http://www.cms.hhs.gov/regulations/pra/*, or E-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office on (410) 786–1326.

Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the CMS Paperwork Reduction Act Reports Clearance Officer designated at the address below: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Melissa Musotto, Room C5–14–03, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: December 3, 2004.

John P. Burke, III,

CMS Paperwork Reduction Act Reports Clearance Officer, Office of Strategic Operations and Regulatory Affairs, Regulations Development Group.

[FR Doc. 04–27145 Filed 12–9–04; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Notice of Hearing: Reconsideration of Disapproval of Oklahoma State Plan Amendment (SPA) 03–26

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice of hearing.

SUMMARY: This notice announces an administrative hearing on January 14, 2005, at 10 a.m., 1301 Young Street, Room 1113, Dallas, Texas 75202, to reconsider our decision to disapprove Oklahoma's Medicaid State Plan Amendment (SPA) 03–26.

DATES: Requests to participate in the hearing as a party must be received by the presiding officer by December 27, 2004.

FOR FURTHER INFORMATION CONTACT: Kathleen Scully-Hayes; Presiding Officer, CMS, Lord Baltimore Drive; Mail Stop LB–23–20, Baltimore, Maryland 21244, Telephone: 410–786–2055.

SUPPLEMENTARY INFORMATION: This notice announces an administrative hearing to reconsider CMS' decision to disapprove Oklahoma's Medicaid State Plan Amendment (SPA) 03–26.

Oklahoma submitted SPA 03–26 on January 2, 2004. This SPA would modify language regarding the rate-setting process for inpatient and outpatient hospital services. Specifically, this SPA would provide for supplemental payments to hospitals located in hospital districts pursuant to the Oklahoma Hospitals Public Trust and Authority Act.

The Centers for Medicare & Medicaid Services (CMS) was unable to approve SPA 03–26 because the SPA did not comply with sections 1902(a), 1902 (a)(19), 1903(w), and 1905(b) of the Social Security Act (the Act).

The payments proposed under SPA 03–26 would be funded through transfers from the Tulsa Hospital Public Trust Authority (THPTA) that CMS has determined are not consistent with the provisions of sections 1903(w)(1) and 1902(a) of the Act. Although the State has indicated that State law recognizes any such entity as a ''government entity * * * with powers of government,'' State law specifically withholds the governmental powers that are characteristic of a unit of government. THPTA is an association of hospitals (formed by the action of hospitals and with a board controlled by hospitals) that has no powers of taxation, or police or business regulation, and is not a sub-unit of the State government or any other local government that exercises such powers. While it has the power to impose assessments on member hospitals, the State has indicated that Oklahoma law specifically indicates that this power is not taxation. THPTA more closely resembles a private association that collects dues from its members. As a result, CMS has concluded that THPTA is not within the scope of a ''unit of government,'' and its assessments are not within the scope of ''state or local taxes'' as those terms are used under section 1903(w)(6) of the Act. Transfers of funds made by THPTA would thus not qualify for protected status under section 1903(w)(6)of the Act. Absent protected status, THPTA is within the definition of a provider-related entity under section 1903(w)(7) of the Act. As such, the transfers are subject to the provider-related donation requirements in section 1903(w)(l) of the Act and the implementing regulations in 42 CFR Part 433. Under those provisions, because payment of supplemental payments to member hospitals (the provider class) is contingent upon the receipt of donations from a provider-related entity, there is a hold harmless arrangement and the donation is not ''bona fide,'' as set forth in 42 CFR 433.54. Under section 1903(w)(l) of the Act, a donation that is not bona fide cannot be recognized as the non-Federal share of Medicaid expenditures that is required under section 1902(a) of the Act.

Nor is SPA 03–26 consistent with the requirement of section 1902(a)(19) of the Act that care and services will be provided consistent with ''simplicity of administration and the best interests of the recipients.'' The best interest of recipients is not served by a payment structure that is designed primarily to divert Medicaid payments from the providers to the State, and to shift financial burdens from the State to the Federal Government. The best interest of recipients requires that the full amount of Medicaid payments should be available to support access to quality care and services.

Finally, section 1905(b) of the Act specifies how the Federal medical assistance percentage (FMAP) will be calculated for states. This section clearly illustrates Congress' intentions as to how the financial partnership of the Medicaid program should operate. The formula in this cite clearly and explicitly states that the FMAP for any state shall be 100 per centum less the state percentage, and then further

defines how the state percentage is to be determined. Any creative funding mechanism that effectively increases the FMAP would undermine the clear direction of Congress. Since Oklahoma proposes to claim Federal matching funds for payments that are funded through impermissible donations, CMS must conclude that effective FMAP being paid to Oklahoma is not consistent with section 1905(b) of the Act, and that the funding of payments under Oklahoma's Attachments 4.19-A and 4.19-B of its Medicaid State plan does not uphold the basic Federal and state financial partnership.

For these reasons, and after consulting with the Secretary as required by 42 CFR 430.15, CMS disapproved this SPA.

Section 1116 of the Act and 42 CFR Part 430 establish Department procedures that provide an administrative hearing for reconsideration of a disapproval of a State plan or plan amendment. CMS is required to publish a copy of the notice to a State Medicaid agency that informs the agency of the time and place of the hearing and the issues to be considered. If we subsequently notify the agency of additional issues that will be considered at the hearing, we will also publish that notice.

Any individual or group that wants to participate in the hearing as a party must petition the presiding officer within 15 days after publication of this notice, in accordance with the requirements contained at 42 CFR 430.76(b)(2). Any interested person or organization that wants to participate as *amicus curiae* must petition the presiding officer before the hearing begins in accordance with the requirements contained at 42 CFR 430.76(c). If the hearing is later rescheduled, the presiding officer will notify all participants.

The notice to Oklahoma announcing an administrative hearing to reconsider the disapproval of its SPA reads as follows:

Mr. Jim Hancock,

Director, Health Policy Division, Oklahoma Health Care Authority, 4545 North Lincoln Blvd., Suite 124, Oklahoma City, OK 73105.

Dear Mr. Hancock: I am responding to your request for reconsideration of the decision to disapprove Oklahoma State Plan Amendment (SPA) 03–26, which was submitted to the Centers for Medicare & Medicaid Services (CMS) on January 2, 2004, with a proposed effective date of January 19, 2004. This SPA would modify language regarding the rate-setting process for inpatient and outpatient hospital services. Specifically, this SPA would provide for supplemental payments to hospitals located in hospital districts pursuant to the Oklahoma Hospitals Public Trust and Authority Act. CMS reviewed this proposal, and for the reasons set forth below, was unable to approve SPA 03–26.

The CMS was unable to approve SPA 03–26 because the SPA did not comply with sections 1902(a), 1902(a)(19), 1903(w), and 1905(b) of the Social Security Act (the Act).

The payments proposed under SPA 03–26 would be funded through transfers from the Tulsa Hospital Public Trust Authority (THPTA) that CMS has determined are not consistent with the provisions of sections 1903(w)(1) and 1902(a) of the Act. Although the State has indicated that State law recognizes any such entity as a ''government entity * * * with powers of government,'' State law specifically withholds the governmental powers that are characteristic of a unit of government. THPTA is an association of hospitals (formed by the action of hospitals and with a board controlled by hospitals) that has no powers of taxation, or police or business regulation, and is not a sub-unit of the State government or any other local government that exercises such powers. While it has the power to impose assessments on member hospitals, the State has indicated that Oklahoma law specifically indicates that this power is not taxation. THPTA more closely resembles a private association that collects dues from its members.

As a result, CMS has concluded that THPTA is not within the scope of a ''unit of government,'' and its assessments are not within the scope of ''state or local taxes'' as those terms are used under section 1903(w)(6) of the Act. Transfers of funds made by THPTA would thus not qualify for protected status under section 1903(w)(6) of the Act. Absent protected status, THPTA is within the definition of a provider-related entity under section 1903(w)(7) of the Act. As such, the transfers are subject to the provider-related donation requirements in section 1903(w)(l) of the Act and the implementing regulations in 42 CFR Part 433.

Under those provisions, because payment of supplemental payments to member hospitals (the provider class) is contingent upon the receipt of donations from a provider-related entity, there is a hold harmless arrangement and the donation is not ''bona fide,'' as set forth in 42 CFR 433.54. Under section 1903(w)(l) of the Act, a donation that is not bona fide cannot be recognized as the non-Federal share of Medicaid expenditures that is required under section 1902(a) of the Act.

Nor is SPA 03–26 consistent with the requirement of section 1902(a)(19) of the Act that care and services will be provided consistent with ''simplicity of administration and the best interests of the recipients.'' The best interest of recipients is not served by a payment structure that is designed primarily to divert Medicaid payments from the providers to the State, and to shift financial burdens from the State to the Federal Government. The best interest of recipients requires that the full amount of Medicaid payments should be available to support access to quality care and services.

Finally, section 1905(b) of the Act specifies how the Federal medical assistance percentage (FMAP) will be calculated for states. This section clearly illustrates Congress' intentions as to how the financial partnership of the Medicaid program should operate. The formula in this cite clearly and explicitly states that the FMAP for any state shall be 100 per centum less the state percentage, and then further defines how the state percentage is to be determined. Any creative funding mechanism that effectively increases the FMAP would undermine the clear direction of Congress. Since Oklahoma proposes to claim Federal matching funds for payments that are funded through impermissible donations, CMS must conclude that effective FMAP being paid to Oklahoma is not consistent with section 1905(b) of the Act, and that the funding of payments under Oklahoma's Attachments 4.19-A and 4.19-B of its Medicaid State plan does not uphold the basic Federal and state financial partnership. For these reasons, and after consulting with the Secretary as required by 42 CFR 430.15, CMS disapproved this SPA.

I am scheduling a hearing to be held on January 14, 2005, at 10:00 a.m., 1301 Young Street, Room 714, Dallas, Texas 75202, to reconsider our decision to disapprove Oklahoma SPA 03–26. If this date is not acceptable, we would be glad to set another date that is mutually agreeable to the parties. The hearing will be governed by the procedures prescribed at 42 CFR, part 430.

I am designating Ms. Kathleen Scully-Hayes as the presiding officer. If these arrangements present any problems, please contact the presiding officer. In order to facilitate any communication which may be necessary between the parties to the hearing, please notify the presiding officer to indicate acceptability of the hearing date that has been scheduled and provide names of the individuals who will represent the State at the hearing. The presiding officer may be reached at (410) 786–2055.

Sincerely,

Mark B. McClellan, M.D., Ph.D.

Section 1116 of the Social Security Act (42 U.S.C. section 1316); 42 CFR Section 430.18)

(Catalog of Federal Domestic Assistance Program No. 13.714, Medicaid Assistance Program)

Dated: December 3, 2004.

Mark B. McClellan,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 04–27144 Filed 12–9–04; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0486]

Agency Information Collection Activities; Proposed Collection; Comment Request; Experimental Study of Health Claims on Food Packages

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on an experimental study to assess consumer responses to health claims on labels of conventional foods. Although the focus of the study is on consumer responses to health claims, the study also looks at their responses to other health messages to help enhance the external validity of the findings.

DATES: Submit written or electronic comments on the collection of information by February 8, 2005.

ADDRESSES: Submit electronic comments on the collection of information to: *http://www.fda.gov/dockets/ecomments*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Peggy Robbins, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Experimental Study of Health Claims on Food Packages

The authority for FDA to collect the information derives from the FDA Commissioner's authority, as specified in section 903(d)(2) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 393(d)(2)).

To help consumers reduce their risk of disease and improve their health by making sound dietary decisions, in the **Federal Register** of November 25, 2003 (68 FR 66040), FDA issued an advance notice of proposed rulemaking (ANPRM) to request comments on various issues related to health claims on conventional food and dietary supplement labels. One of the issues that FDA has raised in the ANPRM relates to whether the wording of a health claim needs to refer to the substance (a component of food, e.g., nutrient) that is the basis of the claim. (Hereinafter, the term ''health claim'' will refer only to a claim meeting the standard of significant scientific agreement or, put another way, an FDA-authorized claim.) For instance, in the example of the calcium-osteoporosis claim (''Calcium may reduce the risk of osteoporosis''), FDA requires that the substance that is the basis of the claim (i.e., calcium) be included in the wording of the claim (21 CFR 101.72). The requirement of including the substance in a health claim was motivated by FDA's experience that most substances that are the subject of an authorized health claim are substances that can be found in a number of foods (e.g., calcium) or spread throughout the food supply (e.g., saturated fat). Therefore, FDA has provided for health claims that include reference to the common substance to assist consumers in their understanding of the nature of the diet-health relationship, and more importantly so that consumers recognize that they can construct healthy diets by using a variety of foods that contain the substance.

FDA requests comments on the usefulness of statements that expressly include the particular component of food (e.g., nutrient) that is the basis for the claim (e.g., ''Calcium-rich foods, such as yogurt, may reduce the risk of osteoporosis'') versus ''food-specific'' claims that do not include the food component (e.g., ''Yogurt may reduce the risk of osteoporosis'' (68 FR 66040 at 66047). How consumers respond to the two kinds of statements can suggest how the explicit mention of a food component in a claim affects dietary choices, which in turn informs any policy initiative(s) that FDA may undertake in the future to provide information to consumers to help them make informed food choices. FDA, however, lacks sufficient empirical evidence to understand how consumers are likely to react to the two different kinds of health claims, has not received any such evidence in comments on the ANPRM, and is not aware of any existent evidence.

The purpose of the proposed collection of information is to help enhance FDA's understanding of consumer responses to health claims and inform any policy initiative(s) that FDA may undertake in the future to provide consumers information to help them make informed food choices. The information will be used to assess what differences, if any, the inclusion of the food component in a health claim makes in consumer recognition of the food component underlying a diet-disease relationship; consumer recognition that, in addition to the food product that carries the claim, there are other foods from which they can obtain the food component; and consumer perceptions of, and attitudes toward, a food.

The proposed collection of information is a controlled randomized experimental study. The study will use a 6 x 3 x 2 within-subjects design (6 front-panel health-claims/health messages x 3 diet-disease relationships x 2 prior knowledge) with participants randomly assigned to experimental conditions. The term ''health message'' refers to nutrient content claims,

structure/function claims, and dietary guidance statements. Prior knowledge of foods, components of food (e.g., nutrients), and risks will be measured and not manipulated; prior knowledge will serve as covariates in the analysis. There are two independent variables, type of front-panel health-claim/health message and type of diet-disease relationship. Health-claim/health-message conditions include the following items:

1. A ''food-specific'' health claim, e.g., ''Yogurt may reduce the risk of osteoporosis;''
2. A ''nutrient-specific'' health claim, e.g., ''Calcium-rich foods, such as yogurt, may reduce the risk of osteoporosis;''
3. A nutrient content claim, e.g., ''A good source of calcium;''
4. A structure/function claim, e.g., ''Helps promote bone health;''
5. A dietary guidance statement, e.g., ''Dairy products may reduce the risk of osteoporosis;'' and
6. No health claim/health message. Claims on food labels must be truthful and nonmisleading as required under sections 403(a)(1) and 201(n) of the act.

Health messages other than the two health claims are included solely for methodological purposes. The ''no health claim/health message'' condition is included to examine what consumers already know about nutrients or food sources, even when neither of them is mentioned on a label. Health messages are frequently found on food product packages and provide consumers various amounts of information about food products and their relationships to health. Whether consumer responses to these health messages are consistent with their responses to the two health claims will help generalize the findings. An examination of response differences between health messages that mention (e.g., a nutrient content claim) or do not mention (e.g., a structure/function claim) a nutrient or food source, and between these health messages and the two health claims in question can help validate any effects observed between the two health claims. This validation will in turn enhance the external validity of the findings between the ''food-specific'' and ''nutrient-specific'' health claims. We emphasize, however, that the inclusion of examples of structure/function claims, nutrient content claims, and dietary guidance statements does not in any way suggest or imply any new, impending, or change in regulatory actions regarding these messages.

The study proposes to include the following three examples of diet-disease relationships: (1) Yogurt-calcium-osteoporosis, (2) orange juice-potassium-hypertension, and (3) olive oil-monounsaturated fatty acid-heart disease. The study includes these three relationships solely for the purpose of covering varying levels of consumer familiarity with the foods, nutrients, and risks, so the study findings may be more useful than if only one diet-disease relationship were examined. We reiterate that the choices do not in any way suggest or imply any new, impending, or change in regulatory actions regarding the use of these health claims/health messages or the scientific basis of these relationships. In total, the study will examine 18 experimental conditions (6 front-panel health-claim/health message conditions x 3 diet-disease relationships), each condition is a combination of a front-panel condition and a diet-disease relationship.

The planned universe of this experimental study is noninstitutionalized adults 18 and older who reside in households with telephones in the contiguous United States and within a 10-mile radius of each of six selected mall interview facilities in various locations. The study will use a two-phase data collection methodology. Phase 1 is a random-digit dialing telephone interview, using the GENESYS sampling system, to recruit participants and to ask about prior knowledge as well as demographic characteristics. Phase 2 is a computer-assisted, self-administered interview (CASAI) to elicit responses to experimental conditions. A contractor will administer the CASAI at mall interview facilities separately from the telephone interview and on a different date after the telephone interview of the same participants. An understanding of the influences of prior knowledge on consumer responses will help reveal factors associated with differential responses and extend the usefulness of the findings to similar messages about other diet-disease relationships. It is necessary to collect prior knowledge information before and separately from collecting responses to health claims and health messages to minimize demand and confounding effects between prior knowledge and message responses. Hence, the study proposes to obtain prior knowledge in the telephone interview. To minimize unnecessary confounding by external factors, it is essential that all participants are able to look at the stimuli (i.e., labels) and stimuli are presented consistently and uniformly to all participants. The CASAI offers the advantage of consistent and uniform presentation of label images.

Target sample size of the study is 1,060 participants who complete both the telephone interview and the CASAI. Participants will be randomly assigned to the same 2 of the 18 experimental conditions in both the telephone interview and the CASAI. Each of the two conditions includes a different diet-disease relationship and a different front-panel condition. Presentation order of the conditions will be counter-balanced within the sample. All front panels will be full-color and patterned after existing labels in the market. Both the front and back panels of a label will be available during the CASAI. Back panel information (e.g., nutrient contents) will be kept constant between front-panel conditions for a given food product.

The following key information is to be collected:

- Responses to the experimental conditions such as perceived health benefits, substances related to the benefits, other food sources that may offer the same benefits;
- Prior knowledge of diet-disease relationships;
- Food purchase and consumption experience;
- Interest in food and food purchase decisions;
- Use of dietary supplements, special diets, and health status; and
- Demographic characteristics.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

Activity	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
Pretest	27	1	27	2.4	65

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]—Continued

Activity	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
Screener	4,500	1	4,500	0.02	90
Interview	1,060	1	1,060	2.4	2,544
Total					2,699

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

These estimates are based on FDA's experience with previous consumer studies. Prior to the administration of the experiment, the agency plans to conduct a pretest of the final questionnaires to minimize potential problems in administration of the interviews. The pretest will be conducted in up to three waves, each with nine participants. The agency will use a screener to select an eligible adult in each household to participate in the study. Each pretest, as well as actual interview, is expected to last no more than a total of 2.4 hours (10 minutes for the telephone interview, 15 minutes for the CASAI, and 2 hours for traveling time to and from the CASAI location).

The anticipated sample size per condition is approximately 120. This sample size is expected to identify small to medium effects with a power of 0.8 and at the .05 significance level.

Dated: December 6, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–27119 Filed 12–9–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004D–0478]

Guidance for Industry and Food and Drug Administration Staff; Class II Special Controls Guidance Document: Implantable Radiofrequency Transponder System for Patient Identification and Health Information; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance document entitled ''Class II Special Controls Guidance Document: Implantable Radiofrequency Transponder System for Patient Identification and Health Information.'' This guidance document describes a means by which an implantable radiofrequency transponder system for patient identification and health information may comply with the requirement of special controls for class II devices. Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule to classify the implantable radiofrequency transponder system for patient identification and health information into class II (special controls). This guidance document is immediately in effect as the special control for the device, but it remains subject to comment in accordance with the agency's good guidance practices (GGPs).

DATES: Submit written or electronic comments on this guidance at any time. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies on a 3.5″ diskette of the guidance document entitled ''Class II Special Controls Guidance Document: Implantable Radiofrequency Transponder System for Patient Identification and Health Information'' to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ–220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–443–8818. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments.* Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Gail Gantt, Center for Devices and Radiological Health (HFZ–480), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1287.

SUPPLEMENTARY INFORMATION:

I. Background

Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule classifying the implantable radiofrequency transponder system for patient identification and health information into class II (special controls) under section 513(f)(2) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360c(f)(2)). This guidance document will serve as the special control for the Implantable Radiofrequency Transponder System for Patient Identification and Health Information device.

Section 513(f)(2) of the act provides that any person who submits a premarket notification under section 510(k) of the act (21 U.S.C. 360(k)) for a device that has not previously been classified may, within 30 days after receiving an order classifying the device in class III under section 513(f)(1) of the act, request FDA to classify the device under the criteria set forth in section 513(a)(1) of the act. FDA shall, within 60 days of receiving such a request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the Federal Register announcing such classification. Because of the timeframes established by section 513(f)(2) of the act, FDA has determined, under § 10.115(g)(2) (21 CFR 10.115(g)(2)), that it is not feasible to allow for public participation before issuing this guidance as a final guidance document. Therefore, FDA is issuing this guidance document as a level 1 guidance document that is immediately in effect. FDA will consider any comments that are received in response to this notice to determine whether to amend the guidance document.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's current thinking on special controls for the implantable radiofrequency transponder system for patient identification and health information. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

To receive ''Class II Special Controls Guidance Document: Implantable Radiofrequency Transponder System for Patient Identification and Health Information'' by FAX, call the CDRH Facts-On-Demand system at 800–899–0381 or 301–827–0111 from a touch-tone telephone. Press 1 to enter the system. At the second voice prompt, press 1 to order a document. Enter the document number (1541) followed by the pound sign (#). Follow the remaining voice prompts to complete your request.

Persons interested in obtaining a copy of the guidance may also do so by using the Internet. CDRH maintains an entry on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturer's assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. The CDRH Web site may be accessed at *http://www.fda.gov/cdrh*. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/cdrh/guidance.html*. Guidance documents are also available on the Division of Dockets Management Internet site at *http://www.fda.gov/ohrms/dockets*.

IV. Paperwork Reduction Act of 1995

This guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA) (44 USC 3501–3520). The quality system regulation provisions addressed in the guidance have been approved by OMB under OMB control number 0910–0073. The labeling provisions addressed in the guidance have been approved by OMB under OMB control number 0910–0485.

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**), written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Comments received may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: November 30, 2004.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 04–27078 Filed 12–9–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of Loan Repayment; Proposed Collection; Comment Request; National Institutes of Health Loan Repayment Programs

Summary: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the Office of Loan Repayment, National Institutes of Health (NIH), will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: Title: National Institutes of Health Loan Repayment Programs. *Type of Information Collection Request:* Revision of currently approved collection (OMB No. 0925–0361, expiration date 12/31/04). Form Numbers: NIH 2674–1, NIH 2674–2, NIH 2674–3, NIH 2674–4, NIH 2674–5, NIH 2674–6, NIH 2674–7, NIH 2674–8, NIH 2674–9, NIH 2674–10, NIH 2674–11, NIH 2674–12, and NIH 2674–14. *Need and Use of Information Collection:* The NIH makes available financial assistance, in the form of educational loan repayment, to M.D., Ph.D., Pharm.D., D.D.S., D.M.D., D.P.M., D.C., and N.D. degree holders, or the equivalent, who perform biomedical or biobehavioral research in NIH intramural laboratories or as extramural grantees for a minimum of 2 years (3 years for the General Research Loan Repayment Program) in research areas supporting the mission and priorities of the NIH.

The AIDS Research Loan Repayment Program (AIDS–LRP) is authorized by Section 487A of the Public Health Service Act (42 U.S.C. 288–1); the Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds (CR–LRP) is authorized by Section 487E (42 U.S.C. 288–5); the General Research Loan Repayment Program (GR–LRP) is authorized by Section 487C (42 U.S.C. 288–3); the Loan Repayment Program Regarding Clinical Researchers (LRP–CR) is authorized by Section 487F (42 U.S.C. 288–5a); the Pediatric Research Loan Repayment Program (PR–LRP) is authorized by Section 487F (42 U.S.C. 288–6); the Extramural Clinical Research LRP for Individuals from Disadvantaged Backgrounds (ECR–LRP) is authorized by an amendment to Section 487E (42 U.S.C. 288–5); the Contraception and Infertility Research LRP (CIR–LRP) is authorized by Section 487B (42 U.S.C. 288–2); and the Health Disparities Research Loan Repayment Program (HD–LRP) is authorized by Section 485G (42 U.S.C. 287c–33).

The Loan Repayment Programs provide for the repayment of up to $35,000 a year of the principal and interest of the educational loan debt of qualified health professionals who agree to conduct qualifying research for each year of obligated service. The information proposed for collection will be used to determine an applicant's eligibility for participation in the program.

Frequency of Response: Initial application and annual renewal application. *Affected Public:* Applicants, financial institutions, research institutions, recommenders. *Type of Respondents:* Physicians, other scientific or medical personnel, and organizational officials. The annual reporting burden is as follows:

Type of respondents	Number of respondents	Estimated number of responses per respondent	Average burden hours per response	Annual burden hours requested
Intramural LRPs:				
Initial Applicants	75	1	9.08	681.00
Recommenders	225	1	0.50	112.50
Financial Institutions	375	1	0.33	123.75
Subtotal	675			917.25
Extramural LRPs:				
Initial Applicants	2,000	1	9.83	19,660.00
Recommenders	6,000	1 0.50	3,000.00	
Advisors/Supervisors	2,000	1	1.50	3,000.00
Financial Institutions	10,000	1	0.33	3,300.00
Subtotal	20,000			28,960.00
Extramural LRPS:				
Renewal Applicants	800	1	7.08	5,664.00
Recommenders	2,400	1	0.50	1,200.00
Advisors/Supervisors	800	1	1.50	1,200.00
Subtotal	4,000			8,064.00
Total	24,675			37,941.25

The annualized cost to respondents is estimated at $1,308,265. There are no capital costs, operating costs, or maintenance costs to report.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Stephen J. Boehlert, Director of Operations, Office of Loan Repayment, National Institutes of Health, 6011 Executive Boulevard, Room 206 (MSC 7650), Bethesda, Maryland 20892–7650. (Mr. Boehlert can be contacted via e-mail at *boehlers@od.nih.gov* or by calling (301) 451–4465 (not a toll-free number).

Comment Dates: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Dated: December 1, 2004.

Raynard S. Kington,

Deputy Director, National Institutes of Health.

[FR Doc. 04–27116 Filed 12–9–04; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel Parkinson's Disease.

Date: December 6–7, 2004.

Time: 6:30 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Katherine Woodbury, PhD, Scientific Review Administrator, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, (301) 496–5980, *kw47o@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel Huntington's Disease.

Date: December 7–8, 2004.

Time: 6:30 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Katherine Woodbury, PhD, Scientific Review Administrator, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, (301) 496–5980, *kw47o@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS.)

Dated: December 6, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–27108 Filed 12–9–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special emphasis Panel Research Project.

Date: December 15, 2004.

Time: 2 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: NIEHS—East Campus, Bldg. 4401—Research Commons, Rm 122, Research Triangle Park, NC 27709, (Telephone Conference Call).

Contact Person: Linda K. Bass, PhD, Scientific Review Administrator, Nat'l Institute of Environmental Health Sciences, P.O. Box 12233, MD EC–24, Research Triangle Park, NC 27709, (919) 541–1307.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: December 6, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–27110 Filed 12–9–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel F05 Reviews.

Date: December 16, 2004.

Time: 2 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Joann McConnell, PhD, Scientific Review Administrator, Scientific Review Branch, NIH/NINDS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, Msc 9529, Bethesda, MD 20892–9529, (301) 496–5324, *mcconnej@ninds.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: December 6, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–27111 Filed 12–9–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of, personal privacy.

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel, Midcareer Investigator Award in Patient-Oriented Research (K24).

Date: January 6, 2005.

Time: 3 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Guo HE Zhang, PhD, MD, Scientific Review Administrator, National Institute of Arthritis and Musculoskeletal and Skin Diseases, National Institutes of Health, 6701 Democracy Boulevard, Suite 800, Bethesda, MD 20817, 301–451–6524, *zhanggu@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: December 6, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–27112 Filed 12–9–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the

National Deafness and Other Communication Disorders Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisioners 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 Deafness and Other Communication Disorders Advisory Council.

Date: January 28, 2005.

Open: 8:30 a.m. to 11:30 a.m.

Agenda: Staff reports on divisional, programmatic and special activities.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Room D, Bethesda, MD 20892.

Closed: 11:30 a.m. to adjournment.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Conference Room D, Bethesda, MD 20892.

Contact Person: Craig A. Jordan, PhD, Director, Division of Extramural Activities, NIDCD, NIH, Executive Plaza South, Room 400C, 6120 Executive Blvd., Bethesda, MD 20892–7180, 301–496–8693, *jordanc@nidcd.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance into the building by non-government employees. Persons without a government I.D. will need to show a photo I.D. and sign-in at the security desk upon entering the building.

Information is also available on the Institute's/Center's home page: *www.nidcd.nih.gov/about/councils/ndcdac/ndcdac.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: December 6, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–27113 Filed 12–9–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to seciton 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel The Pathobiology of Nephrolithiasis.

Date: December 10, 2004.

Time: 3 p.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6707 Democracy Blvd., Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Ned Feder, MD, Scientific Review Administrator, Review Branch, DEA, NIDOK, National Institutes of Health, Room 778, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8890, *FEDERN@EXTRA.NIDDK.NIH.GOV.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Conference Grant Applications Review.

Date: December 16, 2004.

Time: 1:30 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Room 788, Bethesda, MD 20892.

Contact Person: Lakshmanan Sankaran, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 777, 6707 Democracy Boulevard, Bethesda, MD 20892–5452. (301) 594–7799, *Is38oz@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Reserach; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: December 6, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–27114 Filed 12–9–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in section 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 commerical property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel Research Project (R01).

Date: January 18, 2005.

Time: 10:30 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Yan Z Wang, PhD, Scientific Review Administrator, National Institute of Arthritis and Musculoskeletal and Skin Diseases, 6701 Democracy Blvd., Suite 820, Bethesda, MD 20892, (301) 594–4957, *wangy1@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: December 6, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–27115 Filed 12–9–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), 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: Center for Scientific Review Special Emphasis Panel Career Development.

Date: December 13, 2004.

Time: 12:30 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Gayle M. Boyd, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3028–D MSC 7759, Bethesda, MD 20892, 301–451–9956, *gboyd@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel Plant Innate Immunity.

Date: December 15, 2004.

Time: 4:15 p.m. to 5:15 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Tina McIntyre, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4202, MSC 7812, Bethesda, MD 20892, 301–594–6375, *mcintyrt@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel Kidney Disease Epidemiology.

Date: December 17, 2004.

Time: 2:45 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Ann Hardy, DRPH, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3158, MSC 7770, Bethesda, MD 20892, 301–435–0695, *hardyan@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 6, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–27109 Filed 12–9–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: Notice of 30-day information collection under review: implementation of the agreement between the Government of the United States of America and the Government of Canada regarding asylum claims made in transit and at land border ports-of-entry, emergency approval requested, File No. OMB–42.

The Department of Homeland Security, Citizenship and Immigration Services (CIS) has submitted the following information collection request utilizing emergency review procedures to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The CIS has determined that it cannot reasonably comply with the normal clearance procedures under this part because normal clearance procedures are likely to prevent or disrupt the collection of information. Therefore, emergency review and OMB approval has been requested by December 29, 2004. This information collection was published previously in the **Federal Register** on November 29, 2004, at 69 FR 69480, it allowed for a 60-day public comment period.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until January 10, 2005. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding items contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to Mr. Richard A. Sloan, Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, 111 Massachusetts Avenue, NW., Washington, DC 20529; 202–616–7598.

Written comments and/or suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, 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:* This is a new collection.

(2) *Title of the Form/Collection:* Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No agency form number (File No. OMB–42), Office of Policy and Strategy, U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief*

abstract: Primary: Individuals or Households. This information will be used to assess individual and agency needs, identify problems, and plan for programmatic improvements in the delivery of immigration services.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 200 responses at 30 minutes (.50 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 100 annual burden hours.

Dated: December 6, 2004.

Stephen R. Tarragon,

Director, United States Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 04–27085 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1549–DR]

Alabama; Amendment No. 9 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alabama (FEMA–1549–DR), dated September 15, 2004, and related determinations.

EFFECTIVE DATE: December 3, 2004.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Alabama is hereby amended to include the following area among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of September 15, 2004:

Calhoun County for Public Assistance (already designated for Individual 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 Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

Michael D. Brown,

Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 04–27136 Filed 12–9–04; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1571–DR]

Alaska; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alaska (FEMA–1571–DR), dated November 15, 2004, and related determinations.

EFFECTIVE DATE: November 30, 2004.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Alaska is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of November 15, 2004:

The Kashunamiut (Chevak) Regional Educational Attendance Area (REAA), the Lower Kuskokwim REAA, the Lower Yukon REAA, and the Pribilof Island REAA for Public Assistance.

All areas in the State of Alaska 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 Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

Michael D. Brown,

Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 04–27137 Filed 12–9–04; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1545–DR]

Florida; Amendment No. 13 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Florida (FEMA–1545–DR), dated September 4, 2004, and related determinations.

EFFECTIVE DATE: December 3, 2004.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Florida is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of September 4, 2004:

Lafayette and Taylor Counties for Public Assistance [Categories C–G] (already designated for debris removal and emergency protective measures [Categories A and B] under the Public Assistance program and direct Federal assistance at 100 percent Federal funding of the total eligible costs for the first 72 hours.)

(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 Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program-Other Needs, 97.036, Public Assistance

Grants; 97.039, Hazard Mitigation Grant Program.)

Michael D. Brown,

Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 04–27135 Filed 12–9–04; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1538–DR]

Pennsylvania; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Pennsylvania (FEMA–1538–DR), dated August 6, 2004, and related determinations.

EFFECTIVE DATE: December 1, 2004.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the Commonwealth of Pennsylvania is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of August 6, 2004:

Berks, Bradford, Sullivan, and Susquehanna Counties 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 Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

Michael D. Brown,

Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 04–27134 Filed 12–9–04; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2004–19845]

Privacy Act of 1974: Systems of Records

AGENCY: Transportation Security Administration (TSA), DHS.

ACTION: Notice to establish or alter systems of records; request for comments.

SUMMARY: TSA is establishing three new systems of records and altering three established systems of records under the Privacy Act of 1974.

DATES: Submit comments by January 10, 2005.

ADDRESSES: Address or deliver your written, signed comments to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001.

You may also submit comments through the Internet to *http://dms.dot.gov.* Please be aware that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the applicable Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://dms.dot.gov.*

You may review the public docket containing comments in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Dockets Office is on the plaza level of the NASSIF Building at the Department of Transportation at the above address. Also, you may review public dockets on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Lisa S. Dean, Privacy Officer, Office of Transportation Security Policy, TSA–9, 601 South 12th Street, Arlington, VA 22202–4220; telephone (571) 227–3947; facsimile (571) 227–2555.

SUPPLEMENTARY INFORMATION:

Document Availability

You can get an electronic copy using the Internet by—

(1) Searching the Department of Transportation's electronic Docket Management System (DMS) web page (*http://dms.dot.gov/search*);

(2) Accessing the Government Printing Office's Web page at *http://www.access.gpo.gov/su_docs/aces/aces140.html;* or

(3) Visiting the TSA's Law and Policy Web page at *http://www.tsa.dot.gov/public/index.jsp.*

In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Make sure to identify the docket number of this notice.

Background

TSA is establishing three new systems of records under the Privacy Act of 1974: Employee Transportation Facilitation Records (DHS/TSA 003), Transportation Security Administration Notification Contact Lists (DHS/TSA 008), and Transportation Security Intelligence Service Operations Files (DHS/TSA 011). TSA is also altering three established system of records: The Transportation Security Enforcement Record System (DHS/TSA 001) by expanding the system purpose to cover criminal enforcement actions, adding a new category of individuals covered by the system, adding a new routine use to cover security incidents by members of the armed forces, and adding the (j)(2) general law enforcement exemption; the Personnel Background Investigation File System (DHS/TSA 004) by adding the (k)(1) specific exemption for classified information; and the Internal Investigation Record System (DHS/TSA 005) by adding the (j)(2) general law enforcement exemption and expanding the purpose to cover investigations of security-related incidents and reviews of TSA programs and operations. Each of the three altered systems of records (DHS/TSA 001, 004, and 005) is also gaining routine uses to allow for the disclosure of information to an appropriate agency or transportation facility operator when necessary to address threats to transportation security and an existing routine use has been amended to allow for the disclosure of records to state and local transportation agencies when compatible with the purposes for which the information was collected. The complete revised notice of each system of records follows.

DHS/TSA 001

SYSTEM NAME:

Transportation Security Enforcement Record System (TSERS).

SECURITY CLASSIFICATION:

Classified, sensitive.

SYSTEM LOCATION:

Records are maintained in the Office of Chief Counsel and in the Office of the Assistant Administrator for Aviation Operations, Transportation Security Administration (TSA) Headquarters in Arlington, Virginia. Records will also be maintained at the various TSA field offices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Owners, operators, and employees in all modes of transportation for which TSA has security-related duties; witnesses; passengers undergoing screening of their person or property; individuals against whom investigative, administrative, or legal enforcement action has been initiated for violation of certain Transportation Security Administration Regulations (TSR), relevant provisions of 49 U.S.C. Chapter 449, or other laws; individuals being investigated or prosecuted for violations of criminal law; and individuals who communicate security incidents, potential security incidents, or otherwise suspicious activities.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information related to the screening of passengers and property and the investigation or prosecution of any alleged violation, including name of and demographic information about alleged violators and witnesses; place of violation; Enforcement Investigative Reports (EIRs); security incident reports, screening reports, suspicious-activity reports and other incident or investigative reports; statements of alleged violators and witnesses; proposed penalty; investigators' analyses and work papers; enforcement actions taken; findings; documentation of physical evidence; correspondence of TSA employees and others in enforcement cases; pleadings and other court filings; legal opinions and attorney work papers; and information obtained from various law enforcement or prosecuting authorities relating to the enforcement of criminal laws.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

49 U.S.C. 114(d), 44901, 44903, 44916, 46101, 46301.

PURPOSE(S):

The records are created in order to maintain a civil enforcement and inspections system for all modes of transportation for which TSA has security related duties and to maintain records related to the investigation or prosecution of violations or potential violations of federal, state, local, or international criminal law. They may be used, generally, to identify, review, analyze, investigate, and prosecute violations or potential violations of transportation security laws or other laws as well as to identify and address potential threats to transportation security. They may also be used to record the details of TSA security-related activity, such as passenger or baggage screening.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

(1) To the United States Department of Transportation, its operating administrations, or the appropriate state or local agency when relevant or necessary to (a) ensure safety and security in any mode of transportation; (b) enforce safety- and security-related regulations and requirements; (c) assess and distribute intelligence or law enforcement information related to transportation security; (d) assess and respond to threats to transportation; (e) oversee the implementation and ensure the adequacy of security measures at airports and other transportation facilities; (f) plan and coordinate any actions or activities that may affect transportation safety and security or the operations of transportation operators; or (g) the issuance, maintenance, or renewal of a license, certificate, contract, grant, or other benefit.

(2) To the appropriate Federal, State, local, tribal, territorial, foreign, or international agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, where TSA becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation.

(3) To the appropriate Federal, State, local, tribal, territorial, foreign, or international agency regarding individuals who pose or are suspected of posing a risk to transportation or national security.

(4) To contractors, grantees, experts, consultants, or other like persons when necessary to perform a function or service related to this system of records for which they have been engaged. Such recipients are required to comply with the Privacy Act, 5 U.S.C. 552a, as amended.

(5) To a Federal, State, local, tribal, territorial, foreign, or international agency, where such agency has requested information relevant or necessary for the hiring or retention of an individual, or the issuance of a security clearance, license, contract, grant, or other benefit.

(6) To a Federal, State, local, tribal, territorial, foreign, or international agency, if necessary to obtain information relevant to a TSA decision concerning the hiring or retention of an employee, the issuance of a security clearance, license, contract, grant, or other benefit.

(7) To international and foreign governmental authorities in accordance with law and formal or informal international agreement.

(8) To third parties during the course of an investigation into violations or potential violations of transportation security laws to the extent necessary to obtain information pertinent to the investigation.

(9) To airport operators, aircraft operators, and maritime and land transportation operators about individuals who are their employees, job applicants, or contractors, or persons to whom they issue identification credentials or grant clearances to secured areas in transportation facilities when relevant to such employment, application, contract, or the issuance of such credentials or clearances.

(10) To the Department of Justice (DOJ) or other Federal agency in the review, settlement, defense, and prosecution of claims, complaints, and lawsuits involving matters over which TSA exercises jurisdiction or when conducting litigation or in proceedings before any court, adjudicative or administrative body, when: (a) TSA, or (b) any employee of TSA in his/her official capacity, or (c) any employee of TSA in his/her individual capacity where DOJ or TSA has agreed to represent the employee, or (d) the United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and TSA determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which TSA collected the records.

(11) To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual.

(12) To the National Archives and Records Administration or other appropriate Federal agency in records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

(13) To any agency or instrumentality charged under applicable law with the protection of the public health or safety

under exigent circumstances where the public health or safety is at risk.

(14) To the Department of Justice, United States Attorney's Office, or other appropriate Federal agency for further collection action on any delinquent debt when circumstances warrant, or to a debt collection agency for the purpose of debt collection.

(15) With respect to members of the armed forces who may have violated aviation security or safety requirements, disclose the individual's identifying information and details of their travel on the date of the incident in question to the appropriate branch of the armed forces to the extent necessary to determine whether the individual was performing official duties at the time of the incident. Members of the armed forces include active duty and reserve members, and members of the National Guard. This routine use is intended to permit TSA to determine whether the potential violation must be referred to the appropriate branch of the armed forces for action pursuant to 49 U.S.C. 46101(b).

(16) To airport operators, aircraft operators, and/or maritime and land transportation operators when appropriate to address a threat or potential threat to transportation security, or when required for administrative purposes related to the effective and efficient administration of transportation security laws.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Pursuant to 5 U.S.C. 552a(b)(12), disclosures may be made from this system to consumer reporting agencies collecting on behalf of the United States Government.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained on paper and in computer-accessible storage media. Records are also stored on microfiche and roll microfilm.

RETRIEVABILITY:

Records are retrieved by name, address, social security account number, administrative action or legal enforcement numbers, or other assigned identifier of the individual on whom the records are maintained.

SAFEGUARDS:

Information in this system is safeguarded in accordance with applicable laws, rules and policies. All records are protected from unauthorized access through appropriate administrative, physical, and technical safeguards. These safeguards include restricting access to authorized personnel who also have a need-to-know; using locks, alarm devices, and passwords; and encrypting data communications. Strict control measures are enforced to ensure that access to classified and/or sensitive information in these records is also based on ''need to know.'' Electronic access is limited by computer security measures that are strictly enforced. TSA file areas are locked after normal duty hours and the facilities are protected from the outside by security personnel.

RETENTION AND DISPOSAL:

National Archives and Records Administration approval is pending for the records in this system. Once approved, paper records and information stored on electronic storage media are to be maintained within TSA for five years and then forwarded to Federal Records Center. Records are destroyed after ten years.

SYSTEM MANAGER AND ADDRESS:

Information Systems Program Manager, Office of the Chief Counsel, TSA Headquarters, TSA–2, 601 South 12th Street, Arlington, VA 22202–4220.

NOTIFICATION PROCEDURE:

To determine whether this system contains records relating to you, write to the System Manager identified above.

RECORD ACCESS PROCEDURE:

Same as ''Notification Procedures'' above. Provide your full name and a description of information that you seek, including the time frame during which the record(s) may have been generated. Individuals requesting access must comply with the Department of Homeland Security Privacy Act regulations on verification of identity (6 CFR 5.21(d)).

CONTESTING RECORD PROCEDURES:

Same as ''Notification Procedure'' and ''Record Access Procedure,'' above.

RECORD SOURCE CATEGORIES:

Information contained in this system is obtained from the alleged violator, TSA employees or contractors, witnesses to the alleged violation or events surrounding the alleged violation, other third parties who provided information regarding the alleged violation, state and local agencies, other Federal agencies, and law enforcement authorities.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Portions of this system are exempt under 5 U.S.C. 552a(k)(1) and (k)(2). Portions of the system pertaining to investigations or prosecutions of violations of criminal law are exempt under 5 U.S.C. 552a(j)(2).

DHS/TSA 003

SYSTEM NAME:

Employee Transportation Facilitation Records

SECURITY CLASSIFICATION:

Unclassified, sensitive.

SYSTEM LOCATION:

Records are maintained in the Office of Real Estate Services, TSA Headquarters in Arlington, Virginia; at various TSA field offices, the DOT Headquarters Parking and Transit Office in Washington, DC; and at a digital safe site managed by a government contractor.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Applicants or holders of parking permits, members of carpools and vanpools, applicants for ridesharing information, applicants or recipients of transit benefits, applicants or recipients of parking subsidies issued under the Parking Information Payment System (PIPS).

CATEGORIES OF RECORDS IN THE SYSTEM:

Records of holders of parking permits; records of carpool and vanpool members; records and reports of the status of rideshare applications; applications and certifications of fare subsidy recipients; records and reports of disbursements to fare subsidy recipients; information collected related to the payment of parking subsidies; records and reports of disbursements to parking subsidy recipients; information necessary to establish direct debit payment when appropriate. These records may include an individual's name, title, social security number, duty station, commuter costs, method of commute, subsidy amount, bank account information, and the identities of other carpool members.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 49 U.S.C. 114; E.O. 13150; E.O. 9397.

PURPOSE(S):

Records are maintained to facilitate management of parking resources, transportation resources and subsidy benefits, to create and enlarge carpools and vanpools, to ensure employee eligibility for any benefits received, to contact employees regarding matters related to these programs, and to prevent the misuse of government resources.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

(1) To contractors, grantees, experts, consultants, or other like persons when necessary to perform a function or service related to this system of records for which they have been engaged. Such recipients are required to comply with the Privacy Act, 5 U.S.C. 552a, as amended.

(2) To transportation facility operators when necessary to perform a function or service related to this system of records or to determine program eligibility.

(3) To the Department of Transportation (DOT) or other Federal, State, local, tribal, or territorial agencies when necessary to perform a function or service related to this system of records or to determine program eligibility, which may involve the use of an authorized computer matching program.

(4) To the appropriate Federal, State, local, tribal, territorial, foreign, or international agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, where TSA becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation.

(5) To the Department of Justice (DOJ) or other Federal agency in the review, settlement, defense, and prosecution of claims, complaints, and lawsuits involving matters over which TSA exercises jurisdiction or when conducting litigation or in proceedings before any court, adjudicative or administrative body, when: (a) TSA, or (b) any employee of TSA in his/her official capacity, or (c) any employee of TSA in his/her individual capacity where DOJ or TSA has agreed to represent the employee, or (d) the United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and TSA determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which TSA collected the records.

(6) To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual.

(7) To the National Archives and Records Administration or other appropriate Federal agency in records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

(8) To other Federal employees or persons voluntarily participating in ridesharing programs only to the extent necessary for the operation of these programs.

(9) To the Department of Justice, United States Attorney's Office, or other Federal agencies for further collection action on any delinquent debt when circumstances warrant, or to a debt collection agency for the purpose of debt collection.

DISCLOSURES TO CONSUMER REPORTING AGENCIES:

Pursuant to 5 U.S.C. 552a(b)(12), disclosures may be made from this system to consumer reporting agencies collecting on behalf of the United States Government.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored in hard copy or in electronic format on a system database.

RETRIEVABILITY:

Records are retrieved by name, address, social security number, permit number, or other assigned identifier of the individual on whom the records are maintained.

SAFEGUARDS:

Except for carpool listings, access is accorded only to parking and fare subsidy management offices. Printouts of carpool listings contain only name, agency, and work telephone number. Information in this system is safeguarded in accordance with applicable laws, rules and policies. All records are protected from unauthorized access through appropriate administrative, physical, and technical safeguards. Control measures are enforced to ensure that access to sensitive information in these records, such as Social Security Numbers, is based on a ''need to know.''

RETENTION AND DISPOSAL:

Records in this system will be retained in accordance with a schedule to be approved by the National Archives and Records Administration.

SYSTEM MANAGER(S) AND ADDRESS:

Transportation Benefits Coordinator, Office of Real Estate Services, TSA Headquarters, TSA–17, 601 South 12th Street, Arlington, VA 22202–4220.

NOTIFICATION PROCEDURE:

To determine whether this system contains records relating to you, write to the System Manager identified above.

RECORD ACCESS PROCEDURE:

Same as ''Notification Procedure,'' above. Provide your full name and a description of information that you seek, including the time frame during which the record(s) may have been generated. Individuals requesting access must comply with the Department of Homeland Security Privacy Act regulations on verification of identity (6 CFR 5.21(d)).

CONTESTING RECORD PROCEDURE:

Same as ''Notification Procedure'' and ''Record Access Procedure,'' above.

RECORD SOURCE CATEGORIES:

Information contained in this system is obtained from employees participating in parking, ridesharing, and transit benefits programs, from notifications from other Federal agencies in the program, and from periodic certifications and reports regarding fare subsidies.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

DHS/TSA 004

SYSTEM NAME:

Personnel Background Investigation File System

SECURITY CLASSIFICATION:

Classified, Sensitive.

SYSTEM LOCATION:

Records are maintained at the offices of the Transportation Security Administration Headquarters located in Arlington, Virginia. Some records may also be maintained at the offices of a TSA contractor or in TSA field offices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former TSA employees, applicants for TSA employment, and TSA contract employees.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system contains an index reference record used to track the status of an applicant's background investigation, Standard Form 85P—''Questionnaire For Public Trust Positions,'' investigative summaries and compilations of criminal history record checks, and administrative records and correspondence incidental to the background investigation process.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 3301, 3302; 49 U.S.C. 114, 44935; 5 CFR Parts 731, 732, and 736; and Executive Orders 10450, 10577, and 12968.

PURPOSE(S):

The system will maintain investigative and background records used to make suitability and eligibility determinations for the individuals listed under ''Categories of individuals.''

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

(1) To the United States Department of Transportation, its operating administrations, or the appropriate state or local agency when relevant or necessary to (a) ensure safety and security in any mode of transportation; (b) enforce safety- and security-related regulations and requirements; (c) assess and distribute intelligence or law enforcement information related to transportation security; (d) assess and respond to threats to transportation; (e) oversee the implementation and ensure the adequacy of security measures at airports and other transportation facilities; (f) plan and coordinate any actions or activities that may affect transportation safety and security or the operations of transportation operators; or (g) the issuance, maintenance, or renewal of a license, certificate, contract, grant, or other benefit.

(2) Except as noted in Question 14 of the Questionnaire for Public Trust Positions, to the appropriate Federal, State, local, tribal, territorial, foreign, or international agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, where TSA becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation.

(3) To the appropriate Federal, State, local, tribal, territorial, foreign, or international agency regarding individuals who pose or are suspected of posing a risk to transportation or national security.

(4) To contractors, grantees, experts, consultants, or other like persons when necessary to perform a function or service related to this record for which they have been engaged. Such recipients shall be required to comply with the Privacy Act, 5 U.S.C. 552a, as amended.

(5) To a Federal, State, local, tribal, territorial, foreign, or international agency, where such agency has requested information relevant or necessary for the hiring or retention of an individual, or the issuance of a security clearance, license, contract, grant, or other benefit.

(6) To a Federal, State, local, tribal, territorial, foreign, or international agency, if necessary to obtain information relevant to a TSA decision concerning the hiring or retention of an employee, the issuance of a security clearance, license, contract, grant, or other benefit.

(7) To international and foreign governmental authorities in accordance with law and formal or informal international agreement.

(8) To third parties during the course of an investigation into violations or potential violations of transportation security laws to the extent necessary to obtain information pertinent to the investigation.

(9) To airport operators, aircraft operators, and maritime and land transportation operators about individuals who are their employees, job applicants, or contractors, or persons to whom they issue identification credentials or grant clearances to secured areas in transportation facilities when relevant to such employment, application, contract, or the issuance of such credentials or clearances.

(10) To the Department of Justice (DOJ) or other Federal agency in the review, settlement, defense, and prosecution of claims, complaints, and lawsuits involving matters over which TSA exercises jurisdiction or when conducting litigation or in proceedings before any court, adjudicative or administrative body, when: (a) TSA, or (b) any employee of TSA in his/her official capacity, or (c) any employee of TSA in his/her individual capacity where DOJ or TSA has agreed to represent the employee, or (d) the United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and TSA determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which TSA collected the records.

(11) To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual.

(12) To the National Archives and Records Administration or other appropriate Federal agency in records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained on paper and in computer-accessible storage media. Records are also stored on microfiche and roll microfilm.

RETRIEVABILITY:

Records are retrieved by name, address, and social security account number or other assigned tracking identifier of the individual on whom the records are maintained.

SAFEGUARDS:

Access to TSA working and storage areas is restricted to employees on a ''need to know'' basis. Strict control measures are enforced to ensure that access to these records is also based on ''need to know.'' Generally, TSA file areas are locked after normal duty hours and the facilities are protected from the outside by security personnel.

RETENTION AND DISPOSAL:

Paper records and information stored on electronic storage are destroyed upon notification of death or not later than 5 years after separation or transfer of employee or no later than 5 years after contract relationship expires, whichever is applicable.

SYSTEM MANAGER AND ADDRESS:

Director of Transportation Credentialing, TSA Headquarters, TSA–19, 601 South 12th Street, Arlington, VA 22202–4220.

NOTIFICATION PROCEDURE:

To determine whether this system contains records relating to you, write to the System Manager identified above.

RECORD ACCESS PROCEDURE:

Same as ''Notification Procedure'' above. Provide your full name and a description of information that you seek, including the time frame during which the record(s) may have been generated. Individuals requesting access must comply with the Department of Homeland Security Privacy Act regulations on verification of identity (6 CFR 5.21(d)).

CONTESTING RECORD PROCEDURE:

Same as ''Notification Procedure'' and ''Record Access Procedure,'' above.

RECORD SOURCE CATEGORIES:

Information contained in this system is obtained from the job applicant on the Questionnaire For Public Trust Positions, law enforcement and intelligence agency record systems, publicly available government records and commercial databases.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Portions of this system are exempt under 5 U.S.C. 552a(k)(1) and (k)(5).

DHS/TSA 005

SYSTEM NAME:

Internal Investigation Record System (IIRS)

SECURITY CLASSIFICATION:

Classified, sensitive.

SYSTEM LOCATION:

Records are maintained in the Office of the Assistant Administrator for

Internal Affairs and Program Review and the Office of the Assistant Administrator for Human Resources, Transportation Security Administration (TSA) Headquarters in Arlington, Virginia. Records may also be maintained at TSA's Office of Chief Counsel, the Office of the Assistant Administrator for Aviation Operations, or at various TSA field offices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

(a) Current and former TSA employees and current and former consultants, contractors, and subcontractors with whom the agency has done business, and their employees; (b) Witnesses, complainants, and other individuals who have been identified as relevant to the investigation; (c) Individuals who have been identified as relevant to investigations of security-related incidents or reviews of TSA programs and operations.

CATEGORIES OF RECORDS IN THE SYSTEM:

(a) Information relating to investigations conducted by TSA regarding or relevant to covered individuals, including but not limited to identifying information of relevant parties (*e.g.*, subject, complainants, witnesses); correspondence; memoranda (including legal opinions or advice provided by agency counsel); statements and other information provided by investigation subjects, complainants, witnesses, or others; details of security-related incidents or alleged criminal, civil, or administrative misconduct, or that are indicative of such misconduct; and records concerning an individual's employment status or conduct while employed by TSA. ''Investigation'' may include action that is taken in response to complaints or inquiries regarding covered individuals.

(b) Files and reports pertaining to investigations prepared by the Office of Internal Affairs and Program Review or other TSA offices, to include all related material such as exhibits, statements, affidavits, records obtained during the course of the investigation (including those obtained from other sources, such as Federal, State, local, international, or foreign investigatory or law enforcement agencies and other government agencies), and records involving the disposition of the investigation and any resulting agency action (*e.g.*, criminal prosecutions, civil proceedings, administrative action).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

49 U.S.C. 114.

PURPOSE(S):

(a) To facilitate and assist in the management, tracking, and retrieval of investigations of allegations or appearances of misconduct (and related incidents) of current or former TSA employees or contractors and investigations of security-related incidents or reviews of TSA programs and operations.

(b) To promote economy, efficiency, and effectiveness of the Internal Investigation system, to conduct and supervise investigations covered by this system, and to detect fraud and abuse in the investigations program.

(c) To provide support for any adverse action or counseling that may occur as a result of the findings of the investigation.

(d) To monitor case assignment, disposition, status, and results of investigations.

(e) To permit the retrieval of investigation results performed on the individuals covered in this system.

(f) To take action on or respond to a complaint or inquiry concerning a TSA employee or contractor.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

(1) To the United States Department of Transportation, its operating administrations, or the appropriate state or local agency when relevant or necessary to (a) ensure safety and security in any mode of transportation; (b) enforce safety- and security-related regulations and requirements; (c) assess and distribute intelligence or law enforcement information related to transportation security; (d) assess and respond to threats to transportation; (e) oversee the implementation and ensure the adequacy of security measures at airports and other transportation facilities; (f) plan and coordinate any actions or activities that may affect transportation safety and security or the operations of transportation operators; or (g) the issuance, maintenance, or renewal of a license, certificate, contract, grant, or other benefit.

(2) To the appropriate Federal, State, local, tribal, territorial, foreign, or international agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, where TSA becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation.

(3) To the appropriate Federal, State, local, tribal, territorial, foreign, or international agency regarding individuals who pose or are suspected of posing a risk to transportation or national security.

(4) To contractors, grantees, experts, consultants, or other like persons when necessary to perform a function or service related to this system of records for which they have been engaged. Such recipients are required to comply with the Privacy Act, 5 U.S.C. 552a, as amended.

(5) To a Federal, State, local, tribal, territorial, foreign, or international agency, where such agency has requested information relevant or necessary for the hiring or retention of an individual, or the issuance of a security clearance, license, contract, grant, or other benefit.

(6) To a Federal, State, local, tribal, territorial, foreign, or international agency, if necessary to obtain information relevant to a TSA decision concerning the hiring or retention of an employee, the issuance of a security clearance, license, contract, grant, or other benefit.

(7) To international and foreign governmental authorities in accordance with law and formal or informal international agreement.

(8) To third parties during the course of an investigation into violations or potential violations of transportation security laws to the extent necessary to obtain information pertinent to the investigation.

(9) To airport operators, aircraft operators, and maritime and land transportation operators about individuals who are their employees, job applicants, or contractors, or persons to whom they issue identification credentials or grant clearances to secured areas in transportation facilities when relevant to such employment, application, contract, or the issuance of such credentials or clearances.

(10) To the Department of Justice (DOJ) or other Federal agency in the review, settlement, defense, and prosecution of claims, complaints, and lawsuits involving matters over which TSA exercises jurisdiction or when conducting litigation or in proceedings before any court, adjudicative or administrative body, when: (a) TSA, or (b) any employee of TSA in his/her official capacity, or (c) any employee of TSA in his/her individual capacity where DOJ or TSA has agreed to represent the employee, or (d) the United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and TSA determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which TSA collected the records.

(11) To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual.

(12) To the National Archives and Records Administration or other appropriate Federal agency in records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

(13) To complainants to the extent necessary to provide such persons with relevant information and explanations concerning the progress and/or results of the investigation or case arising from the matters about which they complained.

(14) To professional organizations or associations with which individuals covered by this system of records may be affiliated, such as law enforcement disciplinary authorities, to meet those organizations' responsibilities in connection with the administration and maintenance of standards of conduct and discipline.

(15) To airport operators, aircraft operators, and/or maritime and land transportation operators when appropriate to address a threat or potential threat to transportation security, or when required for administrative purposes related to the effective and efficient administration of transportation security laws.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

In electronic storage media and hard copy.

RETRIEVABILITY:

Records may be retrieved by name, unique numbers assigned to the matter, or other assigned tracking identifier of the individual on whom the records are maintained.

SAFEGUARDS:

Information in this system is safeguarded in accordance with applicable laws, rules and policies. All records are protected from unauthorized access through appropriate administrative, physical, and technical safeguards. These safeguards include restricting access to those authorized with a need to know and using locked cabinets, alarms, and passwords. TSA file areas are locked after normal duty hours and the facilities are protected from the outside by security personnel.

RETENTION AND DISPOSAL:

National Archives and Records Administration approval is pending for the records in this system. The request states that paper records and information stored on electronic storage media are maintained within the Office of Internal Affairs and Program Review for 3 years and then forwarded to the Federal Records Center. Records are destroyed after 15 years. The disposition period for records maintained in other offices is still under consideration.

SYSTEM MANAGERS AND ADDRESSES:

Management Analyst, Office of Internal Affairs and Program Review, TSA Headquarters, TSA–13, 601 South 12th Street, Arlington, VA 22202–4220.

Deputy Assistant Administrator for Operations, TSA Office of Human Resources, TSA Headquarters, TSA–21, 601 South 12th Street, Arlington, VA 22202–4220.

NOTIFICATION PROCEDURE:

To determine whether this system contains records relating to you, write to the System Managers identified above.

RECORD ACCESS PROCEDURE:

Same as ''Notification Procedure'' above. Provide your full name and a description of information that you seek, including the time frame during which the records(s) may have been generated and, if applicable the airport to which the covered individual was assigned at the time of the conduct or incident under investigation. Individuals requesting access must comply with the Department of Homeland Security's Privacy Act regulations on verification of identity (6 CFR 5.21(d)).

CONTESTING RECORD PROCEDURE:

Same a ''Notification Procedure'' and ''Record Access Procedure,'' above.

RECORD SOURCE CATEGORIES:

Information maintained in this system is primarily obtained from individuals associated with TSA investigations including investigations of alleged misconduct of TSA employees or contractors and investigations of security-related incidents or reviews of TSA programs and operations. ''Individuals'' include TSA employees or contractors, witnesses to the alleged violation or events surrounding the alleged misconduct or other third parties who provided information regarding the alleged misconduct and passengers or others relevant to security-related incidents or reviews of TSA programs and operations. Information may also be collected from documents such as incident reports and audit reports, and from other sources, such as law enforcement, financial institutions, employers, state and local agencies, and other Federal agencies.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Portions of this system are exempt under 5 U.S.C. 552a(j)(2), (k)(1), and (k)(2).

DHS/TSA 008

SYSTEM NAME:

Transportation Security Administration Notification Contact Lists

SECURITY CLASSIFICATION:

Unclassified, sensitive.

SYSTEM LOCATION:

The records of this system are electronically maintained in a digital safe site at TSA Headquarters in Northern Virginia.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

TSA employees and individuals who interact with TSA in providing transportation security services, including land, air, and maritime carrier and facility operators, local government officials, law enforcement officials, and emergency response personnel. Members of the public or the news media who ask to receive TSA travel alert notifications and news releases.

CATEGORIES OF RECORDS IN THE SYSTEM:

Personal and business contact information, which includes but is not limited to name, work title, work location, work phone numbers, pager numbers, cellular phone numbers, home phone numbers, e-mail addresses, and home addresses.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, 49 U.S.C. 114, Pub. L. 107–347.

PURPOSES(S):

The system of records is designed to allow TSA to relay information throughout the organization, to transportation security emergency first responders, and to those individuals who ask to receive TSA travel alert notifications and news releases.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

(1) To the United States Department of Transportation, its operating administrations, or the appropriate state or local agency when relevant or necessary to (a) ensure safety and security in any mode of transportation; (b) enforce safety- and security-related

regulations and requirements; (c) assess and distribute intelligence or law enforcement information related to transportation security; (d) assess and respond to threats to transportation; (e) oversee the implementation and ensure the adequacy of security measures at airports and other transportation facilities; (f) plan and coordinate any actions or activities that may affect transportation safety and security or the operations of transportation operators; or (g) the issuance, maintenance, or renewal of a license, certificate, contract, grant, or other benefit.

(2) To contractors, grantees, experts, consultants, or other like persons when necessary to perform a function or service related to this system of records for which they have been engaged. Such recipients are required to comply with the Privacy Act, 5 U.S.C. 552a, as amended.

(3) To the National Archives and Records Administration or other appropriate Federal agency in records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

(4) To any agency or instrumentality charged under applicable law with the protection of the public health or safety under exigent circumstances where the public health or safety is at risk.

(5) To the appropriate Federal, State, local, tribal, territorial, foreign, or international agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, where TSA becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation.

(6) To airport operators, aircraft operators, and/or maritime and land transportation operators when appropriate to address a threat or potential threat to transportation security, or when required for administrative purposes related to the effective and efficient administration of transportation security laws.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in computer-accessible storage media and hardcopy format.

RETRIEVABILITY:

Records are retrieved by name, address, or other assigned identifier of the individual on whom the records are maintained.

SAFEGUARDS:

Information in this system is safeguarded in accordance with applicable laws, rules and policies. All records are protected from unauthorized access through appropriate administrative, physical, and technical safeguards. These safeguards include restricting access to authorized personnel who have a need-to-know by using locks, alarm devices, passwords, and encrypting data communications. Electronic access is limited by computer security measures that are strictly enforced. TSA file areas are locked after normal duty hours and facilities are protected by security personnel.

RETENTION AND DISPOSAL:

Records in this system will be retained in accordance with a schedule to be approved by the National Archives and Records Administration. Individuals who ask to receive TSA notifications and news releases will be deactivated from the contact list upon their own request.

SYSTEM MANAGERS AND ADDRESSES:

TSA Office of Information Technology, Office of the Chief Information Officer, TSA Headquarters, TSA–11, 601 South 12th Street, Arlington, VA 22202–4220 (TSA Employee Contact List and TSA Alert Notification System). TSA Public Affairs Office, TSA Headquarters, TSA–4, 601 South 12th Street, Arlington, VA 22202–4220 (Public Affairs News Releases). TSA Transportation Security Policy Office, TSA Headquarters, TSA–9, 601 South 12th Street, Arlington, VA 22202–4220 (E-mail Travel Alert Notification List).

NOTIFICATION PROCEDURE:

To determine whether a contact list within this system contains records relating to you, write to the appropriate System Manager(s) identified above.

RECORD ACCESS PROCEDURE:

Same as ''Notification Procedure,'' above. Provide your full name and a description of information that you seek, including the time frame during which the record(s) may have been generated. Individuals requesting access must comply with the Department of Homeland Security Privacy Act regulations on verification of identity (6 CFR 5.21(d)).

CONTESTING RECORD PROCEDURE:

Same as ''Notification Procedure'' and ''Record Access Procedure,'' above.

RECORD SOURCE CATEGORIES:

Information contained in this system is obtained from TSA Human Resources, TSA employees or contractors, other government agencies, and by individuals who voluntarily sign-up to receive TSA notifications or news releases.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

DHS/TSA 011

SYSTEM NAME:

Transportation Security Intelligence Service (TSIS) Operations Files

SECURITY CLASSIFICATION:

Classified, sensitive.

SYSTEM LOCATION:

Records are maintained in TSA's Office of the Transportation Security Intelligence Service in Washington, DC.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals identified in intelligence, counterintelligence, transportation security, or information system security reports and supporting materials, including but not limited to individuals involved in matters of intelligence, law enforcement or transportation security, information systems security, the compromise of classified information, or terrorism.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records include biographic information; intelligence requirements, analysis, and reporting; information systems security analysis and reporting; articles, public-source data, and other published information on individuals and events of interest to TSA/TSIS; actual or purported compromises of classified intelligence; countermeasures in connection therewith; identification of classified source documents and distribution thereof; records related to transportation security matters (*e.g.*, reports of security-related incidents), and law enforcement records as they pertain to issues involving transportation security.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

49 U.S.C. 114; National Security Act of 1947, as amended, 50 U.S.C. 403–3(d)(2); National Security Agency Act of 1959, Pub. L. 86–36, as amended, 50 U.S.C. 402 Note; E.O. 12333; E.O. 13292 and 12958; E.O. 9397; and National Security Directive 42.

PURPOSE(S):

To maintain records on intelligence, counterintelligence, transportation security, and information systems security matters as they relate to TSA's mission of protecting the nation's transportation systems. To identify

potential threats to transportation security, uphold and enforce the law, and ensure public safety.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

(1) To U.S. Government agencies, and in some instances foreign government agencies or their representatives, to provide intelligence, counterintelligence, information systems and transportation security information, and other information for the purpose of counterintelligence or antiterrorism activities authorized by U.S. law or Executive Order or for the purpose of enforcing laws that protect national and transportation security of the U.S.

(2) To U.S. Government agencies regarding compromises of classified information including the document(s) apparently compromised, implications of disclosure of intelligence sources and methods, investigative data on compromises, and statistical and substantive analysis of the data.

(3) To any U.S. Government organization in order to facilitate any security, employment, detail, liaison, or contractual decision by any U.S. Government organization, or to facilitate access to any U.S. Government information system.

(4) To U.S. agencies involved in the protection of intelligence sources and methods to facilitate such protection and to support intelligence analysis and reporting.

(5) To the appropriate Federal, State, local, tribal, territorial, foreign, or international agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, where TSA becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation.

(6) To a Federal, State, local, tribal, territorial, foreign, or international agency, where such agency has requested information relevant or necessary for the hiring or retention of an individual, or the issuance of a security clearance, license, contract, grant, or other benefit.

(7) To a Federal, State, local, tribal, territorial, foreign, or international agency, if necessary to obtain information relevant to a TSA decision concerning the hiring or retention of an employee, the issuance of a security clearance, license, contract, grant, or other benefit.

(8) To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual.

(9) To international and foreign governmental authorities in accordance with law and formal or informal international agreement.

(10) To the Department of Justice (DOJ) or other Federal agency in the review, settlement, defense, and prosecution of claims, complaints, and lawsuits involving matters over which TSA exercises jurisdiction or when conducting litigation or in proceedings before any court, adjudicative or administrative body, when: (a) TSA, or (b) any employee of TSA in his/her official capacity, or (c) any employee of TSA in his/her individual capacity where DOJ or TSA has agreed to represent the employee, or (d) the United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and TSA determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which TSA collected the records.

(11) To the National Archives and Records Administration or other appropriate Federal agency in records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

(12) To the United States Department of Transportation, its operating administrations, or the appropriate state or local agency when relevant or necessary to (a) ensure safety and security in any mode of transportation; (b) enforce safety- and security-related regulations and requirements; (c) assess and distribute intelligence or law enforcement information related to transportation security; (d) assess and respond to threats to transportation; (e) oversee the implementation and ensure the adequacy of security measures at airports and other transportation facilities; (f) plan and coordinate any actions or activities that may affect transportation safety and security or the operations of transportation operators; or (g) the issuance, maintenance, or renewal of a license, certificate, contract, grant, or other benefit.

(13) To contractors, grantees, experts, consultants, or other like persons when necessary to perform a function or service related to this system of records for which they have been engaged. Such recipients are required to comply with the Privacy Act, 5 U.S.C. 552a, as amended.

(14) To third parties during the course of or as follow-up to an investigation into violations or potential violations of the law, or an investigation related to the hiring or retention of an individual, or the issuance of a security clearance, license, contract, grant, or other benefit, to the extent necessary to obtain information pertinent to the follow-up inquiry or investigation.

(15) To airport operators, aircraft operators, and maritime and land transportation operators about individuals who are their employees, job applicants, or contractors, or persons to whom they issue identification credentials or grant clearances to secured areas in transportation facilities.

(16) To the appropriate Federal, State, local, tribal, territorial, foreign, or international agency regarding individuals who pose or are suspected of posing a risk to transportation or national security.

(17) To airport operators, aircraft operators, and/or maritime and land transportation operators when appropriate to address a threat or potential threat to transportation security, or when required for administrative purposes related to the effective and efficient administration of transportation security laws.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Magnetic tape, disk or other computer storage media, computer listings and databases, paper in file folders, audio recordings, microfilm or microfiche.

RETRIEVABILITY:

Information is retrieved by the individual's name, social security number, or other assigned personal identifier.

SAFEGUARDS:

Records stored on paper, computer printouts, audio recordings, and microfilm are stored in secure, limited-access facilities in lockable containers. Access to this information is limited to those individuals specifically authorized and granted access by TSA/TSIS. Computer record access is controlled by passwords or physical protection and is limited to authorized personnel only.

RETENTION AND DISPOSAL:

A request is pending for National Archives and Records Administration approval for the retention and disposal of records in this system.

SYSTEM MANAGER(S) AND ADDRESS:

Special Assistant, Transportation Security Intelligence Service, TSA–10, 601 South 12th Street, Arlington, VA 22202–4220.

NOTIFICATION PROCEDURE:

To determine whether this system contains records relating to you, write to the System Manager identified above.

RECORD ACCESS PROCEDURE:

Same as ''Notification Procedure,'' above. Provide your full name and a description of information that you seek, including the time frame during which the record(s) may have been generated. Individuals requesting access must comply with the Department of Homeland Security Privacy Act regulations on verification of identity (6 CFR 5.21(d)).

CONTESTING RECORD PROCEDURE:

Same as ''Notification Procedure'' and ''Record Access Procedure,'' above.

RECORD SOURCE CATEGORIES:

Information contained in this system is obtained from subject individuals; other U.S. agencies and organizations; media, including periodicals, newspapers, and broadcast transcripts; public and classified reporting, intelligence source documents, investigative reports, and correspondence.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Portions of this system are exempt under 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), and (k)(5).

Issued in Arlington, Virginia, on December 3, 2004.

Lisa S. Dean,

Privacy Officer.

[FR Doc. 04–27096 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Privacy Act of 1974: Revision to an Existing System of Records; Transportation Security Threat Assessment System (T–STAS)

AGENCY: Transportation Security Administration (TSA), DHS.

ACTION: Notice to alter an existing system of records.

SUMMARY: TSA is altering an existing system of records under the Privacy Act of 1974. The revisions affect the Transportation Security Threat Assessment System (T–STAS), DHS/TSA 002, and will update the ''Categories of records in the system'' section.

DATES: This action will be effective upon publication.

FOR FURTHER INFORMATION CONTACT: Lisa S. Dean, Privacy Officer, (571) 227–3947.

SUPPLEMENTARY INFORMATION: The Transportation Security Administration (TSA) is modifying the ''Categories of records in the system'' section of T–STAS, DHS/TSA 002 system of records, to include a new category of information in the system: military service history. This category includes, but is not limited to, what branch of the military an individual served in, their discharge date, and discharge type. T–STAS is a system of records that facilitates the performance of threat assessments and employment investigations on individuals who require special access to the transportation system. The military service history is necessary to allow TSA, during the course of a criminal history records check, to identify any criminal convictions that may have occurred while an individual served in the U.S. Military. T–STAS was most recently published in full on September 24, 2004. See 69 FR 57348, 57349.

Accordingly, TSA amends the ''Category of records in the system'' portion of T–STAS by revising category ''s'' and adding a new category ''t'', at the end of the list of records to read as follows:

DHS/TSA 002

SYSTEM NAME:

Transportation Security Threat Assessment System (T–STAS).

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

* * * * *

(s) The individual's level of access at an airport; and (t) the individual's military service history.

* * * * *

Issued in Arlington, Virginia, on December 3, 2004.

Lisa S. Dean,

Privacy Officer.

[FR Doc. 04–27098 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4901–N–50]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Kathy Ezzell, room 7266, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Heather Ranson, Division of Property Management, Program Support Center, HHS, room 5B–17, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not

a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Mark Johnston at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.*, acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: *Air Force:* Mr. Albert F. Lowas, Jr., Air Force Real Property Agency, 1700 North Moore Street, Suite 2300, Arlington, VA 22209–2802; (703) 696–5501; *Army:* Ms. Audrey C. Ormerod, Headquarters, Department of the Army, Office of the Assistant Chief of Staff for Installation Management, Attn: DAIM-MD, 600 Army Pentagon, Washington, DC 20310–0600; (703) 601–2520; *COE:* Ms. Shirley Middleswarth, Army Corps of Engineers, Civil Division, Directorate of Real Estate, 441 G Street, NW., Washington, DC 20314–1000; (202) 761–7425; *Energy:* Mr. Andy Duran, Department of Energy, Office of Engineering & Construction Management, ME–90, 1000 Independence Ave, SW., Washington, DC 20585: (202) 586–4548; *GSA:* Mr. Brian K. Polly, Assistant Commissioner, General Services Administration, Office of Property Disposal, 18th and F Streets, NW., Washington, DC 20405; (202) 501–0084; *Interior:* Ms. Linda Tribby, Acquisition & Property Management, Department of the Interior, 1849 C Street, NW., MS5512, Washington, DC 20240; (202) 219–0728; *Navy:* Mr. Charles C. Cocks, Department of the Navy, Real Estate Policy Division, Naval Facilities Engineering Command, Washington Navy Yard, 1322 Patterson Ave., SE., Suite 1000, Washington, DC 20374–5065; (202) 685–9200; (These are not toll-free numbers).

Dated: December 2, 2004.

Mark R. Johnston,

Director, Office of Special Needs Assistance Programs.

Title V, Federal Surplus Property Program Federal Register Report for 12/10/04

Suitable/Available Properties

Buildings (by State)

Arizona

Bldg. 43002
Fort Huachuca
Cochise Co: AZ 85613–7010
Landholding Agency: Army
Property Number: 21200440066
Status: Excess
Comment: 23,152 sq. ft., presence of asbestos/lead paint, most recent use—dining, off-site use only

California

Former Radio Relay Station
Blue Ridge Road Mount Vaca
Solano Co: CA
Landholding Agency: GSA
Property Number: 54200440017
Status: Unutilized
Comment: 1352 sq. ft. communication station/approx. 38 acres, no water, steep hillsides/4-wheel drive recommended, communication licenses
GSA Number: 9–J–CA–1631

District of Columbia

5 Bldgs.
Walter Reed Army Medical Center
Washington Co: DC 20012–
Location: 19, 22, 26, 30, 35
Landholding Agency: Army
Property Number: 21200440067
Status: Excess
Comment: 3893 sq. ft., residential, off-site use only

Kansas

Dwelling
Admin Area Wilson Lake
Sylvan Grove Co: KS 67481–
Landholding Agency: COE
Property Number: 31200440001
Status: Excess
Comment: 1600 sq. ft. residence, off-site use only

Dwelling
Admin Area Wilson Lake
Sylvan Grove Co: KS 67481–
Landholding Agency: COE
Property Number: 31200440002
Status: Excess
Comment: 1600 sq. ft., storage, off-site use only

Maryland

Bldg. 0401A
Aberdeen Proving Grounds
Aberdeen Co: Harford MD 21005–
Landholding Agency: Army
Property Number: 21200440068
Status: Unutilized
Comment: 220 sq. ft., needs rehab, most recent use—storage, off-site use only

Bldg. 0748A
Aberdeen Proving Grounds
Aberdeen Co: Harford MD 21005–
Landholding Agency: Army
Property Number: 21200440069
Status: Unutilized
Comment: 112 sq. ft., needs rehab, most recent use—shelter, off-site use only

Bldg. 01198
Aberdeen Proving Grounds
Aberdeen Co: Harford MD 21005–
Landholding Agency: Army
Property Number: 21200440070
Status: Unutilized
Comment: 168 sq. ft., needs rehab, most recent use—ordnance, off-site use only

Bldg. 03557
Aberdeen Proving Grounds
Aberdeen Co: Harford MD 21005–
Landholding Agency: Army
Property Number: 21200440071
Status: Unutilized
Comment: 340 sq. ft., needs rehab, most recent use—storage, off-site use only

Bldg. E3732
Aberdeen Proving Grounds
Aberdeen Co: Harford MD 21005–
Landholding Agency: Army
Property Number: 21200440072
Status: Unutilized
Comment: 1080 sq. ft., needs rehab, most recent use—storage, off-site use only

Bldg. E5876
Aberdeen Proving Grounds
Aberdeen Co: Harford MD 21005–
Landholding Agency: Army
Property Number: 21200440073
Status: Unutilized
Comment: 1192 sq. ft., needs rehab, most recent use—storage, off-site use only

Social Security Bldg.
688 East Main Street
Salisbury Co: Wicomico MD 21804–
Landholding Agency: GSA
Property Number: 54200440010
Status: Surplus
Comment: 7200 sq. ft., needs repair, most recent use—office
GSA Number: 4–G–MD–618

Montana

Metal Shed
18 SW of Chester
Chester Co: Liberty MT 59522–
Landholding Agency: Interior
Property Number: 61200440001
Status: Excess
Comment: 220 sq. ft., most recent use—storage, off-site use only

New York

Bldg. 1227
U.S. Military Academy
Highlands Co: Orange NY 10996–1592
Landholding Agency: Army
Property Number: 21200440074
Status: Unutilized
Comment: 3800 sq. ft., needs repair, possible asbestos/lead paint, most recent use—maintenance, off-site use only

Texas

29 Bldgs.
Fort Sam Houston
Canyon Lake Co: TX–
Location: S–34 thru S–39, S–40 thru S–63
Landholding Agency: Army
Property Number: 21200440076
Status: Unutilized
Comment: 924 sq. ft., mobile homes, off-site use only

Virginia

Bldg. 01025
Fort Belvoir
Ft. Belvoir Co: Fairfax VA 22060–
Landholding Agency: Army
Property Number: 21200440108
Status: Unutilized
Comment: 3594 sq. ft., presence of asbestos, most recent use—chapel, off-site use only

Bldgs. 01804, 01824
Fort Belvoir
Ft. Belvoir Co: Fairfax VA 22060–
Landholding Agency: Army
Property Number: 21200440109
Status: Unutilized
Comment: 3960 sq. ft., presence of asbestos, most recent use—chapel, off-site use only

Land (by State)

Indiana

Patriot Boat Ramp
Rt 156
Switzerland Co: IN–
Landholding Agency: GSA
Property Number: 54200440009
Status: Excess
Comment: 34.11 acres, parking and boat launch, flowage easement
GSA Number: 1–D–IN–571–B

New Jersey

Storage Site
Black Oak Ridge Road
Wayne Co: Passaic NJ
Landholding Agency: GSA
Property Number: 54200440011
Status: Excess
Comment: 6.5 acres, utility infrastructure exist
GSA Number: 1–B–NJ–0653

Texas

1 acre
Fort Sam Houston
San Antonio Co: Bexar TX 78234–
Landholding Agency: Army
Property Number: 21200440075
Status: Excess
Comment: 1 acre, grassy area

Suitable/Unavailable Properties

Buildings (by State)

Texas

Bldg. 00255
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440077
Status: Excess
Comment: 528 sq. ft., possible asbestos, off-site use only

3 Bldgs.
Fort Hood
Bell Co: TX 76544–
Location: 00256, 00257, 00258
Landholding Agency: Army
Property Number: 21200440078
Status: Excess
Comment: 2504 sq. ft., possible asbestos, most recent use—classroom, off-site use only

Bldgs. 00259, 00267
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440079
Status: Excess
Comment: 288 & 168 sq. ft., possible asbestos, most recent use—lunch room, off-site use only

Bldgs. 00268–00269
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440080
Status: Excess
Comment: 2304 sq. ft., possible asbestos, most recent use—instruction, off-site use only

3 Bldgs.
Fort Hood
Bell Co: TX 76544–
Location: 00716, 00717, 00718
Landholding Agency: Army
Property Number: 21200440081
Status: Excess
Comment: 3200 sq. ft., possible asbestos, most recent use—hq. bldg., off-site use only

Bldg. 00720
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440082
Status: Excess
Comment: 3200 sq. ft., possible asbestos, most recent use—shipping, off-site use only

Bldg. 00722
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440083
Status: Excess
Comment: 2665 sq. ft., possible asbestos, most recent use—dining, off-site use only

Bldg. 00728
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440084
Status: Excess
Comment: 2400 sq. ft., possible asbestos, most recent use—hq. bldg., off-site use only

Bldg. 00729
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440085
Status: Excess
Comment: 2400 sq. ft., possible asbestos, most recent use—auto aide, off-site use only

Bldgs. 01121, 01156
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440086
Status: Excess
Comment: 6728, 7020 sq. ft., possible asbestos, most recent use—general, off-site use only

Bldg. 04220
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440087
Status: Excess
Comment: 12,427 sq. ft., possible asbestos, most recent use—general, off-site use only

Bldgs. 04223–04226
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440088
Status: Excess
Comment: 9000 sq. ft., possible asbestos, most recent use—general, off-site use only

Bldg. 04280
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440089
Status: Excess
Comment: 96 sq. ft., possible asbestos, most recent use—scale house, off-site use only

Bldg. 04335
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440090
Status: Excess
Comment: 3378 sq. ft., possible asbestos, most recent use—general, off-site use only

6 Bldgs.
Fort Hood
Bell Co: TX 76544–
Location: 0441, 04412, 04413, 04414, 04418, 04432
Landholding Agency: Army
Property Number: 21200440091
Status: Excess
Comment: various sq. ft., possible asbestos, most recent use—hq. bldg., off-site use only

Bldg. 04450
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440092
Status: Excess
Comment: 5310 sq. ft., possible asbestos, most recent use—general, off-site use only

3 Bldgs.
Fort Hood
Bell Co: TX 76544–
Location: 04452, 04456, 04457
Landholding Agency: Army
Property Number: 21200440093
Status: Excess
Comment: 5310 sq. ft., possible asbestos, most recent use—hq. bldg., off-site use only

Bldg. 04465
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440094
Status: Excess
Comment: 5310 sq. ft., possible asbestos, most recent use—general, off-site use only

Bldgs. 04466–04467
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440095
Status: Excess
Comment: 5310 sq. ft., possible asbestos, most recent use—hq. bldg., off-site use only

Bldg. 04468
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440096
Status: Excess
Comment: 3100 sq. ft., possible asbestos, most recent use—misc., off-site use only

Bldg. 04473
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440097
Status: Excess
Comment: 3100 sq. ft., possible asbestos, most recent use—general, off-site use only

Bldgs. 04475–04476
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440098
Status: Excess
Comment: 3241 sq. ft., possible asbestos, most recent use—general, off-site use only

Bldg. 04477
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440099
Status: Excess
Comment: 3100 sq. ft., possible asbestos, most recent use—general, off-site use only

Bldg. 07002
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440100
Status: Excess
Comment: 2598 sq. ft., possible asbestos, most recent use—fire station, off-site use only

Bldg. 7002A
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440101
Status: Excess
Comment: 73 sq. ft., possible asbestos, most recent use—storage, off-site use only

Bldgs. 31007, 31009
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440102
Status: Excess
Comment: 139,693 sq. ft., possible asbestos, most recent use—barracks/operations, off-site use only

Bldg. 31008
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440103
Status: Excess
Comment: 17,936 sq. ft., possible asbestos, most recent use—dining, off-site use only

Bldg. 31011
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440104
Status: Excess
Comment: 23624 sq. ft., possible asbestos, most recent use—hq. bldg., off-site use only

Bldg. 57001
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440105
Status: Excess
Comment: 53,024 sq. ft., possible asbestos, most recent use—storage, off-site use only

Bldgs. 90039–90040
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440106
Status: Excess
Comment: 13,124 sq. ft., possible asbestos, most recent use—general, off-site use only

Bldgs. 90053–90054
Fort Hood
Bell Co: TX 76544–
Landholding Agency: Army
Property Number: 21200440107
Status: Excess
Comment: 884 & 206 sq. ft., possible asbestos, most recent use—storage, off-site use only

Virginia

Bldg. 03137
Fort Belvoir
Ft. Belvoir Co: Fairfax VA 22060–
Landholding Agency: Army
Property Number: 21200440110
Status: Unutilized
Comment: 2966 sq. ft., presence of asbestos, most recent use—airfield operations, off-site use only

Land (by State)

Arizona

0.03 acres
Dobson & Elliott Road
Chandler Co: Maricopa AZ 85224–
Landholding Agency: Interior
Property Number: 61200440002
Status: Excess
Comment: 35′ x 35′

Unsuitable Properties

Buildings (by State)

California

28 Bldgs.
Edwards AFB
Area C
Kern Co: CA 93524–
Landholding Agency: Air Force
Property Number: 18200440001
Status: Excess
Reasons: Secured Area, Extensive deterioration

Bldg. 440
Naval Base Point Loma
Fleet Warfare Center
San Diego Co: CA
Landholding Agency: Navy
Property Number: 77200440002
Status: Excess
Reason: Extensive deterioration

Colorado

Loveland Substation
Loveland Co: Larimer CO 80537–
Landholding Agency: GSA
Property Number: 54200440007
Status: Surplus
Reason: Secured Area
GSA Number: 7–B–CO–0654

Pueblo Substation
Pueblo Co: CO 81006–
Landholding Agency: GSA
Property Number: 54200440008
Status: Underutilized
Reason: Secured Area
GSA Number: 7–B–CO–0653

Georgia

Bldg. B1412
International Airport
Garden City Co: Chatham GA 31408–
Landholding Agency: Air Force
Property Number: 18200440002
Status: Excess
Reason: Within 2000 ft. of flammable or explosive material

Hawaii

Bldgs. 1091, 1092
Hickam AFB
Hickam Co: HI
Landholding Agency: Air Force
Property Number: 18200440003
Status: Unutilized
Reasons: Within airport runway clear zone, Secured Area, Extensive deterioration

Bldg. 1864
Hickam AFB
Hickam Co: HI
Landholding Agency: Air Force
Property Number: 18200440004
Status: Unutilized
Reasons: Secured Area, Extensive deterioration

Bldg. 2074
Hickam AFB
Hickam Co: HI
Landholding Agency: Air Force
Property Number: 18200440005
Status: Unutilized
Reasons: Secured Area, Extensive deterioration,

Bldg. 2174
Hickam AFB
Hickam Co: HI
Landholding Agency: Air Force
Property Number: 18200440006
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material, Secured Area

Bldgs. 3426, 3431
Hickam AFB
Hickam Co: HI
Landholding Agency: Air Force
Property Number: 18200440007
Status: Unutilized
Reasons: Secured Area, Extensive deterioration

Bldgs. 12, 14
Kokee AFB
Kokee Co: HI
Landholding Agency: Air Force
Property Number: 18200440008
Status: Unutilized
Reasons: Secured Area, Extensive deterioration

Bldg. 62NS
Naval Station
Beckoning Point
Pearl Harbor Co: Honolulu HI 96860–
Landholding Agency: Navy
Property Number: 77200440003
Status: Unutilized
Reason: Secured Area

Bldg. 63NS
Naval Station
Beckoning Point
Pearl Harbor Co: Honolulu HI 96860–
Landholding Agency: Navy
Property Number: 77200440004
Status: Unutilized
Reason: Secured Area

Bldg. 1269
Pacific Missile Range Facility
Kekaha Co: Kauai HI 96752–
Landholding Agency: Navy
Property Number: 77200440006
Status: Excess
Reason: Extensive deterioration

Bldgs. 246, 1255
Pacific Missile Range Facility
Kekaha Co: Kauai HI 96752–
Landholding Agency: Navy
Property Number: 77200440007
Status: Excess
Reasons: Secured Area, Extensive deterioration

Idaho

Bldg. CPP729/741
Idaho National Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440012
Status: Excess
Reason: Secured Area

Bldgs. CPP733, CPP736
Idaho National Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440013
Status: Excess
Reason: Secured Area

Bldgs. CPP740, CPP742
Idaho National Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440014
Status: Excess
Reason: Secured Area

Bldgs. CPP746, CPP748
Idaho National Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440015
Status: Excess
Reason: Secured Area

3 Bldgs.
Idaho National Eng & Env Lab
CPP750, CPP751, CPP752
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440016
Status: Excess
Reason: Secured Area

3 Bldgs.
Idaho National Eng & Env Lab
CPP753, CPP753A, CPP754
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440017
Status: Excess
Reason: Secured Area

Bldgs. CPP760, CPP763
Idaho National Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440018
Status: Excess
Reason: Secured Area

Bldgs. CPP764, CPP765
Idaho National Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440019
Status: Excess
Reason: Secured Area

Bldgs. CPP767, CPP768
Idaho National Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440020
Status: Excess
Reason: Secured Area

Bldgs. CPP791, CPP795
Idaho National Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440021
Status: Excess
Reason: Secured Area

3 Bldgs.
Idaho National Eng & Env Lab
CPP796, CPP797, CPP799
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440022
Status: Excess
Reason: Secured Area

Bldgs. CPP701B, CPP719
Idaho National Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440023
Status: Excess
Reason: Secured Area

Bldgs. CPP720A, CPP720B
Idaho National Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440024
Status: Excess
Reason: Secured Area

Bldg. CPP1781
Idaho National Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440025
Status: Excess
Reason: Secured Area

2 Bldgs.
Idaho National Eng & Env Lab
CPP0000VES–UTI–111, VES–UTI–112
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440026
Status: Excess
Reason: Secured Area

3 Bldgs.
Idaho National Eng & Env Lab
TAN607, TAN666, TAN668
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440027
Status: Excess
Reason: Secured Area

Bldgs. TAN704, TAN733
Idaho National Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440028
Status: Excess
Reason: Secured Area

Bldgs. TAN1611, TAN1614
Idaho National Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200440029
Status: Excess
Reason: Secured Area

Illinois

Bldgs. 3220, 3221
Naval Station
Great Lakes Co: IL 60088–
Landholding Agency: Navy
Property Number: 77200440008
Status: Excess
Reason: Extensive deterioration

Kansas

3 Vault Toilets
West Rolling Hills
Milford Lake
Junction City Co: KS 66441–
Landholding Agency: COE
Property Number: 31200440003
Status: Excess
Reason: Extensive deterioration

Vault Toilet
East Rolling Hills
Milford Lake
Junction City Co: KS 66441–
Landholding Agency: COE
Property Number: 31200440004
Status: Excess
Reason: Extensive deterioration

Kentucky

Comfort Station
Holmes Bend Access
Green River Lake
Adair Co: KY
Landholding Agency: COE
Property Number: 31200440005
Status: Excess
Reason: Extensive deterioration

Steel Structure
Mcalpine Locks & Dam
Louisville Co: KY 40212–
Landholding Agency: COE
Property Number: 31200440006
Status: Excess
Reasons: Within 2000 ft. of flammable or explosive material Floodway

Comfort Station
Mcalpine Locks & Dam
Louisville Co: KY 40212–
Landholding Agency: COE
Property Number: 31200440007
Status: Excess
Reasons: Within 2000 ft. of flammable or explosive material Floodway

Shelter
Mcalpine Locks & Dam
Louisville Co: KY 40212–
Landholding Agency: COE
Property Number: 31200440008
Status: Excess
Reasons: Within 2000 ft. of flammable or explosive material Floodway

Parking Lot
Mcalpine Locks & Dam
Louisville Co: KY 40212–
Landholding Agency: COE
Property Number: 31200440009
Status: Excess
Reasons: Within 2000 ft. of flammable or explosive material Floodway

Missouri

Privy
Pomme de Terre Lake
Wheatland Co: Hickory MO
Landholding Agency: COE
Property Number: 31200440010
Status: Underutilized
Reason: Floodway

Vault Toilet
Ruark Bluff
Stockton Co: MO
Landholding Agency: COE
Property Number: 31200440011
Status: Excess
Reason: Extensive deterioration

Comfort Station
Overlook Area
Stockton Co: MO
Landholding Agency: COE
Property Number: 31200440012
Status: Excess
Reason: Extensive deterioration

New York

Bldgs. 735, 740
Hancock Field
Syracuse Co: Onondaga NY 13211–
Landholding Agency: Air Force
Property Number: 18200440009
Status: Underutilized
Reasons: Within 2000 ft. of flammable or explosive material
Secured Area

Bldgs. 762, 778
Hancock Field
Syracuse Co: Onondaga NY 13211–
Landholding Agency: Air Force
Property Number: 18200440010
Status: Underutilized
Reasons: Within 2000 ft. of flammable or explosive material Secured Area

Bldgs. 0197A, 0422A
Brookhaven National Lab
Upton Co: Suffolk NY 11973–
Landholding Agency: Energy
Property Number: 41200440030
Status: Excess
Reason: Extensive deterioration

North Carolina

Bldgs. 20, 25
Charlotte/Douglas IAP
Charlotte Co: Mecklenburg NC 28208–
Landholding Agency: Air Force
Property Number: 18200440011
Status: Excess
Reasons: Within 2000 ft. of flammable or explosive material
Secured Area

Oregon

Testing Laboratory 1491 NW Graham Road
Troutdale Co: OR 97060–
Landholding Agency: GSA
Property Number: 54200440012
Status: Surplus
Reasons: Within 2000 ft. of flammable or explosive material
Within airport runway clear zone
GSA Number : 9–D–OR–729

Pennsylvania

Bldgs. 201, 203, 204
Pittsburgh IAP
Coraopolis Co: Allegheny PA 15108–
Landholding Agency: Air Force
Property Number: 18200440012
Status: Excess
Reason: Secured Area

Bldgs. 208, 210, 211
Pittsburgh IAP
Coraopolis Co: Allegheny PA 15108–
Landholding Agency: Air Force
Property Number: 18200440013
Status: Excess
Reason: Secured Area

Rhode Island

Facilities 9, 10
Quonset State Airport
N. Kingstown Co: RI 02852–
Landholding Agency: Air Force
Property Number: 18200440014
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material Secured Area

Facility 13
Quonset State Airport
N. Kingstown Co: RI 02852–
Landholding Agency: Air Force
Property Number: 18200440015
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material Within airport runway clear zone Secured Area

Facility 25
Quonset State Airort
N. Kingstown Co: RI 02852–
Landholding Agency: Air Force
Property Number: 18200440016
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material Secured Area

South Carolina

Bldg. 264
Mcentire Air Natl Station
Eastover Co: Richland SC 29044–
Landholding Agency: Air Force
Property Number: 18200440017
Status: Excess
Reason: Secured Area

Bldg. 608–000P
Savannah River Site
Aiken Co: SC 29802–
Landholding Agency: Energy
Property Number: 41200440031
Status: Excess
Reason: Secured Area

Bldg. 690–000N
Savannah River Site
Aiken Co: SC 29802–
Landholding Agency: Energy
Property Number: 41200440032
Status: Underutilized
Reason: Secured Area

Bldg. 763–106N
Savannah River Site
Aiken Co: SC 29802–
Landholding Agency: Energy
Property Number: 41200440033
Status: Underutilized
Reason: Secured Area

Tennessee

Bldgs. 104, 105
Alcoa ANG Station
Louisville Co: Blount TN 37777–
Landholding Agency: Air Force
Property Number: 18200440018
Status: Unutilized
Reason: Secured Area

Bldg. 106
Alcoa ANG Station
Louisville Co: Blount TN 37777–
Landholding Agency: Air Force
Property Number: 18200440019
Status: Unutilized
Reason: Secured Area

Bldgs. 109, 110
Alcoa ANG Station
Louisville Co: Blount TN 37777–
Landholding Agency: Air Force
Property Number: 18200440020
Status: Unutilized
Reason: Secured Area

Bldg. 111
Alcoa ANG Station
Louisville Co: Blount TN 37777–
Landholding Agency: Air Force
Property Number: 18200440021
Status: Unutilized
Reason: Secured Area

Pump House/6 acres
Volunteer Army Ammo Plant
Chattanooga Co: Hamilton TN 37422–
Landholding Agency: GSA
Property Number: 54200440013
Status: Surplus
Reason: Within 2000 ft. of flammable or explosive material
GSA Number: 4DTN05943T

Texas

Border Patrol Station
Hebbronville Co: Jim Hogg TX 78361–
Landholding Agency: GSA
Property Number: 54200440016
Status: Surplus
Reason: Within 2000 ft. of flammable or explosive material
GSA Number: 7–J–TX–0621B

Virginia

Bldg. 3079
Marine Corps Base
Quantico Co: VA 22134–
Landholding Agency: Navy
Property Number: 77200440009
Status: Excess
Reasons: Secured Area; Extensive deterioration

Washington

Bldgs. 2652, 2705
Naval Air Station
Whidbey
Oak Harbor Co: WA 98277–
Landholding Agency: Navy
Property Number: 77200440010
Status: Unutilized
Reason: Secured Area

Bldgs. 79, 884

NAS Whidbey Island
Seaplane Base
Oak Harbor Co: WA 98277–
Landholding Agency: Navy
Property Number: 77200440011
Status: Unutilized
Reason: Secured Area

Bldg. 121
NAS Whidbey Island
Ault Field
Oak Harbor Co: WA 98277–
Landholding Agency: Navy
Property Number: 77200440012
Status: Unutilized
Reason: Secured Area

Bldg. 419
NAS Whidbey Island
Ault Field
Oak Harbor Co: WA 98277–
Landholding Agency: Navy
Property Number: 77200440013
Status: Unutilized
Reason: Secured Area

Bldgs. 2609, 2610
NAS Whidbey Island
Ault Field
Oak Harbor Co: WA 98277–
Landholding Agency: Navy
Property Number: 77200440014
Status: Unutilized
Reason: Secured Area

Bldg. 2753
NAS Whidbey Island
Ault Field
Oak Harbor Co: WA 98277–
Landholding Agency: Navy
Property Number: 77200440015
Status: Unutilized
Reason: Secured Area

Land (by State)

Hawaii

Portion/PR111016
Naval Station
Beckoning Point
Pearl Harbor Co: Honolulu HI 96860–
Landholding Agency: Navy
Property Number: 77200440005
Status: Unutilized
Reason: Secured Area

Tennessee

51 acres
Volunteer Army Ammo Plant
Chattanooga Co: Hamilton TN 37422–
Landholding Agency: GSA
Property Number: 54200440014
Status: Surplus
Reason: Contamination
GSA Number: 4DTN05943V

11 acres
Volunteer Army Ammo Plant
Chattanooga Co: Hamilton TN 37422–
Landholding Agency: GSA
Property Number: 54200440015
Status: Surplus
Reason: Contamination
GSA Number: 4DTN05943W

[FR Doc. 04–26854 Filed 12–9–04; 8:45 am]

BILLING CODE 4210–29–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO–03–840–1610–241A]

Canyons of the Ancients National Monument Advisory Committee Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Canyons of the Ancients National Monument (Monument) Advisory Committee (Committee), will meet as directed below.

DATES: A meeting will be held January 11, 2005, at the Anasazi Heritage Center in Dolores, Colorado at 9 a.m. The public comment period for the meeting will begin at approximately 10:30 a.m. and the meeting will adjourn at approximately 12 p.m.

FOR FURTHER INFORMATION CONTACT: LouAnn Jacobson, Monument Manager or Stephen Kandell, Monument Planner, Anasazi Heritage Center, 27501 Hwy 184, Dolores, Colorado 81323; Telephone (970) 882–5600.

SUPPLEMENTARY INFORMATION: The eleven member committee provides counsel and advice to the Secretary of the Interior, through the BLM, concerning development and implementation of a management plan developed in accordance with FLMPA, for public lands within the Monument. At this meeting, topics we plan to discuss include planning issues and management concerns, planning alternatives, planning vision statement, grazing subcommittee nominees and other issues as appropriate.

The meeting will be open to the public and will include a time set aside for public comment. Interested persons may make oral statements at the meeting or submit written statements at any meeting. Per-person time limits for oral statements may be set to allow all interested persons an opportunity to speak.

Summary minutes of all Committee meetings will be maintained at the Anasazi Heritage Center in Dolores, Colorado. They are available for public inspection and reproduction during regular business hours within thirty (30) days of the meeting. In addition, minutes and other information concerning the Committee can be obtained from the Monument planning Web site at: *http://www.blm.gov/rmp/canm* which will be updated following each Committee meeting.

Dated: December 6, 2004.

LouAnn Jacobson,

Monument Manager, Canyons of the Ancients National Monument.

[FR Doc. 04–27154 Filed 12–9–04; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureua of Land Management

[WY–100–05–1310–DB]

Notice of Meeting of the Pinedale Anticline Working Group

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (1976) and the Federal Advisory Committee Act (1972), the U.S. Department of the Interior, Bureau of Land Management (BLM) Pinedale Anticline Working Group (PAWG) will meet in Pinedale, Wyoming, for a business meeting. Group meetings are open to the public.

DATES: The PAWG will meet January 5, 2005, from 9 a.m. until 5 p.m.

ADDRESSES: The meeting of the PAWG will be held in the Lovatt room of the Pinedale Library, 155 S. Tyler Ave., Pinedale, WY.

FOR FURTHER INFORMATION CONTACT: Carol Kruse, BLM/PAWG Liaison, Bureau of Land Management, Pinedale Field Office, 432 E. Mills St., PO Box 738, Pinedale, WY, 82941; 307–367–5352.

SUPPLEMENTARY INFORMATION: The Pinedale Anticline Working Group (PAWG) was authorized and established with release of the Record of Decision (ROD) for the Pinedale Anticline Oil and Gas Exploration and Development Project on July 27, 2000. The PAWG advises the BLM on the development and implementation of monitoring plans and adaptive management decisions as development of the Pinedale Anticline Natural Gas Field (PAPA) proceeds for the life of the field.

After the ROD was issued, Interior determined that a Federal Advisory Committees Act (FACA) charter was required for this group. The charter was signed by Secretary of the Interior, Gale Norton, on August 15, 2002, and renewed on August 13, 2004. An announcement of committee initiation and call for nominations was published

in the **Federal Register** on February 21, 2003, (68 FR 8522). PAWG members were appointed by Secretary Norton on May 4, 2004.

The agenda for this meeting will include separate presentations on sagebrush ecology and the recently completed 5-year mule deer winter range study on the Mesa, task group leader discussions and individual task group discussions. At a minimum, public comments will be heard just prior to adjournment of the meeting.

Dated: December 2, 2004.

Priscilla E. Mecham,

Field Office Manager.

[FR Doc. 04–27080 Filed 12–9–04; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureua of Land Management

[WY–100–05–1310–DB]

Notice of Meeting of the Pinedale Anticline Working Group's Wildlife Task Group

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (1976) and the Federal Advisory Committee Act (1972), the U.S. Department of the Interior, Bureau of Land Management (BLM) Pinedale Anticline Working Group (PAWG) Wildlife Task Group (subcommittee) will meet in Pinedale, Wyoming, for a business meeting. Task Group meetings are open to the public.

DATES: The next PAWG Wildlife Task Group meeting is scheduled for January 6, 2005, from 9 a.m. until 5:30 p.m.

ADDRESSES: The meeting of the PAWG Wildlife Task Group will be held in the conference room of the BLM at 432 E. Mill St., Pinedale, WY.

FOR FURTHER INFORMATION CONTACT: Steve Belinda, BLM/Wildlife TG Liaison, Bureau of Land Management, Pinedale Field Office, 432 E. Mills St., PO Box 768, Pinedale, WY 82941; 307–367–5323.

SUPPLEMENTARY INFORMATION: The Pinedale Anticline Working Group (PAWG) was authorized and established with release of the Record of Decision (ROD) for the Pinedale Anticline Oil and Gas Exploration and Development Project on July 27, 2000. The PAWG advises the BLM on the development and implementation of monitoring plans and adaptive management decisions as development of the Pinedale Anticline Natural Gas Field (PAPA) proceeds for the life of the field.

After the ROD was issued, Interior determined that a Federal Advisory Committees Act (FACA) charter was required for this group. The charter was signed by Secretary of the Interior, Gale Norton, on August 15, 2002, and renewed on August 13, 2004. An announcement of committee initiation and call for nominations was published in the **Federal Register** on February 21, 2003, (68 FR 8522). PAWG members were appointed by Secretary Norton on May 4, 2004.

At their second business meeting, the PAWG established seven resource- or activity-specific Task Groups, including one for Wildlife. Public participation on the Task Groups was solicited through the media, letters, and word-of-mouth.

The agenda for this meeting will include information gathering and discussion related to developing a wildlife monitoring plan to assess the impacts of development in the Pinedale Anticline gas field, and identifying who will do and who will pay for the monitoring. Task Group recommendations are due to the PAWG in February, 2005. At a minimum, public comments will be heard just prior to adjournment of the meeting.

Dated: December 2, 2004.

Priscilla E. Mecham,

Field Office Manager.

[FR Doc. 04–27081 Filed 12–9–04; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–100–05–1310–DB]

Notice of Meeting of the Pinedale Anticline Working Group's SocioEconomic Task Group

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (1976) and the Federal Advisory Committee Act (1972), the U.S. Department of the Interior, Bureau of Land Management (BLM) Pinedale Anticline Working Group (PAWG) SocioEconomic Task Group (subcommittee) will meet in Pinedale, Wyoming, for a business meeting. Task Group meetings are open to the public.

DATES: The next PAWG SocioEconomic Task Group meeting is scheduled for January 11, 2005, from 10 a.m. until 5 p.m. A second meeting will occur on January 25, 2005, from 10 a.m. to 5 p.m.

ADDRESSES: The January 11 PAWG SocioEconomic Task Group meeting will be held in the Sublette County School Board meeting room at 146 E. Hennick St., Pinedale, WY. The January 25 meeting will be held in the Lovatt room of the Pinedale Library at 155 S. Tyler Ave., Pinedale, WY.

FOR FURTHER INFORMATION CONTACT: Roy Allen, BLM/SocioEconomic TG Liaison, Bureau of Land Management, Wyoming State Office, 5353 Yellowstone Rd., Cheyenne, WY, 82009, or PO Box 1828, Cheyenne, WY 82003; 307–775–6031.

SUPPLEMENTARY INFORMATION: The Pinedale Anticline Working Group (PAWG) was authorized and established with release of the Record of Decision (ROD) for the Pinedale Anticline Oil and Gas Exploration and Development Project on July 27, 2000. The PAWG advises the BLM on the development and implementation of monitoring plans and adaptive management decisions as development of the Pinedale Anticline Natural Gas Field (PAPA) proceeds for the life of the field.

After the ROD was issued, Interior determined that a Federal Advisory Committees Act (FACA) charter was required for this group. The charter was signed by Secretary of the Interior, Gale Norton, on August 15, 2002, and renewed on August 13, 2004. An announcement of committee initiation and call for nominations was published in the **Federal Register** on February 21, 2003, (68 FR 8522). PAWG members were appointed by Secretary Norton on May 4, 2004.

At their second business meeting, the PAWG established seven resource-or activity-specific Task Groups, including one for SocioEconomics. Public participation on the Task Groups was solicited through the media, letters, and word-of-mouth. The agenda for this meeting will include information gathering and discussion related to developing a socioeconomic monitoring plan to assess the impacts of development in the Pinedale Anticline gas field, and identifying who will do and who will pay for the monitoring. Task Group recommendations are due to the PAWG in February, 2005. At a minimum, public comments will be heard just prior to adjournment of the meeting.

Dated: December 2, 2004.

Priscilla E. Mecham,

Field Office Manager.

[FR Doc. 04–27082 Filed 12–9–04; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–100–05–1310–DB]

Notice of Meeting of the Pinedale Anticline Working Group's Water Resources Task Group

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting and cancellation.

SUMMARY: In accordance with the Federal Land Policy and Management Act (1976) and the Federal Advisory Committee Act (1972), the U.S. Department of the Interior, Bureau of Land Management (BLM) Pinedale Anticline Working Group (PAWG) Water Resources Task Group (subcommittee) will meet in Pinedale, Wyoming, for a business meeting. Task Group meetings are open to the public.

DATES: The PAWG Water Resources Task Group meeting scheduled for January 13, 2005 is cancelled. The next PAWG Water Resources Task Group meeting will be January 6, 2005, from 9 a.m. until 5 p.m.

ADDRESSES: The meeting of the PAWG Water Resources Task Group will be held in the Lovatt room of the Pinedale Library at 155 S. Tyler Ave., Pinedale, WY.

FOR FURTHER INFORMATION CONTACT: Catherine Woodfield, BLM/Water Resources TG Co-Liaison, Bureau of Land Management, Pinedale Field Office, 432 E. Mills St., P.O. Box 738, Pinedale, WY, 82941; 307–367–5360 or Dennis Doncaster, BLM/Water Resources TG Co-Liaison, Bureau of Land Management, Rock Springs Field Office, 280 Hwy 191 North, Rock Springs, Wyoming 82901; 307–352–0207.

SUPPLEMENTARY INFORMATION: The Pinedale Anticline Working Group (PAWG) was authorized and established with release of the Record of Decision (ROD) for the Pinedale Anticline Oil and Gas Exploration and Development Project on July 27, 2000. The PAWG advises the BLM on the development and implementation of monitoring plans and adaptive management decisions as development of the Pinedale Anticline Natural Gas Field (PAPA) proceeds for the life of the field.

After the ROD was issued, Interior determined that a Federal Advisory Committees Act (FACA) charter was required for this group. The charter was signed by Secretary of the Interior, Gale Norton, on August 15, 2002, and renewed on August 13, 2004. An announcement of committee initiation and call for nominations was published in the **Federal Register** on February 21, 2003, (68 FR 8522). PAWG members were appointed by Secretary Norton on May 4, 2004.

At their second business meeting, the PAWG established seven resource-or activity-specific Task Groups, including one for Water Resources. Public participation on the Task Groups was solicited through the media, letters, and word-of-mouth. The agenda for this meeting will include information gathering and discussion related to developing a water resources monitoring plan to assess the impacts of development in the Pinedale Anticline gas field, and identifying who will do and who will pay for the monitoring. Task Group recommendations are due to the PAWG in February, 2005. At a minimum, public comments will be heard just prior to adjournment of the meeting.

Dated: December 2, 2004.

Priscilla E. Mecham,

Field Office Manager.

[FR Doc. 04–27083 Filed 12–9–04; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–100–05–1310–DB]

Notice of Meeting of the Pinedale Anticline Working Group's Transportation Task Group

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (1976) and the Federal Advisory Committee Act (1972), the U.S. Department of the Interior, Bureau of Land Management (BLM) Pinedale Anticline Working Group (PAWG) Transportation Task Group (subcommittee) will meet in Pinedale, Wyoming, for a business meeting. Task Group meetings are open to the public.

DATES: The next PAWG Transportation Task Group meeting is scheduled for January 11, 2005, from 1 p.m. until 5 p.m.

ADDRESSES: The meeting of the PAWG Transportation Task Group will be held in the Lovatt room of the Pinedale Library at 155 S. Tyler Ave., Pinedale, WY.

FOR FURTHER INFORMATION CONTACT: Bill Wadsworth, BLM/Transportation TG Liaison, Bureau of Land Management, Pinedale Field Office, 432 E. Mills St., PO Box 738, Pinedale, WY 82941; 307–367–5341.

SUPPLEMENTARY INFORMATION: The Pinedale Anticline Working Group (PAWG) was authorized and established with release of the Record of Decision (ROD) for the Pinedale Anticline Oil and Gas Exploration and Development Project on July 27, 2000. The PAWG advises the BLM on the development and implementation of monitoring plans and adaptive management decisions as development of the Pinedale Anticline Natural Gas Field (PAPA) proceeds for the life of the field.

After the ROD was issued, Interior determined that a Federal Advisory Committees Act (FACA) charter was required for this group. The charter was signed by Secretary of the Interior, Gale Norton, on August 15, 2002, and renewed on August 13, 2004. An announcement of committee initiation and call for nominations was published in the **Federal Register** on February 21, 2003 (68 FR 8522). PAWG members were appointed by Secretary Norton on May 4, 2004.

At their second business meeting, the PAWG established seven resource-or activity-specific Task Groups, including one for Transportation. Public participation on the Task Groups was solicited through the media, letters, and word-of-mouth.

The agenda for this meeting will include information gathering and discussion related to developing a transportation monitoring plan to assess the impacts of development in the Pinedale Anticline gas field, and identifying who will do and who will pay for the monitoring. Task Group recommendations are due to the PAWG in February, 2005. At a minimum, public comments will be heard just prior to adjournment of the meeting.

Dated: December 2, 2004.

Priscilla E. Mecham,

Field Office Manager.

[FR Doc. 04–27084 Filed 12–9–04; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of extension of an information collection (1010–0068).

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), MMS is inviting comments on a collection of information that we will submit to the Office of Management and Budget (OMB) for review and approval. The information collection request (ICR) concerns the paperwork requirements in the regulations under 30 CFR 250, Subpart M, Unitization.

DATES: Submit written comments by February 8, 2005.

ADDRESSES: You may submit comments by any of the following methods listed below. Please use the approved OMB Information Collection number 1010–0068 as an identifier in your message.

- MMS's Public Connect on-line commenting system, *https://ocsconnect.mms.gov*. Follow the instructions on the Web site for submitting comments.
- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions on the Web site for submitting comments.
- E-mail MMS at *rules.comments@mms.gov*. Use the OMB number in the subject line.
- Fax: 703–787–1093. Identify with OMB number.
- Mail or hand-carry comments to the Department of the Interior; Minerals Management Service; Attention: Rules Processing Team (RPT); 381 Elden Street, MS–4024; Herndon, Virginia 20170–4817.

FOR FURTHER INFORMATION CONTACT: Cheryl Blundon, Rules Processing Team at (703) 787–1600. You may also contact Cheryl Blundon to obtain a copy, at no cost, of the regulation that requires the subject collection of information.

SUPPLEMENTARY INFORMATION:

Title: 30 CFR Part 250, Subpart M, Unitization.

OMB Control Number: 1010–0068.

Abstract: The Outer Continental Shelf (OCS) Lands Act, as amended (43 U.S.C. 1331 *et seq.* and 43 U.S.C. 1801 *et seq.*), authorizes the Secretary of the Interior (Secretary) to prescribe rules and regulations to administer leasing of the OCS. Such rules and regulations will apply to all operations conducted under a lease. Operations on the OCS must preserve, protect, and develop oil and natural gas resources in a manner that is consistent with the need to make such resources available to meet the Nation's energy needs as rapidly as possible; to balance orderly energy resource development with protection of human, marine, and coastal environments; to ensure the public a fair and equitable return on the resources of the OCS; and to preserve and maintain free enterprise competition.

This notice concerns the reporting and recordkeeping elements of 30 CFR 250, Subpart M, Unitization. We will protect information from respondents considered proprietary under the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR Part 2) and under regulations at 30 CFR 250.196, ''Data and information to be made available to the public.'' No items of a sensitive nature are collected. Responses are mandatory or are required to retain a benefit. MMS OCS Regions use the information to determine whether to approve a proposal to enter into an agreement to unitize operations under two or more leases or to approve modifications when circumstances change. The information is necessary to ensure that operations will result in preventing waste, conserving natural resources, and protecting correlative rights, including the Government's interests. We also use information submitted to determine competitiveness of a reservoir or to decide that compelling unitization will achieve these results.

Frequency: The frequency of reporting is on occasion.

Estimated Number and Description of Respondents: Approximately 130 Federal OCS oil and gas or sulphur lessees.

Estimated Reporting and Recordkeeping ''Hour'' Burden: The currently approved annual reporting burden for this collection is 5,396 hours. The following chart details the individual components and respective hour burden estimates of this ICR. There are no recordkeeping requirements under 30 CFR 250, Subpart M. In calculating the burdens, we assumed that respondents perform certain requirements in the normal course of their activities. We consider these to be usual and customary and took that into account in estimating the burden.

BURDEN BREAKDOWN

Citation 30 CFR 250 subpart M	Reporting requirement	Hour burden
1301	General description of requirements	Burden included in following sections.
1301(d), (f)(3), (g)(1), (g)(2)(ii).	Request or order suspension of production or operations	Burden covered in 1010–0114.
1302(b)	Request preliminary determination on competitive reservoir	36.
1302(b)	Submit concurrence or objection on competitiveness with supporting evidence	36.
1302(c), (d)	Submit joint plan of operations, supplemental plans, or a separate plan if agreement cannot be reached.	36.
1303	Apply for voluntary unitization, including submitting unit agreement, unit operating agreement, initial plan of operation, and supporting data; request for variance from model agreement.	144.
1304(b)	Request compulsory unitization, including submitting unit agreement, unit operating agreement, initial plan of operation, and supporting data; serving non-consenting lessees with documents.	144.
1303; 1304	Submit revisions or modifications to unit agreement, unit operating agreement, plan of operation, change of unit operator, *etc.*	6.
1303; 1304	Submit initial, and revisions to, participating area	48.
1304(d)	Request hearing on required unitization	1.
1304(e)	Submit statement at hearing on compulsory unitization	4.
1304(e)	Submit three copies of verbatim transcript of hearing	1.
1304(f)	Appeal final order of compulsory unitization	Burden covered under 1010–0121.
1300–1304	General departure and alternative compliance requests not specifically covered elsewhere in Subpart M regulations.	2.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: Section 250.1304(d) provides an opportunity for parties notified of compulsory unitization to request a hearing. Section 250.1304(e) requires the party seeking the compulsory unitization to pay for the court reporter and three copies of the verbatim transcript of the hearing. It should be noted there have been no such hearings in the recent past, and none are expected in the near future. We estimate that the burden would be approximately $250.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

Comments: Before submitting an ICR to OMB, PRA section 3506(c)(2)(A) requires each agency ''* * * to provide notice * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *''. Agencies must specifically solicit comments to: (a) Evaluate whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Agencies must also estimate the ''non-hour cost'' burdens to respondents or recordkeepers resulting from the collection of information. Therefore, if you have costs to generate, maintain, and disclose this information, you should comment and provide your total capital and startup cost components or annual operation, maintenance, and purchase of service components. You should describe the methods you use to estimate major cost factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Capital and startup costs include, among other items, computers and software you purchase to prepare for collecting information, monitoring, and record storage facilities. You should not include estimates for equipment or services purchased: (i) Before October 1, 1995; (ii) to comply with requirements not associated with the information collection; (iii) for reasons other than to provide information or keep records for the Government; or (iv) as part of customary and usual business or private practices.

We will summarize written responses to this notice and address them in our submission for OMB approval. As a result of your comments, we will make any necessary adjustments to the burden in our submission to OMB.

Public Comment Policy: MMS's practice is to make comments, including names and addresses of respondents, available for public review during regular business hours. If you wish your name and/or address to be withheld, you must state this prominently at the beginning of your comment. MMS will honor this request to the extent allowable by law; however, anonymous comments will not be considered. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

MMS Information Collection Clearance Officer: Arlene Bajusz (202) 208–7744.

Dated: December 3, 2004.

E.P. Danenberger,

Chief, Engineering and Operations Division.

[FR Doc. 04–27142 Filed 12–9–04; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under The Clean Air Act, Resource Conservation and Recovery Act, And Clean Water Act

Consistent with 28 CFR 50.7, notice is hereby given that on December 2, 2004, a proposed consent decree (''decree'') in *United States* v. *AK Steel Corporation*, Civil Action No. 04–1833, was lodged with the United States District Court for the Western District of Pennsylvania.

In this action, the United States seeks civil penalties and injunctive relief against AK Steel Corporation (''AK Steel'') for violations under Section 3008(a)(1) of the Resource Conservation and Recovery Act, 42 U.S.C. 6928(a)(1), Section 113(a)(3) of the Clean Air Act, 42 U.S.C. 7413(a)(3); and Section 309(b) of the Clean Water Act, 42 U.S.C. 1319(b) at its Butler Works facility in Butler County, Pennsylvania. The proposed consent decree provides that AK Steel will pay a civil penalty and perform three different Supplemental Environmental Projects (''SEPs'') in mitigation of a portion of the penalty, for a total package valued at $1.2 million. AK Steel will pay $300,000 by electronic funds transfer, and perform the following SEPs: (1) NO_X Reduction SEP; (2) CFC Unit Conversions SEP; and (3) Refrigerant Recycling Program in Butler County, Pennsylvania.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *AK Steel Corporation*, D.J. Ref. 90–7–1–07684.

The decree may be examined at the Office of the United States Attorney, U.S. Post Office & Courthouse, 700 Grant Street, Suite 400, Pittsburgh, PA 15219, and at the U.S. Environmental Protection Agency-Region III, 1650 Arch Street, Philadelphia, PA 19103. During the public comment period, the decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the decree may also be obtained by mail from the Consent Decree library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood *tonia.fleetwood@usdoj.gov*, fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, Please enclose a check in the amount of $18.25 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Robert Brook,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 04–27152 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging Of Consent Decree Under The Clean Air Act

Consistent with Departmental policy and 28 CFR 50.7, notice is hereby given that on November 29, 2004, a proposed consent decree in *United States* v. *Global Companies, LLC.* et al., Civil Action No. 04–CV–12495–DPW, was lodged with the United States District Court for the District of Massachusetts.

In this action, the United States sought a civil penalty for violations of Section 211 of the Clean Air Act, 42 U.S.C. 7545, and its implementing

regulations. The Consent Decree requires settling defendants Global Companies, L.L.C. and Global Petroleum Corp. to pay a $500,000 civil penalty and to perform a three-year ''Compliance Assurance Program'' to ensure future compliance with the requirements for importing and blending reformulated and conventional gasoline. The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Global Companies, LLC.* et al., D.J. Ref. #90–5–2–1–07738.

The consent decree may be examined at the Office of the United States Attorney, District of Massachusetts, 1 Courthouse Way, John Joseph Moakley Courthouse, Boston, MA 02210 (contact AUSA George B. Henderson), and at U.S. EPA Headquarters, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460 (contact Jocelyn L. Adair). During the public comment period, the consent decree also may be examined on the Department of Justice Web site at *http://www.usdoj.gov/enrd/open.html.* A copy of the consent decree also may be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood *(tonia.fleetwood@usdoj.gov),* fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $4.50 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Bruce S. Gelber,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 04–27151 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Public Comment Period For Proposed Consent Decree Addenda Under the Clean Air Act

Under 28 CFR 50.7, notice is hereby given that, for a period of 15 days, the United States will receive public comments on a proposed Fourth Addendum to Consent Decree in *United States,* et al. v. *Motiva Enterprises LLC, Equilon Enterprises LLC, and Deer Park Refining Limited Partnership,* Civil Action No. H–01–0978, which was lodged with the United States District Court for the Southern District of Texas on December 2, 2004.

The original settlement was for civil penalties and injunctive relief pursuant to Section 113(b) of the Clean Air Act (''CAA''), 42 U.S.C. 7413(b) (1983), *amended by,* 42 U.S.C. 7413(b) (Supp. 1991), covering nine refineries, and was lodged with the Court on March 21, 2001, and entered on August 20, 2001, as part of EPA's Petroleum Refinery Initiative. The proposed Addendum modifies the NO_X emission reduction requirement for heaters and boilers at Shell's Bakersfield refinery. The proposed Addendum specifies that Shell will achieve a NO_X reduction of 3,661 tons per year (''tpy'') by December 31, 2004 (the original 3,668 tpy less a 7 tpy shortfall). Shell has agreed to make up for the 7 tpy shortfall by not later than March 31, 2005, and to additionally achieve a further reduction of 62 tpy by that date.

The Department of Justice will receive for a period of fifteen (15) days from the date of this publication comments relating to the Fourth Addendum to Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to: *United States* v. *Motiva Enterprises LLC., D.J. Ref. 90–5–2–1–07209.*

The proposed Addendum may be examined at the Office of the United States Attorney, Southern District of Texas, U.S. Courthouse, 515 Rusk, Houston, Texas 77002, and at EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202. During the public comment period the Fourth Addendum to the Consent Decrees may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the Addendum may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $2.00 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Robert D. Brook,

Assistant Chief Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 04–27150 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—American Institute of Steel Construction, Inc.

Notice is hereby given that, on September 20, 2004, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), American Institute of Steel Construction, Inc. (''AISC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the name and principal place of business of the standards development organization is: American Institute of Steel Construction, Inc., Chicago, IL. The nature and scope of AISC's standards development activities are: to develop standards addressing the design, fabrication and erection of structural steel, including specifications for structural steel buildings, specifications for nuclear facilities, seismic provisions for structural steel buildings, standards for the qualification of steel structures inspectors, code of standard practice for structural steel fabrication and erection, and standards for steel shipment notices and bar codes.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 04–27070 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—The American Society for Nondestructive Testing

Notice is hereby given that, on September 21, 2004, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), The American Society for Nondestructive Testing (''ASNT'') had filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the name and principal place of business of the standards development organization is: The American Society for Nondestructive Testing, Columbus, OH. The nature and scope of ASNT's standards development activities are: to develop personnel qualifications and certification requirements for nondestructive testing.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 04–27071 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—ANSI Accredited Standards Committee ''C78''

Notice is hereby given that, on September 17, 2004, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''Act''), ANSI Accredited Standards Committee ''C78'' Committee''), by its Secretariat, National Electrical Manufacturers Association (''NEMA''), has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the name and principal place of business of the standards development organization is: ANSI Accredited Standards Committee ''C78'', Rosslyn, VA. The nature and scope of C78 Committee's standards development activities are: to develop and maintain American National Standards related to electric lamps. Currently, C78 Committee maintains standards relating to different types of electric lamps including fluorescent, metal halide, sodium, mercury, and incandescent lamps. The standards developed by C78 Committee are published by NEMA.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 04–27061 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—ANSI Accredited Standards Committee ''C84''

Notice is hereby given that, on September 17, 2004, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), ANSI Accredited Standards Committee ''C84'' (''C84 Committee''), by its Secretariat, National Electrical Manufacturers Association (''NEMA''), has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the name and principal place of business of the standards development organization is: ANSI Accredited Standards Committee ''C84'', Rosslyn, VA. The nature and scope of C84 Committee's standards development activities are: to develop and maintain American National Standards related to preferred voltage ratings for AC systems and equipment. C84 Committee currently maintains one standard relating to voltage ratings for electric power equipment systems operating at 60 Hertz or less. The standards developed by C84 Committee are published by NEMA.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 04–27062 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—ANSI Accredited Standards Committee ''C37''

Notice is hereby given that, on September 17, 2004, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), ANSI Accredited Standards Committee ''C37'' (''C37 Committee''), by its Secretariat, National Electrical Manufacturers Association (''NEMA''), has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the name and principal place of business of the standards development organization is: ANSI Accredited Standards Committee ''C37'', Rosslyn, VA. The nature and scope of C37 Committee's standards development activities are: test procedures for power switchgear equipment.

Currently, C37 Committee maintains nine standards relating to test procedures for power switchgear equipment. The standards developed by C37 Committee are published by NEMA.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 04–27063 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—ANSI Accredited Standards Committee ''C80''

Notice is hereby given that, on September 17, 2004, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), ANSI Accredited Standards Committee ''C80'' (''C80 Committee''), by its Secretariat, National Electrical Manufacturers Association (''NEMA''), has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provision limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the name and principal place of business of the standards development organization is: ANSI Accredited Standards Committee, ''C80'', Rosslyn, VA. The nature and scope of C80 Committee's standards development activities are: Related to raceways for electrical wiring. C80 Committee currently maintains four standards relating to different types of metal conduit used for electrical wiring. The standards developed by C80 Committee are published by NEMA.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 04–27073 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1933—ASIS International

Notice is hereby given that, on September 20, 2004, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), ASIS International (''ASIS'') has filed written notifications simultaneously with the Attorney General and the Federal Tarde Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the name and principal place of business of the standards development organization is: ASIS International, Alexandria, VA. The nature and scope of ASIS' standards development activities are: Security guidelines that address specific concerns and issues related to security in order to increase the effectiveness and productivity of risk mitigation security practices and solutions.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 04–27072 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Business Process Management Initiative

Notice is hereby given that, on October 1, 2004, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Business Process Management Initiative (''BPMI'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the name and principal place of business of the standards development organization is: Business Process Management Initiative, Lighthouse Point, FL. The nature and scope of BPMI's standards development activities are: standardization of terminology, definitions, formats, quality, and procedures for the production, use and deployment of business process management systems, and related data. Standards, recommended practices, and technical reports prepared in accordance with BPMI's policies and procedures are intended to have broad national acceptance, as well as provide the basis upon which to achieve international accord in the development of ISO standards.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 04–27066 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Joint Venture Under ATP Award No. 70NANB4H3028

Notice is hereby given that, on October 28, 2004, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Joint Venture under ATP Award No. 70NANB4H3028 has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the identities of the parties are Carbon Nanotechnologies, Inc., Houston, TX; Johnson Matthey Fuel Cells, Inc., West Chester, PA; and Motorola Inc., Motorola Labs, Microelectronics & Physical Sciences Lab, Tempe, AZ. The nature and objectives of the venture are: to exploit the unique properties of single-wall carbon nanotubes (SWNT) in order to achieve major breakthroughs in Proton Exchange Membrane (PEM) fuel cell performance, durability and manufacturability.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 04–27067 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of the National Cooperation Research and Production Act of 1993—National Committee for Clinical Laboratory Standards

Notice is hereby given that, on September 16, 2004, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), National Committee for Clinical Laboratory Standards (''NCCLS'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the name and principal place of business of the standards development organization is: National Committee for Clinical Laboratory Standards, Wayne, PA. (On January 1, 2005 the organization's name will become: Clinical and Laboratory Standards Institute). The nature and scope of NCCLS's standards development activities are: to improve the quality of work performed by organizations concerned with health care services, medical testing, and clinical and other laboratory services. Examples include training verification; safety of healthcare workers; preanalytic specimen collection and handling; evaluation of analytical methods and devices; analytic procedures in clinical chemistry and toxicology, hematology, immunology and ligand assay, microbiology, and molecular methods; performance goals for internal quality control; point of service testing in acute and chronic care facilities; physician's office laboratory testing; cytologic specimen collection and cytoprepatory techniques; laboratory design; laboratory automation and informatics; and emergency response procedures.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 04–27068 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—North American Security Products Organization

Notice is hereby given that, on November 18, 2004, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), North American Security Products Organization (''NASPO'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the name and principal place of business of the standards development organization is: North American Security Products Organization, Washington, DC. The nature and scope of NASPO's standards development activities are: to certify that providers of security documents, lables, cards, packaging, materials and technology, operate under an agreed-upon set of operational standards and security protocols.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 04–27069 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—RapidIO Trade Association

Notice is hereby given that, on September 22, 2004, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), RapidIO Trade Association (''RapidIO'') had filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the name and principal place of business of the standards development organization is: RapidIO Trade Association, Austin, TX. The nature and scope of RapidIO's standards development activities are: To direct the future development and drive the adoption of the RapidIO architecture. The RapidIO Interconnect Architecture, designed to be compatible with the most popular integrated communications processors, host processors, and networking digital signal processors, is a high-performance, packet-switched, interconnect technology.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 04–27060 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Wisconsin Certification Board, Inc.

Notice is hereby given that, on September 27, 2004, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Wisconsin Certification Board, Inc. (''WCB'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the name and principal place of business of the standards development organization is: Wisconsin Certification Board, Inc., Wauwatosa, WI. The nature and scope of WCB's standards development activities are: To promote the quality and accessibility of substance use disorder counseling, clinical supervision services, and prevention services to the citizens of Wisconsin through: (1) Certifications for substance use disorder counselors; clinical

supervisors, and prevention professionals; (2) the accreditation and endorsement of education and training activities; (3) the support for research; and (4) the support for advocacy.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 04–27065 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Workflow Management Coalition

Notice is hereby given that, on October 1, 2004, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Workflow Management Coalition (''WfMC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the name and principal place of business of the standards development organization is: Workflow Management Coalition, Lighthouse Point, FL. The nature and scope of WfMC's standards development activities are: standardization of terminology, definitions, formats, quality, apparatuses and procedures for the production, use and deployment of workflow process systems and related data. Standards, recommended practices, and technical reports prepared in accordance with WfMC's policies and procedures are intended to have broad national acceptance, as well as provide the basis upon which to achieve international accord in the development of ISO standards.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 04–27064 Filed 12–9–04; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF LABOR

Employment Standards Administration; Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (49 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under The Davis-Bacon And Related Acts,'' shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S–3014, Washington, DC 20210.

Modification to General Wage Determination Decisions

The number of the decisions listed to the Government Printing Office document entitled ''General Wage Determinations Issued Under the Davis-Bacon and related Acts'' being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

None

Volume II

Pennsylvania
PA030001, (Jun. 13, 2003)
PA030002, (Jun. 13, 2003)
PA030004, (Jun. 13, 2003)
PA030007, (Jun. 13, 2003)
PA030009, (Jun. 13, 2003)
PA030014, (Jun. 13, 2003)
PA030018, (Jun. 13, 2003)
PA030032, (Jun. 13, 2003)
PA030040, (Jun. 13, 2003)
PA030042, (Jun. 13, 2003)
PA030050, (Jun. 13, 2003)
West Virginia
WV030001, (Jun. 13, 2003)
WV030002, (Jun. 13, 2003)

Volume III

Tennessee
TN030023 ((Jun. 13, 2003))

Volume IV

Wisconsin

WI030008 ((Jun. 13, 2003))
WI030032 ((Jun. 13, 2003))

Volume V

Missouri
MO030003 (Jun. 13, 2003)
MO030005 (Jun. 13, 2003)
MO030007 (Jun. 13, 2003)
MO030018 (Jun. 13, 2003)
Nebraska
NE030003 (Jun. 13, 2003)
NE030007 (Jun. 13, 2003)
NE030010 (Jun. 13, 2003)
NE030011 (Jun. 13, 2003)
NE030041 (Jun. 13, 2003)

Volume VI

Alaska
AK030001 (Jun. 13, 2003)
Oregon
OR030001 (Jun. 13, 2003)
OR030007 (Jun. 13, 2003)
Washington
WA030011 (Jun. 13, 2003)

Volume VII

None

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled ''General Wage determinations Issued Under the Davis-Bacon And Related Acts''. This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

General wage determinations issued under the Davis-Bacon and related Acts are available electronically at no cost on the Government Printing Office site at *http://www.access.gpo.gov/davisbacon.* They are also available electronically by subscription to the Davis-Bacon Online Service (*http://davisbacon.fedworld.gov*) of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at 1–800–363–2068. This subscription offers value-added features such as electronic delivery of modified wage decisions directly to the user's desktop, the ability to access prior wage decisions issued during the year, extensive Help desk Support, etc.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 512–1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the six separate Volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed in Washington, DC this 2nd day of December, 2004.

John Frank,

Acting Chief, Branch of Construction Wage Determinations.

[FR Doc. 04–26812 Filed 12–9–04; 8:45 am]

BILLING CODE 4510–27–M

INTERNATIONAL BOUNDARY AND WATER COMMISSION, UNITED STATES AND MEXICO

United States Section; Notice of Intent To Prepare a Programmatic Environmental Impact Statement for Its Flood Control Projects Within the Rio Grande and Tijuana River Basins

AGENCY: United States Section, International Boundary and Water Commission, United States and Mexico.

ACTION: Notice of intent to prepare a programmatic environmental impact statement (PEIS).

SUMMARY: This notice advises the public that pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969, as amended, the United States Section, International Boundary and Water Commission (USIBWC) proposes to gather information necessary to analyze and evaluate impacts of management activities for the flood control projects maintained by USIWB along the Rio Grande, from Percha Dam in Doña Ana County, New Mexico, to the Gulf of Mexico; and in the United States portion of the Tijuana River in San Diego County, California. The findings of this evaluation will be documented in a PEIS.

This notice is being provided as required by the Council on Environmental Quality Regulations (40 CFR 1501.7) and the USIBWC's Operating Procedures for Implementing Section 102 of the National Environmental Policy Act of 1969, to obtain suggestions and information from other agencies and the public on the scope of issues to be addressed in the PEIS. Public meetings will be held to obtain community input to ensure all concerns are identified and addressed in the PEIS.

DATES: The USIBWC will conduct five public meetings at the following locations and dates: (1) El Paso, Texas on January 11, 2005, from 6 to 9 p.m. m.s.t. at the El Paso Marriot, 1600 Airway Blvd., El Paso, Texas 79925; (2) Las Cruces, New Mexico on January 12, 2005, from 6 to 9 p.m. m.s.t. at the Holiday Inn, 201 E. University, Las Cruces New Mexico 88005; (3) Presidio, Texas on January 13, 2005, from 6 to 9 p.m. c.s.t. at the Presidio Chamber of Commerce, 202 W. Oreilly Street, Presidio Texas 79845; (4) McAllen Texas on January 19, 2005, from 6 to 9 p.m. c.s.t. at the Four Point Sheraton Hotel, 2721 S. 10th Street, McAllen, Texas 78503; and (5) City of Imperial Beach (San Diego County), California on January 27, 2005, from 6 to 9 p.m. P.s.t., at the Imperial Beach City Hall, 825 Imperial Beach Boulevard, Imperial Beach, California 91932.

Full public participation by interested federal, state, and local agencies, as well as other interested organizations and the general public is encouraged during the scoping process which will end 60 days from the date of this notice. Public comments on the scope of the PEIS, reasonable alternatives that should be considered, anticipated environmental problems, and actions that might be taken to address them are requested.

FOR FURTHER INFORMATION CONTACT: Comments will be accepted for 60 days following the date of this notice by Daniel Borunda, Environmental Protection Specialist, USIBWC, 4171 N. Mesa Street, Suite C–100, El Paso, Texas 79902. Phone: (915) 832–4701, FAX: (915) 832–4167, e-mail: *danielborunda@ibwc.state.gov.*

SUPPLEMENTARY INFORMATION:

1. Proposed Action

The USIBWC maintains the following four flood control projects along the Rio Grande, in the United States:

A. Canalization Project, extending 106 miles from Percha Diversion Dam in New Mexico to American Diversion Dam in El Paso County, Texas.

B. Rectification Project, extending 86 miles from American Diversion Dam to Fort Quitman, Texas.

C. Presidio-Ojinaga Flood Control Project, approximately 15 miles in length and located along the Rio Grande within the sister cities of Presidio, Texas and Ojinaga, Chihuahua, Mexico,

D. Lower Rio Grande Flood Control Project (LRGFCP), extending 180 miles between the town of Peñitas, Texas, to the Gulf of Mexico.

These projects were constructed with the objectives of providing flood control to urban, suburban, and agricultural areas adjacent to the river; stabilizing the International Boundary between the United States and Mexico (Rectification Project, Presidio-Ojinaga Project, and LRGFCP); and ensuring water deliveries (Canalization Project, Presidio-Ojinaga

Project, and LRGFCP). In addition, USIBWC maintains the Tijuana River Flood Control Project, located in the United States portion of the Tijuana River, extending 2.3 miles from the international boundary. This project provides flood protection to areas in the United States.

The proposed federal action that will be evaluated in the PEIS may include activities to ensure adequate flood control and water deliveries per international agreements and treaties, while identifying opportunities for enhancements to the riparian ecosystem and the development of recreational opportunities.

2. Alternatives

The USIBWC, as the lead agency, proposes to collect information necessary for the preparation of a PEIS and to analyze alternatives for the management of the flood control projects to ensure compliance with the projects' mandates (flood protection, water deliveries and/or boundary stabilization) while creating opportunities for habitat restoration and recreation. Management activities to be evaluated may include: (1) Construction activities, such as raising and setting back levees, recreating meanders, and modifying the river channel; (2) maintenance activities such as vegetation control, channel dredging, and erosion control; and (3) other non-structural activities, such as land management and grazing.

The PEIS will identify, describe, and evaluate the existing environmental, cultural, sociological and economical, and recreational resources; describe the flood protection projects; and evaluate the impacts associated with the alternatives under consideration. Significant issues which have been identified to be addressed in the PEIS include, but are not limited to impacts to water resources, water quality, cultural and biological resources, threatened and endangered species, and recreation. Coordination with the United States Fish and Wildlife Service will ensure compliance with the Fish and Wildlife Coordination Act of 1973, as amended. Cultural resources assessments for the project areas will be coordinated by the New Mexico State Historic Preservation Officer, the Texas State Historic Preservation Officer, and the California State Historic Preservation Officer. Other federal and state agencies will be consulted, as required, to ensure compliance with federal and state laws and regulations.

The USIBWC has invited several agencies to participate as cooperating agencies pursuant 40 CFR 1501.6, to the extent possible. Other agencies may be invited to become cooperators as they are identified during the scoping process.

The environmental review of this project will be conducted in accordance with the requirements of NEPA, CEQ Regulations (40 CFR parts 1500–1508), other appropriate federal regulations, and the USIBWC procedures for compliance with those regulations. Copies of the PEIS will be transmitted to federal and state agencies and other interested parties for comments and will be filed with the Environmental Protection Agency in accordance with 40 CFR parts 1500–1508 and USIBWC procedures.

The USIBWC anticipates the Draft PEIS will be made available to the public by November 2005.

Dated: November 16, 2004.

Susan E. Daniel,

General Counsel.

[FR Doc. 04–26502 Filed 12–9–04; 8:45 am]

BILLING CODE 4710–03–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Notice [04–145]

Notice of Establishment of a NASA Advisory Committee, Pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 1 et seq.

AGENCY: National Aeronautics and Space Administration (NASA).

Explanation of Need: The Administrator of the National Aeronautics and Space Administration has determined that the establishment of the NASA Summit Industry Panel 2005 is necessary and in the public interest in connection with the performance of duties imposed upon NASA by law. This determination follows consultation with the Committee Management Secretariat, General Services Administration.

Name of Committee: Summit Industry Panel 2005.

Purpose and Objective: The Panel will draw on the expertise of its members and other sources to provide its advice and recommendations to the Associate Administrator for Space Operations on plans, policies, programs, and other matters pertinent to the Space Operations Mission Directorate's responsibilities, including integrating and implementing aerospace industry approaches, resources, and capabilities to support the Space Shuttle Program (SSP), the International Space Station (ISS), and future needs of the Agency as applicable to the preparation and conduct of the Integrated Space Operations Summit (ISOS) currently scheduled for 2005. The Panel will hold meetings and make site visits as necessary to accomplish their responsibilities. The Panel will function solely as an advisory body and will comply fully with the provisions of the Federal Advisory Committee Act.

Lack of Duplication of Resources: The Panel's functions cannot be performed by the agency, another existing committee, or other means such as a public meeting.

Fairly Balanced Membership: Membership will be selected from among industry representatives to ensure a balanced representation of expertise and points of view in scientific and technical areas relevant to space flight and exploration.

Duration: Ad hoc.

Responsible NASA Official: Col. (Ret) Stephen Pitotti, Special Assistant for Program Integration for the Deputy Associate Administrator for Space Station and Shuttle, National Aeronautics and Space Administration, 300 E Street, SW., Washington, DC 20546, telephone (202) 358–4764.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 04–27149 Filed 12–9–04; 8:45 am]

BILLING CODE 7510–13–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 52–008]

Dominion Nuclear North Anna, LLC; Notice of Availability of the Draft Environmental Impact Statement for an Early Site Permit (ESP) at the North Anna ESP Site and Associated Public Meeting

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC, the Commission) has published NUREG–1811, ''Draft Environmental Impact Statement for an Early Site Permit (ESP) at the North Anna ESP Site,'' (DEIS). The site is located near the Town of Mineral in Louisa County, Virginia, on the southern shore of Lake Anna. The application for the ESP was submitted by letter dated September 25, 2003, pursuant to 10 CFR Part 52. The application included a site redress plan in accordance with 10 CFR 52.17(c) and 52.25. If the site redress plan is incorporated in an approved ESP, then the applicant may carry out certain site preparation work and preliminary construction activities. A notice of

receipt and availability of the application, which included the environmental report (ER), was published in the **Federal Register** on October 16, 2003 (68 FR 59642). A notice of acceptance for docketing of the application for the ESP was published in the **Federal Register** on October 29, 2003, (68 FR 61705). A notice of intent to prepare an environmental impact statement and to conduct the scoping process was published in the **Federal Register** on November 24, 2003, (68 FR 65961).

The purpose of this notice is to inform the public that NUREG–1811, ''Draft Environmental Impact Statement for an Early Site Permit (ESP) at the North Anna ESP Site,'' is available for public inspection in the NRC Public Document Room (PDR) located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, 20852, or from the Publicly Available Records (PARS) component of NRC's Agencywide Documents Access and Management System (ADAMS), and will also be placed directly on the NRC Web site at *http://www.nrc.gov.* ADAMS is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html* (the Public Electronic Reading Room). (**Note:** Public access to ADAMS has been temporarily suspended so that security reviews of publicly available documents may be performed and potentially sensitive information removed. Please check the NRC Web site for updates on the resumption of ADAMS access.) Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.* In addition, the Louisa County Library, located at 881 Davis Highway, Mineral, Virginia, has agreed to make the DEIS available for public inspection.

The NRC staff will hold a public meeting to present an overview of the DEIS and to accept public comments on the document. The public meeting will be held in the Forum at the Louisa County Middle School, 1009 Davis Highway, Mineral, Virginia, on Wednesday, January 19, 2005. The meeting will convene at 7 p.m. and will continue until 10 p.m., as necessary. The meeting will be transcribed and will include: (1) A presentation of the contents of the DEIS, and (2) the opportunity for interested government agencies, organizations, and individuals to provide comments on the draft report. Additionally, the NRC staff will host informal discussions one hour before the start of the meeting outside the Forum in the Louisa County Middle School. No formal comments on the DEIS will be accepted during the informal discussions. To be considered, comments must be provided either at the transcribed public meeting or in writing. Persons may register to attend or present oral comments at the meeting by contacting Ms. Alicia Williamson, by telephone at 1–800–368–5642, extension 1878, or by Internet to the NRC at *NorthAnna_ESP@nrc.gov* no later than January 14, 2005. Members of the public may also register to speak at the meeting within 15 minutes of the start of the meeting. Individual oral comments may be limited by the time available, depending on the number of persons who register. Members of the public who have not registered may also have an opportunity to speak, if time permits. Ms. Williamson will need to be contacted no later than January 14, 2005, if special equipment or accommodations are needed to attend or present information at the public meeting, so that the NRC staff can determine whether the request can be accommodated.

Members of the public may send written comments on the DEIS for the North Anna ESP to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mailstop T–6D59, U.S. Nuclear Regulatory Commission, Washington DC 20555–0001, and should cite the publication date and page number of this **Federal Register** Notice. Comments may also be delivered to Room T–6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. during Federal workdays. To be considered written comments should be postmarked by March 1, 2005. Electronic comments may be sent by the Internet to the NRC at *NorthAnna_ESP@nrc.gov.* Electronic submissions should be sent no later than March 1, 2005. Comments will be available electronically and accessible through the NRC's PERR link at *http://www.nrc.gov/reading-rm/adams.html.*

FOR FURTHER INFORMATION CONTACT: Alicia Williamson, License Renewal and Environmental Impacts Program, Division of Regulatory Improvement Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Ms. Williamson may be contacted at the aforementioned telephone number or e-mail address.

Dated at Rockville, Maryland, this 2nd day of December, 2004.

For the Nuclear Regulatory Commission.

Pao-Tsin Kuo,

Program Director, License Renewal and Environmental Impacts Program, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.

[FR Doc. 04–27107 Filed 12–9–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–259, 50–260, and 50–296]

Tennessee Valley Authority; Browns Ferry Nuclear Plant, Units 1, 2, and 3; Notice of Availability of the Draft Supplement 21 to the Generic Environmental Impact Statement and Public Meeting for the License Renewal of Browns Ferry Nuclear Plant, Units 1, 2, and 3

Notice is hereby given that the U.S. Nuclear Regulatory Commission (the Commission) has published a draft plant-specific supplement to the Generic Environmental Impact Statement (GEIS), NUREG–1437, regarding the renewal of operating licenses DPR–33, DPR–52, and DPR–68 for an additional 20 years of operation at Browns Ferry Nuclear Plant, Units 1, 2, and 3 (BFN). BFN is located in Limestone County, Alabama, 16 km (10 mi) southwest of Athens, Alabama. Possible alternatives to the proposed action (license renewal) include no action and reasonable alternative energy sources.

The draft Supplement to the GEIS is available for public inspection in the NRC Public Document Room (PDR) located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, 20852 or from the Publicly Available Records (PARS) component of NRC's Agencywide Documents Access and Management System (ADAMS). ADAMS is accessible from the Public Electronic Reading Room at the NRC Web site *http://www.nrc.gov/reading-rm/adams.html* (**Note:** Public access to ADAMS has been temporarily suspended so that security reviews of publicly available documents may be performed and potentially sensitive information removed. Please check the NRC Web site for updates on the resumption of ADAMS access). Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.* In addition, the Athens-Limestone Public Library, 405 East South Street, Athens, Alabama has agreed to make the draft plant-specific

supplement to the GEIS available for public inspection.

Any interested party may submit comments on the draft supplement to the GEIS for consideration by the NRC staff. To be certain of consideration, comments on the draft supplement to the GEIS and the proposed action must be received by March 2, 2005. Comments received after the due date will be considered if it is practical to do so, but the NRC staff is able to assure consideration only for comments received on or before this date. Written comments on the draft supplement to the GEIS should be sent to: Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mailstop T–6D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Comments may be hand-delivered to the NRC at 11545 Rockville Pike, Room T–6D59, Rockville, Maryland, between 7:45 a.m. and 4:15 p.m. on Federal workdays. Electronic comments may be submitted to the NRC by e-mail at *BrownsFerryEIS@nrc.gov.* All comments received by the Commission, including those made by Federal, State, and local agencies, Native American Tribes, or other interested persons, will be made available electronically at the Commission's PDR in Rockville, Maryland, and from the PARS component of ADAMS.

The NRC staff will hold two public meetings to present an overview of the draft plant-specific supplement to the GEIS and to accept public comments on the document. The public meetings will be held on January 25, 2005, at the Athens State University, Student Center Cafeteria Ballroom, 300 North Beaty Street, Athens, Alabama. The first session will convene at 1:30 p.m. and will continue until 4:30 p.m., as necessary. The second session will convene at 7 p.m. with a repeat of the overview portions of the meeting and will continue until 10 p.m., as necessary. Both meetings will be transcribed and will include: (1) a presentation of the contents of the draft plant-specific supplement to the GEIS, and (2) the opportunity for interested government agencies, organizations, and individuals to provide comments on the draft report. Additionally, the NRC staff will host informal discussions one hour before the start of each meeting at the Athens State University, Student Center Cafeteria Ballroom. No comments on the draft supplement to the GEIS will be accepted during the informal discussions. To be considered, comments must be provided either at the transcribed public meetings or in writing, as discussed below. Persons may register to attend or present oral comments at the meetings by contacting Dr. Michael Masnik, by telephone at 1–800–368–5642, extension 1191, or by e-mail at *BrownsFerryEIS@nrc.gov* no later than January 18, 2005. Members of the public may also register to speak at the meeting within 15 minutes of the start of each session. Individual oral comments may be limited by the time available, depending on the number of persons who register. Members of the public who have not registered may also have an opportunity to speak, if time permits. If special equipment or accommodations are needed to attend or present information at the public meeting, Dr. Masnik will need to be contacted no later than January 18, 2004, so that the NRC staff can determine whether the request can be accommodated.

For Further Information Contact: Dr. Michael Masnik, License Renewal and Environmental Impacts Program, Division of Regulatory Improvement Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Dr. Masnik may be contacted at the aforementioned telephone number or e-mail address.

Dated in Rockville, Maryland, this 30th day of November, 2004.

For the Nuclear Regulatory Commission.

Pao-Tsin Kuo,

Program Director, License Renewal and Environmental Impacts Program, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.

[FR Doc. 04–26906 Filed 12–9–04; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meetings during the week of December 13, 2004:

A closed meeting will be held on Tuesday, December 14, 2004 at 2 p.m. and an Open meeting will be held on Wednesday, December 15, 2004 at 2 p.m. in Room 1C30, the William O. Douglas Room.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (4), (5), (7), (8), (9)(B), and (10) and 17 CFR 200.402(a)(3), (4), (5), (7), (8), 9(ii) and (10), permit consideration of the scheduled matters at the closed meeting.

Commissioner Atkins, as duty officer, voted to consider the items listed for the closed meeting in closed session and determined that no earlier notice thereof was possible.

The subject matter of the closed meeting scheduled for Tuesday, December 14, 2004, will be:

Formal orders of investigations;

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings of an enforcement nature; and a regulatory matter regarding a financial institution.

The subject matter of the Open Meeting scheduled for Wednesday, December 15, 2004 will be:

1. The Commission will consider whether to republish for public comment proposed rules under Regulation NMS and two amendments to the joint industry plans for disseminating market information, to give the public an opportunity to review and comment on proposed modifications to the original rule text to reflect comments received. In particular, the Commission will consider whether to repropose the follow rules and amendments:

A. Rule 611 of Regulation NMS (''Order Protection Rule''), which would establish marketwide price protection for automated quotations that are immediately accessible;

B. Rule 610 of Regulation NMS (''Access Rule''), which would promote fair and non-discriminatory access to quotations through a private access approach and establish a limit on access fees to harmonize the pricing of quotations across different trading centers;

C. Rule 612 of Regulation NMS (''Sub-Penny Rule''), which would establish a uniform pricing increment of no less than a penny for orders, quotations, or indications of interest, except for those priced at less than $1.00 per share;

D. Amendments to Rules 11Aa3–1 and 11Ac1–2 under the Securities Exchange Act of 1934 (''Exchange Act'') (redesignated as Rule 601 and 603 of Regulation NMS) (''Market Data Rules''), which would update the requirements for consolidating, distributing, and displaying market information, and amendments to the joint industry plans for disseminating market information that would modify the formulas for allocating plan revenues (''Allocation Amendment'') and broaden

participation in plan governance (''Governance Amendment''); and

E. Redesignation of the national market system (''NMS'') rules adopted under the Exchange act and inclusion of those rules, as well as proposed Rules 610, 611, and 612, under Regulation NMS. Regulation NMS would also include a separate definitional rule that would (i) retain most of the definitions currently used in the NMS rules, (ii) include new definitions related to the reproposed rules, and (iii) update or eliminate obsolete definitions in the NMS rules.

For further information, please contact Jennifer Colihan, Special Counsel, at (202) 942–0735 (Order Protection Rule); David Liu, Attorney, at (202) 942–8085 (Access Rule); Ronesha Butler, Special Counsel, at (202) 942–0791 (Sub-Penny Rule); Sapna Patel, Special Counsel, at (202) 942–0166 (Market Data Rules, Allocation Amendment, and Governance Amendment); or Yvonne Fraticelli, Special Counsel, at (202) 942–0197 (Regulation NMS).

2. The Commission will consider whether to adopt new and amended rules and forms to address the registration, disclosure and reporting requirements for asset-backed securities under the Securities Act of 1933 and the Securities Exchange Act of 1934. The new and amended rules and forms relate to four primary regulatory areas: Securities Act registration; disclosure requirements; communications during the offering process; and ongoing reporting under the Exchange Act.

For further information, please contact Jeffrey J. Minton, Special Counsel, or Jennifer G. Williams, Attorney-Advisor, Office of Rulemaking, Division of Corporation Finance, at (202) 942–2910.

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) 942–7070.

Dated: December 8, 2004.

Jonathan G. Katz,

Secretary.

[FR Doc. 04–27251 Filed 2–8–04; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50796; File No. SR–NSX–2004–12]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Stock Exchange To Eliminate the ''CBOE Exerciser Member'' Membership Class, To Eliminate the Exchange's Special Nominating Committee, and To Remove Certain Special Limitations on Changes to Certain By-Laws and Rules

December 6, 2004.

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 21, 2004, National Stock Exchange (''NSX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in items I, II, and III below, which items have been prepared by 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

NSX is proposing to amend its By-Laws and Rules in order to eliminate the right of the Chicago Board Options Exchange, Incorporated (''CBOE'') members to become NSX members without purchasing membership certificates, to eliminate NSX's Special Nominating Committee, and to remove certain special limitations on changes to certain By-Laws and Rules. The text of the proposed rule change is below. Proposed new language is in *italics;* proposed deletions are in [brackets].

* * * * *

CODE OF REGULATIONS (BY-LAWS) OF NATIONAL STOCK EXCHANGE

ARTICLE I. Definitions

Section 1. When used in this Code of Regulations (By-Laws), unless the context otherwise requires—

* * * * *

(k) The term ''Proprietary Member'' means a person who was a ''Regular Member'' prior to the effective date of these By-Laws or a person who, pursuant to the provisions of Article II of these By-Laws, has applied for, and been admitted to, membership as a proprietary member subsequent to the effective date of these By-Laws.

[References contained in these By-Laws to Proprietary Members shall be deemed to refer to both Proprietary Members with certificates and Proprietary Members without certificates unless expressly provided otherwise.]

* * * * *

[(m) The term ''Protected Provisions'' shall mean the provisions contained in Articles I, II, V, VI, VII, VIII, IX, X, XII, and XIII of these By-Laws and Rules 11.9 and 11.10 of the Exchange Rules as in effect on the effective date of this provision of these By-Laws.]

([n]*m*) No change.

([o]*n*) No change.

* * * * *

ARTICLE II. Exchange Membership

Section 1. Classes of Exchange Members

The membership of the Exchange shall be comprised of [three]*two* classes of members:

(i) Proprietary Members[with certificates].

(ii) [Proprietary Members without certificates.

(iii)] Access Participant Members (''Access Participants'').

* * * * *

Section 5. Restrictions on Admittance to or Continuance in Membership and Association

* * * * *

5.2. Certain Restrictions Applicable to Proprietary Members Only

(a) No applicant for proprietary membership[, except an applicant who is a CBOE member,] who fails to purchase and own a certificate of proprietary membership after the Exchange has approved such person's application shall become a Proprietary Member of the Exchange. A CBOE member [shall be eligible to become]*who became* a Proprietary Member *without certificate prior to the effective date of this provision of these By-Laws (''CBOE Exerciser Member'') shall have ninety days from such effective date to purchase a certificate of proprietary membership*[of the Exchange without having to purchase and own a certificate of proprietary membership, provided such CBOE member meets all other requirements for eligibility set forth in these By-Laws]. *During such ninety day period, a CBOE Exerciser Member who has not yet purchased a certificate of proprietary membership shall have the rights and obligations of a Proprietary Member without certificate as such rights and obligations were in effect prior to the effective date of this provision of these By-Laws. At the conclusion of the ninety*

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

day period, any CBOE Exerciser Member who does not then own a certificate of proprietary membership shall cease to be a Proprietary Member of the Exchange, and may not again become a Proprietary Member of the Exchange without first complying with all of the procedures and requirements for proprietary membership set forth in these By-Laws and the Exchange Rules.

* * * * *

Section 9. Transfer, Cancellation or Sale of Membership

9.1. Transfer and Cancellation

Access Participants [and Proprietary Members without certificates]may not transfer or sell or encumber their memberships or any interest therein. [The Exchange membership of a Proprietary member without a certificate automatically shall be cancelled when he ceases to be a CBOE member.]

9.2. Proprietary Membership Lien

Every certificate of proprietary membership shall be subject to a lien, prior to any others, to secure, first, payment in full of all indebtedness of the member to the Exchange, and second, payment in full of all indebtedness of the member to any member of the Exchange to the extent allowed by the Board. [As a substitute for such a lien, Proprietary Members without certificates shall meet such requirements as the Board may establish.]

* * * * *

ARTICLE V. Exchange Organization and Administration

Section 1. Board of Directors

1.1. General

The management and administration of the affairs of the Exchange shall be vested in a Board of Directors, which shall be composed of thirteen voting Directors as follows: (a) The Exchange President; (b) two Proprietary Members[with certificates], or executive officers of Proprietary Member organizations[with certificates], who are Designated Dealers in the National Securities Trading System (''Designated Dealer Directors''); (c) one Proprietary Member[with certificate] or an executive officer of a Proprietary Member organization[with certificate], who conducts a nonmember public customer business on the Exchange (''At-Large Director''); (d) the Chairman of CBOE (''CBOE Director''); (e) the President of CBOE (''CBOE Director''); (f) four CBOE members or executive officers of CBOE member organizations (''CBOE Directors''); and (g) three representatives of issuers and investors who shall not be associated with any member of the Exchange or with any registered broker or dealer or with another self-regulatory organization, other than as a public trustee or director (''Public Directors''). Excepting affiliations with national securities exchanges, no two or more Directors may be partners, officers of directors of the same person or be affiliated with the same person.

* * * * *

2.2. Candidate Selection

(a) The three candidates for election to the Board either as Designated Dealer Directors or as At-Large Director shall be selected by the Nominating Committee. The Committee shall select at least one candidate for the position to be voted upon. An additional candidate or candidates may be nominated by a petition signed by ten percent or more of the Proprietary Members[with certificates] and delivered to the Secretary of the Exchange, provided that such candidate or candidates conforms to the requirements for the open position(s). There shall be an annual election on the second Monday of January of each year (if such day is a legal holiday, then on the next business day), at which only Proprietary Members[with certificates] can vote.

* * * * *

(c) The three Public Directors shall be selected by means of the following process. The Exchange's Chairman shall submit a name or names of a candidate(s) to [a Special]*the* Nominating Committee[composed of the two Designated Dealer Directors, the At-Large Director and three of the six CBOE Directors]. The [Special]Nominating Committee shall approve the candidate(s) to be submitted to the Board for approval or disapproval at the first Board meeting following the annual membership meeting.

* * * * *

ARTICLE VI. Committees

Section 1. Establishment of Committees

1.1. Committees

There shall be a Membership Committee, a Business Conduct Committee, a Securities Committee, an Appeals Committee, a Nominating Committee, [a Special Nominating Committee]and such other committees as may be established from time to time by the Board. Committees shall have such authority as is vested in them by the By-Laws or Rules or as is delegated to them by the Board. All Committees [except the Special Nominating Committee] are subject to the control and supervision of the Board.

[ARTICLE XII. Special Limitations on Changes to Certain By-Laws and Rules

(a) For two years following the effective date of this provision of these By-Laws, no change may become effective to the Protected Provisions without the unanimous consent of the two Designated Dealer Directors and the one At-Large Director, provided, however, that in the event the SEC approves side-by-side trading of listed securities and options on listed securities, the Board may adopt changes in Rule 11.9 that are reasonably required to participate effectively in such trading without the consent of the two Designated Dealer Directors and the one At-Large Director.

(b) After two years but before ten years following the effective date of this provision of these By-Laws, no change may be made to Section 1 of Article V or to Article XII without the affirmative vote of two-thirds of the total number of both the Proprietary Members with certificates and the Proprietary Members without certificates, voting separately as classes.

(c) After ten years from the effective date of this provision of these By-Laws, no change may be made to Section 1 of Article V or to Article XII without the affirmative vote of two-thirds of all Proprietary Members; such a change(s) may be voted on without the Board approval required under Article IX.]

ARTICLE XII[I]. Off-Exchange Transactions

* * * * *

RULES OF NATIONAL STOCK EXCHANGE

* * * * *

CHAPTER XI

Trading Rules

* * * * *

Rule 11.10 National Securities Trading System Fees

A. No change.

B. Membership Fees.

Item	Fee
Yearly Membership Dues (Quarterly Charge $625)	$2,500
New Member Application Fee	$1,000
Transfers	$350
Responsible Party Change	
Firm Registration/Name Change	
[CBOE Exercise Application	$350]

C. No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it had received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On November 14, 1986, the Cincinnati Stock Exchange (''CSE''), now known as NSX, and CBOE entered into an agreement of affiliation pursuant to which CBOE currently holds 162 certificates of proprietary membership of NSX, and CBOE and its members have certain rights associated with NSX.[3] Among those rights, the Exchange By-Laws had been amended to provide that CBOE members are eligible to become Proprietary Members of NSX without having to purchase and own a certificate of proprietary membership, provided that each such CBOE member meets all other eligibility requirements for NSX membership. This class of NSX membership is known in NSX's By-Laws as ''Proprietary Members without certificates'' and these NSX members are commonly referred to as ''CBOE Exerciser Members.''

NSX and CBOE have recently taken steps to terminate or amend certain aspects of their affiliation and, in connection therewith, CBOE has agreed to transfer certain of its certificates to NSX and to relinquish certain rights associated with NSX, in exchange for certain cash payments and other undertakings by NSX, subject to the terms and conditions set forth in a termination of rights agreement that NSX and CBOE entered on September 27, 2004. One of the conditions to the initial closing of the termination of rights agreement calls for amendments to the NSX By-Laws to eliminate the right of CBOE members to become NSX members without purchasing membership certificates, and thus the elimination of the CBOE Exerciser Member membership class.

In eliminating this class of membership and related references to Proprietary Members without certificates, the Exchange is proposing a transition period whereby any CBOE Exerciser Members existing on the effective date of the approval of this proposed rule change (the ''Effective Date'') will have ninety days from the Effective Date to purchase a certificate of proprietary membership. During the ninety day period, a CBOE Exerciser Member who has not purchased a certificate shall have the rights and obligations of a Proprietary Member without certificate as those rights and obligations existed prior to the Effective Date. At the conclusion of the ninety day period, any CBOE Exerciser Member who does not own a NSX certificate shall automatically cease to qualify for membership on the Exchange and may not again become a member of the Exchange without first complying with all the procedures and requirements set forth in the NSX By-Laws and Rules. Related to the elimination of the CBOE Exerciser Members, NSX is proposing to eliminate the ''CBOE Exercise Application'' fee contained in Rule 11.10(B).

In addition and also in connection with the termination of rights agreement, NSX is proposing to eliminate provisions in Article XII of the Exchange By-Laws pertaining to special voting limitations on changes to certain By-Laws and Rules. NSX is also proposing to amend its By-Laws to eliminate the NSX's Special Nominating Committee, which is composed of two Designated Dealer Directors, the At-Large Director and three of the six CBOE Directors and which has the responsibility to approve candidates for Public Director positions to be submitted to the Board for approval, and to re-assign that responsibility to the NSX's Nominating Committee, which selects candidates for Designated Dealer and At-Large Director positions to be submitted to the membership for approval. These special voting limitations and Special Nominating Committee provisions had been incorporated into the Exchange By-Laws as part of the initial affiliation agreement with CBOE and are no longer necessary. The initial closing of the termination of rights agreement is also conditioned on the adoption of these By-Law amendments.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with section 6(b) of the Act[4] in general, and furthers the objectives of section 6(b)(5)[5] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, generally, to protect investors and the public interest. In addition, the Exchange believes that the proposed rule change furthers the objectives of section 6(b)(1),[6] in that it helps to assure that the Exchange is so organized and has the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its members, with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which NSX consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File

[3] *See* Securities Exchange Act Release No. 24090 (February 12, 1987), 52 FR 5225 (February 19, 1987) (SR–CSE–86–6) (order approving proposed rule change by CSE relating to an affiliation with CBOE).

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78f(b)(1).

Number SR–NSX–2004–12 on the subject line.

Paper Comments

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NSX–2004–12. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of NSX. 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 publicly available. All submissions should refer to File Number SR–NSX–2004–12 and should be submitted on or before December 27, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E4–3598 Filed 12–9–04; 8:45 am]

BILLING CODE 8010–01–P

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50788; File No. SR–Phlx–2004–57]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendments No. 1, 2, 3, and 4 Thereto by the Philadelphia Stock Exchange, Inc. Relating to the Trade Allocation Algorithm Applicable to Options Traded on the Exchange's Electronic Trading Platform, Phlx XL

December 3, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1], and Rule 19b–4 [2] thereunder, notice is hereby given that on August 16, 2004, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in items I and II, below, which items have been prepared by the Exchange. On October 8, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.[3] On October 20, 2004, the Exchange filed Amendment No. 2 to the proposed rule change.[4] On November 3, 2004, the Exchange filed Amendment No. 3 to the proposed rule change.[5] Finally, on December 2, 2004, the Exchange filed Amendment No. 4 to the proposed rule change.[6] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and is approving the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Phlx proposes to adopt a new trade allocation algorithm for trades executed electronically on the Exchange's electronic options trading platform, Phlx XL. Brackets indicate deletions; *italics* indicate new text:

* * * * *

Obligations and Restrictions Applicable to Specialists and Registered Options Traders

Rule 1014. (a)–(f) No change.

(g)(i)–(vi) No change.

(vii) Allocation of Automatically Executed Trades in Streaming Quote Options. Solely with respect to Streaming Quote Options approved by the Exchange to be traded on Phlx XL by Streaming Quote Traders (''SQTs'') pursuant to Exchange Rule 1080(k), after public customer market and marketable limit orders have been executed, trades automatically executed in such options shall be allocated automatically in the following manner:

(A) If [one] *the specialist, an SQT or a non-SQT ROT that has placed a limit order on the limit order book ('*Phlx XL [p]*P*articipant*'')* is quoting alone at the disseminated price and their quote is not matched by another Phlx XL participant prior to execution, such Phlx XL [p]*P*articipant shall be entitled to receive a number of contracts up to the size associated with his/her quotation.

(B) Parity. Quotations entered electronically by the specialist or an SQT that do not cause an order resting on the limit order book to become due for execution may be matched at any time by quotations entered electronically by the specialist and/or other SQTs, and by ROT limit orders entered via electronic interface and shall be deemed to be on parity, subject to the requirement that orders of controlled accounts must yield priority to customer orders as set forth in Rule 1014(g)(i)(A).

(1) [if the specialist is quoting at the Exchange's disseminated price:]

(a) Orders for 5 contracts or fewer shall be allocated first to the specialist, provided, however, that on a quarterly basis, the Exchange will evaluate what

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Richard S. Rudolph, Counsel, Phlx, to Marc F. McKayle, Special Counsel, Division of Market Regulation (''Division''), Commission, dated October 7, 2004 (''Amendment No. 1''). In Amendment No. 1, Phlx amended the proposed rule change to: (1) Clarify that a Phlx XL Participant would be entitled to receive an allocation of a number of contracts only up to its disseminated size; (2) clarify that options subject to the Enhanced Specialist Participation are described in Phlx Rules 1014(g)(ii)–(iv); (3) clarify that the proposed rule would apply only to electronically executed and allocated Streaming Quote Options that trade on Phlx XL; and (4) make technical amendments to the presentation of the allocation algorithm described in proposed Phlx Rule 1014(g)(vii)(B)(1)(b).

[4] *See* letter from Richard S. Rudolph, Counsel, Phlx, to Molly M. Kim, Attorney, Division, dated October 20, 2004 (''Amendment No. 2''). In Amendment No. 2, Phlx amended the proposed rule change to correct a typographical error in the numbering of the proposed rule text.

[5] *See* letter from Richard S. Rudolph, Counsel, Phlx, to Deborah Lassman Flynn, Assistant Director, Division, Commission, dated November 2, 2004 (''Amendment No. 3''). In Amendment No. 3, Phlx amended the proposed rule change to: (1) Delete the phrase ''if the specialist is quoting at the Exchange's disseminated price'' from Rule 1014(g)(vii)(B)(1); (2) delete current Rule 1014(g)(vii)(B)(2); and (3) clarify the definition of ''Phlx XL Participant'' to include the specialist, an SQT or a non-SQT ROT that has placed a limit order on the limit order book.

[6] *See* Amendment No. 4 from Richard S. Rudolph, Counsel, Phlx, dated December 2, 2004 (''Amendment No. 4''). In Amendment No. 4, Phlx amended the proposed rule change to clarify that, if specialists are not quoting at the Exchange's disseminated price, orders for 5 contracts or fewer will be allocated to Phlx XL Participants on parity.

percentage of the volume executed on the Exchange is comprised of orders for 5 contracts or fewer allocated to specialists, and will reduce the size of the orders included in this provision if such percentage is over 25%. In order to be entitled to receive the 5 contract or fewer order preference set forth in this sub-paragraph (B)(1)(a), the specialist must be quoting at the Exchange's disseminated price, and shall not be entitled to receive a number of contracts that is greater than the size that is associated with its quote. *If the specialist is not quoting at the Exchange's disseminated price at the time of execution, orders for 5 contracts or fewer shall be allocated to Phlx XL Participants on parity as set forth in paragraph (b) below.*

(b) Respecting orders for greater than 5 contracts *(regardless of whether the specialist is quoting at the Exchange's disseminated price), or orders for 5 contracts or fewer when the specialist is not quoting at the Exchange's disseminated price, inbound electronic orders shall be allocated pursuant to the following allocation algorithm:*

[, the specialist shall be entitled to receive a number of contracts that is the greater of: (i) The proportion of the aggregate size associated with the specialist's quote, SQT quotes, and non-SQT ROT limit orders entered on the book via electronic interface at the disseminated price represented by the size of the specialist's quote, or (ii) 60% of the contracts to be allocated if the specialist is on parity with one SQT or one non-SQT ROT that has placed a limit order on the book via electronic interface at the Exchange's disseminated price; (iii) 40% of the contracts to be allocated if the specialist is on parity with two SQTs or non-SQT ROTs that have placed a limit order on the book via electronic interface at the Exchange's disseminated price; and (iv) 30% of the contracts to be allocated if the specialist is on parity with three or more SQTs or non-SQT ROTs that have placed a limit order on the book via electronic interface at the Exchange's disseminated price. In order to be entitled to receive the number of contracts set forth in this sub-paragraph (B)(1)(b), the specialist must be quoting at the Exchange's disseminated price, and shall not be entitled to receive a number of contracts that is greater than the size that is associated with its quote.

(c) Thereafter, SQTs quoting at the disseminated price and non-SQT ROTs that have placed limit orders on the limit order book via electronic interface at the Exchange's disseminated price shall be entitled to receive a number of contracts that is the proportion of the total remaining aggregate size associated with SQT quotes and non-SQT ROT limit orders on the book entered via electronic interface at the disseminated price represented by the size of the SQT's quote or, in the case of a non-SQT ROT, by the size of the limit order they have placed on the limit order book via electronic interface. Such SQT(s) and non-SQT ROTs shall not be entitled to receive a number of contracts that is greater than the size associated with their quotation or limit order.]

Equal percentage based on the number of Phlx XL Participants quoting or with limit orders at BBO (Component A) + Pro rata percentage based on size of Phlx XL participant quotes/limit orders (Component B) x Incoming Order Size

2

Where:

Component A: The percentage to be used for Component A shall be an equal percentage, derived by dividing 100 by the number of Phlx XL participants quoting at the BBO.

Component B: Size Pro Rata Allocation. The percentage to be used for Component B of the allocation algorithm formula is that percentage that the size of each Phlx XL Participant's quote at the best price represents relative to the total number of contracts in the disseminated quote.

*Final Weighting: The final weighting formula for equity options, which shall be determined by a three-member special committee of the Board of Governors, chaired by the Chairman of the Board, and including the Chairman of the Options Committee and one on-floor Governor (the ''Special Committee''), and apply uniformly across all equity options, shall be a weighted average of the percentages derived for Components A and B multiplied by the size of the incoming order. Initially, the weighting of components A and B shall be equal, represented mathematically by the formula: (Component A Percentage + Component B Percentage)/2) * incoming order size.*

The final weighting formula for index options and options on Exchange Traded Fund Shares (as defined in Rule 1000(b)(42.) shall be established by the Special Committee and may vary by product. Changes made to the percentage weightings of Components A and B shall be announced to the membership via Regulatory Circular at least one day before implementation of the change.

(c) Enhanced Specialist Participation: For options subject to the Enhanced Specialist Participation as set forth in Rules 1014(g)(ii)–(iv), the specialist shall be entitled to receive a number of contracts (not to exceed the size of the specialist's quote) that is the greater of the amount he would be entitled to receive pursuant to Rules 1014(g)(ii)–(iv), or the amount he would otherwise receive pursuant to the operation of the algorithm described above.

(d) Broker-dealer Orders: If any contracts remain to be allocated after the [specialist, SQTs and non-SQT ROTs with limit orders on the limit order book] *Phlx XL Participants* have received their respective allocations, off-floor broker-dealers (as defined in Rule 1080(b)(i)(C)) that have placed limit orders on the limit order book which represent the Exchange's disseminated price shall be entitled to receive a number of contracts that is the proportion of the aggregate size associated with off-floor broker-dealer limit orders on the limit order book at the disseminated price represented by the size of the limit order they have placed on the limit order book. Such off-floor broker-dealers shall not be entitled to receive a number of contracts that is greater than the size that is associated with each such limit order.

(e) No Phlx XL Participant shall be entitled to receive a number of contracts that is greater than the size that is associated with their quotation or limit order.

(2) [If the specialist is not quoting at the Exchange's disseminated price, SQTs quoting at the disseminated price and non-SQT ROTs that have placed limit orders on the limit order book via electronic interface which represent the Exchange's disseminated price shall be entitled to receive a number of contracts equal to the proportion of the aggregate size associated with SQT quotes and non-SQT ROT limit orders on the book entered via electronic interface at the disseminated price represented by the size of the SQT's quote or, in the case of a non-SQT ROT, by the size of the limit order they have placed on the limit order book via electronic interface. Thereafter, off-floor broker-dealers that have placed limit orders on the limit order book which represent the Exchange's disseminated price shall be entitled to receive a number of contracts as specified in paragraph (1)(d) above.

(3)] No Split-Price Executions in Streaming Quote Options. If the size associated with a market order or an electronic quotation to be executed in a Streaming Quote Option is received for a greater number of contracts than the Exchange's disseminated size, the portion of such an order or quotation executed automatically at the

Exchange's disseminated size shall be allocated automatically in accordance with Rule 1014(g)(vii). Contracts remaining in such an order shall be represented by the specialist and handled in accordance with Exchange rules.

([4]*3*) Notwithstanding the first sentence of Rule 1014(g)(i), neither Rule 119(a)–(d) and (f), nor Rule 120 (insofar as it incorporates those provisions by reference) shall apply to the allocation of automatically executed trades in Streaming Quote Options.

(h) No change.

Commentary: No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Phlx 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 III below. Phlx has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to adopt a new trade allocation algorithm for trades executed electronically on Phlx XL,[7] to establish a weighted formula that would provide an equal allocation of a certain percentage of executed contracts among Phlx XL Participants on parity,[8] and an allocation of contracts based on a size pro rata formula for the remaining contracts. The proposed allocation algorithm would allocate orders based on two separate components: parity (*i.e.*, multiple participants quoting at the best price) and depth of liquidity (*i.e.*, size pro rata). The two components would be weighted on a percentage basis as described below. Under the proposal, all equity options traded on Phlx XL would be subject to the same weighted percentage, while each index option traded on Phlx XL could be weighted differently, on a product-by-product basis.

Component A

Component A of the allocation algorithm is the parity component, which would treat all Phlx XL Participants quoting at the relevant best bid or best offer as equal. Accordingly, the percentage used for Component A is an equal percentage, derived by dividing 100 by the number of market participants quoting at the best price, except as provided in Phlx Floor Procedure Advice F–11.[9]

Component B

Component B of the allocation algorithm is the size pro-rata component designed to reward market participants who quote with size. The percentage used for Component B is the percentage that the size of each market participant's quote at the best price represents relative to the total number of contracts in the disseminated quote (*i.e.*, size pro rata).

Weighting of Each Component

The final weighting formula for equity options would be determined by a three-member special committee of the Phlx Board of Governors and would apply uniformly across all equity options. The committee will be chaired by the Chairman of the Phlx Board and will include the Chairman of the Phlx Options Committee and one on-floor Phlx Governor (''Special Committee'').[10] Each index traded on the Exchange could be weighted differently by the Special Committee, on a product-by-product basis. Initially, the Exchange proposes to assign equal weighting to Components A and B for all Exchange-traded products. The assigned weightings of Components A and B would be multiplied by the percentages derived for Components A and B, respectively, and then would be multiplied by the size of the incoming order.

Additional Features

Public customer priority. Public customer orders on the limit order book and at the Exchange's Best Bid or Offer (''BBO'') would continue to have priority.[11] Multiple public customer orders on the limit order book at the same price would be ranked based on time priority. If a public customer order on the limit order book matches, or is matched by, a Phlx XL Participant's quote, the public customer order would have priority, and the balance of the electronic order, if any, would be allocated based on the new allocation algorithm.

Quoting alone. A Phlx XL Participant quoting alone at the BBO would continue to have priority and would be entitled to receive a number of contracts executed against inbound quotes or orders up to the size of its quote.[12]

Enhanced Specialist Participation. For options subject to the Enhanced Specialist Participation,[13] the specialist would be entitled to receive a number of contracts (not to exceed the size of the specialist's quote) that is the greater of the amount he would be entitled to receive pursuant to the Enhanced Specialist Participation described in Phlx Rules 1014(g)(ii)–(iv), or the amount he would otherwise receive pursuant to the operation of the new algorithm.

Off-floor broker-dealer orders and orders that are handled manually by the specialist will continue to be handled in accordance with Phlx Rules 1014(g)(i)(A) and 1080(b)(i)(C) and Commentary .05 thereto.

2. Statutory Basis

The Exchange believes that its proposal, as amended, is consistent with Section 6(b) of the Act,[14] in general, and furthers the objectives of Section 6(b)(5) of the Act,[15] in particular, in that it is designed to perfect the mechanisms of a free and open market and the national market system, protect investors and the public interest and promote just and equitable principles of trade by expressly providing a mechanism to allocate trades among Phlx XL Participants on parity.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

---

[7] *See* Securities Exchange Act Release No. 50100 (July 27, 2004), 69 FR 46612 (August 3, 2004) (SR–Phlx–2003–59).

[8] Pursuant to Phlx Floor Procedure Advice F–11, ROTs of the same Firm, dually affiliated or financially affiliated ROTs, when bidding or offering at the same price for the same option, are to be treated as one interest for purpose of splitting an order in the trading crowd.

[9] *Id.*

[10] Phlx By-Law Article IV, Section 4–4(b)(xviii) authorizes a majority of the Phlx Board of Governors to designate one or more ad hoc or special committees, each to consist of two (2) or more Governors, to have such duties, powers and authority as the Board of Governors determines.

[11] Phlx rules currently provide that equity option and index option orders of ''controlled accounts'' are required to yield priority to customer orders when competing at the same price. A ''controlled account'' includes any account controlled by or under common control with a broker-dealer. Customer accounts are all other accounts. *See* Phlx Rule 1014(g)(i)(A).

[12] *See* Phlx Rule 1014(g)(vii)(A).

[13] The Enhanced Specialist Participation is a percentage of an order to which the specialist is entitled after limit orders with priority over the specialist have been executed. *See* Phlx Rules 1014(g)(ii)—(iv).

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2004–57 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–Phlx–2004–57. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2004–57 and should be submitted on or before January 3, 2005.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder, applicable to a national securities exchange,[16] and, in particular, with the requirements of section 6(b) of the Act[17] and the rules and regulations thereunder. The Commission finds that the proposed rule change, which establishes a new allocation algorithm, is consistent with section 6(b)(5) of the Act,[18] which requires that the rules of an exchange be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national securities system, and, in general, protect investors and the public interest.

Specifically, the Commission believes that the proposed allocation algorithm may enhance incentives to quote competitively by providing all market participants with the opportunity to participate in the allocation of trade, regardless of their disseminated size, if they are quoting at the disseminated price. The proposal also should provide incentives for Phlx XL participants to quote in greater size to obtain a larger allocation under Component B of the proposed allocation algorithm.

The Commission finds good cause, pursuant to section 19(b)(2) of the Act,[19] for approving the proposed rule change prior to the 30th day after the date of publication of the notice of the filing thereof in the **Federal Register**. The Commission notes that the proposal is substantially similar to the Chicago Board Options Exchange, Inc. Rule 6.45A,[20] which was previously approved by the Commission after notice and comment, and, therefore, does not raise any new regulatory issues.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[21] that the proposed rule change and Amendments Nos. 1, 2, 3, and 4 thereto (SR–Phlx–2004–57) are hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[22]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E4–3594 Filed 12–9–04; 8:45 am]

BILLING CODE 8010–01–P

[16] In approving this rule, the Commission notes that it has considered its impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78s(b)(2).

[20] *See* Securities Exchange Act Release No. 47959 (May 30, 2003), 68 FR 34441 (June 9, 2003) (SR–CBOE–2002–05).

[21] 15 U.S.C. 78s(b)(2).

[22] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages that will require clearance by the Office of Management and Budget (OMB) in compliance with Pub. L. 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. The information collection packages that may be included in this notice are for revisions to OMB-approved information collections and extensions (no change) of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and on ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Written comments and recommendations regarding the information collection(s) should be submitted to the OMB Desk Officer and the SSA Reports Clearance Officer. The information can be mailed and/or faxed to the individuals at the addresses and fax numbers listed below:

(OMB), Office of Management and Budget, Fax: 202–395–6974.

(SSA), Social Security Administration, DCFAM, Attn: Reports Clearance Officer, 1338 Annex Building, 6401 Security Blvd., Baltimore, MD 21235; Fax: 410–965–6400.

I. The information collections listed below are pending at SSA and will be submitted to OMB within 60 days from the date of this notice. Therefore, your comments should be submitted to SSA within 60 days from the date of this publication. You can obtain copies of the collection instruments by calling the SSA Reports Clearance Officer at 410–965–0454 or by writing to the address listed above.

1. Quarterly Statistical Report on Recipients and Payments Under State-Administered Assistance Programs for

Aged, Blind and Disabled (Individuals and Couples) Recipients—20 CFR 416.2010, 20 CFR 416.2098—0960–0130. The purpose of the statistical report is to obtain State data on expenditures and caseloads of State-administered supplementation under the Supplemental Security Income (SSI) program. The statistics are needed to complement information available for the federally administered programs and to more fully explain the impact of the public income support programs on the needy, aged, blind, and disabled. In addition, the expenditure data are used to monitor State compliance with the mandatory pass-along provision.

States use our publications, which are prepared from data submitted on this statistical report, for administrative purposes to compare their expenditures and caseloads with those of other States, to determine the feasibility of program change, and to keep abreast of program developments in other States. Federal personnel request data about State-administered supplementation programs to compare various State programs, to examine the relationship of State supplementation expenditures and caseloads to federally financed programs such as Medicaid, and to determine the effect of changes in SSI and other Federal programs on State supplementation programs. In addition, Federal and State personnel have used data obtained from this report in developing legislative proposals and budget estimates.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 31.

Frequency of Response: 4.

Average Burden Per Response: 60 minutes.

Estimated Annual Burden: 124 hours.

2. Application for Survivors Benefits—20 CFR 404.611 (a) and (c)—0960–0062. The information collected by form SSA–24 is needed to satisfy the ''Joint Prescribed Application'' of Title 38 U.S.C. 5105. That provision requires that survivors who file with either SSA or the Veteran's Administration (VA) shall be deemed to have filed with both agencies, and that each agency's forms must request sufficient information to constitute an application for both SSA and VA benefits. The respondents are survivors of members or former members of the armed services. When form SSA–24 is received by SSA from the VA, an earnings record is requested to determine if insured status exists so that the claimant will complete the appropriate SSA survivor application. If entitlement does not exist, SSA may disallow the claim.

If an SSA survivor application has already been filed, form SSA–24 is treated as a duplicate application.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 3,200.

Frequency of Response: 1.

Average Burden Per Response: 15 minutes.

Estimated Annual Burden: 800 hours.

3. Continuing Disability Review Report—20 CFR 404.1589, 20 CFR 416.989—0960–0072. We use form SSA–454–BK to collect information from individuals receiving disability benefits or their representatives. We evaluate the information to determine whether the individuals remain eligible for benefit payments. Adults are considered eligible for payment if they continue to be unable to do substantial gainful activity (SGA) by reason of their impairments. Title XVI children are considered eligible for payment if they still have marked and severe functional limitations by reason of their impairments. We obtain information concerning sources of medical treatment, participation in vocational rehabilitation programs (if any), attempts to work (if any), and the opinions of individuals regarding whether their conditions have improved.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 792,020.

Frequency of Response: 1.

Average Burden Per Response: 45 minutes.

Estimated Annual Burden: 594,015 hours.

4. Statement Regarding Marriage—20 CFR 404.726—0960–0017. Form SSA–753 elicits information from third parties to verify the applicant's statement about intent, cohabitation, and holding out to the public as married, which are basic tenets of a common-law marriage. The responses are used by SSA to determine if a valid marital relationship exists and to make an accurate determination regarding entitlement to spouse/widow(er) benefits. The respondents are individuals who are familiar with and can provide confirmation of an applicant's common-law marriage.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 40,000.

Frequency of Response: 1.

Average Burden Per Response: 9 minutes.

Estimated Annual Burden: 6,000 hours.

5. Advance Notice of Termination of Child's Benefits and Student's Statement Regarding School Attendance—20 CFR 404.350–404.352, 404.367–404.368—0960–0105. The information collected on form SSA–1372 is needed to determine whether children of an insured worker are eligible for student benefits. The data allows SSA to determine student entitlement and whether entitlement will end. The respondents are student claimants for Social Security benefits, their respective schools and, in some cases, their payees.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 200,000.

Frequency of Response: 1.

Average Burden Per Response: 10 minutes.

Estimated Average Burden: 33,333 hours.

6. Request for Address Information From Motor Vehicles Records; Request for Address Information From Employment Commissions Records—4 CFR 104.2 —0960–0341. SSA sends form SSA–L711 to State Motor Vehicle Administrations to obtain the last known address from driver's license and registration records. SSA sends form SSA–L712 to State Employment Commissions to obtain the last known address from State unemployment/employment wage records. SSA uses the information to locate debtors to arrange for payment of debts owed to SSA. The respondents are State Motor Vehicle Administrations and State Employment Commissions.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 2,400.

Frequency of Response: 1.

Average Burden Per Response: 2 minutes.

Estimated Average Burden: 80 hours.

7.General Request for Social Security Records, eFOIA—20 CFR 402.130 —0960–NEW. SSA uses the information collected on this electronic request for Social Security records to respond to the public's request for information under the rights provided by the Freedom of Information Act (FOIA), and to track those requests by amount received, type of request, fees charged and responses sent within the required 20 days. Respondents are individuals or agencies requesting documents under FOIA.

Type of Request: New information collection.

Number of Respondents: 300,000.

Frequency of Response: 1.

Average Burden Per Response: 3 minutes.

Estimated Annual Burden: 15,000 hours.

8. Social Security Number Verification Service (SSNVS)—0960–0660

Background

Under Internal Revenue Service regulations, employers are obligated to provide wage and tax data to SSA using form W-2, Wage and Tax Statement or its electronic equivalent. As part of this process, the employer must furnish the employee's name and their Social Security Number (SSN). This information must match SSA's records in order for the employee's wage and tax data to be properly posted to their Earnings Record. Information that is incorrectly provided to the Agency must be corrected by the employer using an amended reporting form, which is a labor-intensive and time-consuming process for both SSA and the employer. Therefore, to help ensure that employers provide accurate name and SSN information, SSA piloted SSNVS with 100 employers and now plans to implement the service nationally.

SSNVS Collection

SSNVS is an optional free and secure Internet service for employers that allows them to perform advance verification of their employees' name and SSN information against SSA records. SSA will use the information collected through the SSNVS to verify that employee name and SSN information, provided by employers, matches SSA records. SSA will respond to the employer informing them only of matches and mismatches of submitted information. Respondents are employers who provide wage and tax data to SSA and elected to use the service.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 200,000.

Frequency of Response: 120.

Average Burden Per Response: 5 minutes.

Estimated Annual Burden: 2,000,000 hours.

9. Report of Death by Funeral Director—20 CFR 404.715, 404.720, 416.635—0960–0142. SSA uses the information on form SSA–721 to make timely and accurate decisions based on the report of death including: (1) proving the death of an insured individual, (2) learning of the death of a beneficiary whose benefits should terminate, and (3) determining who is eligible for the Lump-Sum Death Payment (LSDP) or may be eligible for benefits. The respondents are funeral directors with knowledge of the fact of death.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 741,113.

Frequency of Response: 1.

Average Burden Per Response: 3.5 minutes.

Estimated Annual Burden: 43,231 hours.

10. Application for SSI—20 CFR 416.305–335—0960–0229.

SSA uses the information collected on form SSA–8000–BK or its electronic equivalent, the Modernized SSI Claims System (MSSICS), to determine eligibility for SSI and the amount of benefits payable to the applicant. During the personal interview process the MSSICS system takes less time to complete because the system propagates like information and only asks relevant questions of the applicant. Approximately 97% of SSI applications are taken via MSSICS. The respondents are applicants for SSI payments.

Type of Request: Revision of an OMB-approved information collection.

Form SSA–8000

Number of Respondents: 33,851.

Frequency of Response: 1.

Average Burden Per Response: 41 minutes.

Estimated Annual Burden: 23,132 hours.

MSSICS

Number of Respondents: 1,094,523.

Frequency of Response: 1.

Average Burden Per Response: 36 minutes.

Estimated Annual Burden: 656,714 hours.

Total Burden Hours: 679,846.

II. The information collections listed below have been submitted to OMB for clearance. Your comments on the information collections would be most useful if received by OMB and SSA within 30 days from the date of this publication. You can obtain a copy of the OMB clearance packages by calling the SSA Reports Clearance Officer at 410–965–0454, or by writing to the address listed above.

1. Work Activity Report (Self-Employed)—20 CFR 404.1520(b) 20 CFR 1571–.1576 20 CFR 404.1584–.1593 20 CFR 416.971–.976—0960–0598. The information on form SSA–820–F4 is used by SSA to determine initial or continuing eligibility for SSI or Social Security disability benefits. Under Title II and Title XVI of the Act, applicants for disability benefits must prove an inability to perform any kind of substantial gainful activity (SGA) generally available in the national economy for which they might be expected to qualify on the basis of age, education, and work experience. SSA needs to secure information about this work in order to ascertain whether the applicant was (or is) engaging in SGA. Work after a claimant becomes entitled can cause the cessation of disability benefits. The information obtained from form SSA–820–F4 is needed to determine if a cessation of benefits should occur.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 100,000.

Frequency of Response: 1.

Average Burden Per Response: 30 minutes.

Estimated Annual Burden: 50,000 hours.

2. Cessation or Continuance of Disability or Blindness Determination—20 CFR 404.1615–20 CFR 404.1512–20 CFR 404.1588–1599—0960–0443. The information on form SSA–832–U3/C3 is used by SSA to document determinations as to whether an individual's disability benefits should be terminated or continued on the basis of his/her impairment. The respondents are State Disability Determination Services (DDS) employees adjudicating Title XVI disability claims.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 392,191.

Frequency of Response: 1.

Average Burden Per Response: 30 minutes.

Estimated Annual Burden: 196,096 hours.

3. Representative Payee Report—20 CFR 404.2035, 404.2065, 416.635, and 416.665—0960–0068. The information on forms SSA–623 and SSA–6230 is used by SSA to determine whether payments certified to a representative payee have been used for the beneficiary's current maintenance and personal needs and to determine whether the representative payee continues to be concerned with the beneficiary's welfare. The respondents are representative payees.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 5,250,000.

Frequency of Response: 1.

Average Burden Per Response: 15 minutes.

Estimated Annual Burden: 1,312,500 hours.

4. Modified Benefit Formula Questionnaire—0960–0395. SSA uses the information collected by form SSA–150 to determine the correct formula to be used in computing the Social Security benefit for someone who receives a pension from employment not covered by Social Security. The Windfall Elimination Provision (WEP) requires use of a benefit formula that replaces a smaller percentage of a worker's pre-retirement earnings. However, the difference in the benefit computed using the modified and regular formulas cannot be greater than

one-half the amount of the pension received in the first month an individual is entitled to both the pension and the Social Security benefit. Form SSA–150 collects the information needed to make all the necessary benefit computations. The respondents are claimants for Social Security benefits who are entitled to both benefits.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 90,000.

Frequency of Response: 1.

Average Burden Per Response: 8 minutes.

Estimated Average Burden: 12,000 hours.

5. Modified Benefit Formula Questionnaire-Employer—0960–0477. The information collected on form SSA–58 is used by SSA to verify the claimant's allegations on form SSA–150 (OMB #0960–0395). SSA must make a determination regarding whether the modified benefit formula is applicable and when to first apply it to a person's benefit. This form will be sent to an employer for pension-related information if the claimant is unable to provide it. The respondents are people who are eligible after 1985 for both Social Security benefits and a pension based on work not covered by SSA.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 30,000.

Frequency of Response: 1.

Average Burden Per Response: 20 minutes.

Estimated Average Burden: 10,000 hours.

6. Acknowledgement of Receipt (Notice of Hearing)—part 404, subpart J, 404.936(d), (e) and (f); 404.938(c); 404.950(a); part 416, subpart N, 416.1436(d), (e) and (f); 416.1438(c); 416.1450(a)—0960–0671. The information collected under 20 CFR 404.938(c) and 416.1438(c) through form HA–504 is used by SSA to process requests for hearings on unfavorable determinations of entitlement or eligibility to disability payments. SSA needs the information to determine if the individual received the notice of hearing issued by an Administrative Law Judge (ALJ) and whether the individual intends to appear at the scheduled time and place. The respondents are applicants for Social Security and SSI disability payments who want to have a hearing to appeal an unfavorable decision.

Information collected under 20 CFR 404.936(d), (e) and (f) and 416.1436(d), (e) and (f) (not on a prescribed form, but in writing, if possible) is used to determine if the individual objects to the scheduled time and place for his or her hearing and, if so, the individual's reasons for objecting and the time and place he or she would like to have the hearing held. Documentary evidence that a party presents at his or her hearing under 20 CFR 404.950(a) and 416.1450(a) is used in deciding if the individual qualifies for benefits. For those collections cleared through SSA forms, the public reporting burden is accounted for in the ICRs for the various forms. Consequently, a 1-hour placeholder burden is being assigned to the specific reporting requirements contained in the rule.

Section	Annual number of responses	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
404.936(d), (e) & (f)	92,000	1	10	15,333
404.938(c) & 416.1438(c)–HA–504	550,000	1	1	9,166
404.950(a)	210,000	1	30	105,000
416.1436(d), (e) & (f)	75,000	1	10	12,500
416.1450(a)	172,000	1	30	86,000
Total	1,099,000			227,999

Type of Request: Extension of an OMB-approved information collection.

7. State Death Match—20 CFR 404.301, 20 CFR 404.310–311, 20 CFR 404.316, 20 CFR 404.330–341, 20 CFR 404.350–352, 20 CFR 404.371, and 20 CFR 416.912—0960–NEW.

Background

Section 205(r) of the Social Security Act requires SSA to contract with the States to obtain death certificate information in order to compare it to SSA's payment files. This match ensures the accuracy of our payment files by detecting unreported or inaccurate deaths of beneficiaries.

Entitlement to retirement, disability, wife's, husband's or parent's benefits under the provisions of the Social Security Act terminates when the beneficiary dies. About 2.5 million people die in the United States each year. Approximately 2.0 million are SSA beneficiaries. Therefore, the information is instrumental in maintaining payment integrity.

SSA is seeking clearance of both the current state death match reporting process and the new Web-based Electronic Death Registration (EDR) process described below:

State Death Match—Current Process

The first participants in the death registration process, usually funeral directors, are charged by State law to complete the demographic information on the decedent and obtain necessary physicians' signatures to complete the death registration. Once the death registration information is completed, the first participant sends the information to the State's bureau of vital statistics (SBVS). The SBVS officially registers the death and is the official keeper of the death record.

Each State then furnishes this information to SSA, using current technology including Vital Information Systems Network (VISN), electronic Vital Information Systems Network (eVISN), and ConnectDirect.

Under this process SSA must independently verify the State death data before taking a termination action. The respondents are the SBVS.

State Death Match—EDR Online Verification of the SSN in State Death Registration Process

The States are now updating and further automating the death registration processes. This State reengineering effort is widely known as the EDR initiative. The EDR system permits electronic transfer of the death certificate. Under EDR the first participant completes a portion and electronically sends the document to the next participant for completion and submission to the SBVS.

An additional feature of EDR is the Online Verification System (OVS) developed by the National Association for Public Health Statistics and Information System (NAPHSIS) in conjunction with SSA. The process allows the first participants in the death registration process to enter the

decedent's demographic information including the SSN into the EDR system. The system will verify the SSN online in real time and creates an electronic death certificate as well as a fact of death report. The States have agreed that the on-line verification of the SSN at the first point of collection in the registration process will satisfy the requirement to independently verify the SSN.

EDR reduces the processing time needed to register deaths and greatly improves the business practices of the various participants in death registration process. EDR will result in the State's ability to send SSA the report with a verified SSN within 5 days of the date of death and within 24 hours of receipt in the State repository. SSA is using a phased-in approach to EDR. When fully implemented, SSA will save significant program dollars and work years annually. The respondents are the SBVS.

Type of Request: New information collection.

Estimated Annual Cost for all respondents:

Collection format	Number of respondents	Frequency of responses (per state)	Average cost per record request	Estimated annual cost burden
State Death Match—Current Registration process	52	50,000	$.67	$1,742,000
State Death Match—Electronic Death Registration (EDR)	3	50,000	2.48	372,000

Please note that both of these data matching processes are entirely electronic and there is no hourly burden for the respondent to provide this information.

III. Agency Information Collection Activities: Emergency Consideration Request. In compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, SSA is providing notice that it is submitting to OMB information collections for emergency consideration. SSA is revising these forms as a result of the Social Security Protection Act of 2004. SSA is requesting emergency consideration from OMB by January 10, 2005 of the information collections listed below. Therefore, comments should be submitted to OMB and SSA by that date.

1. Petition To Obtain Approval Of A Fee For Representing A Claimant Before the Social Security Administration—20 CFR Subpart R, 404.1720, 404.1725; Subpart F, 410.686b; Subpart O, 416.1520 and 416.1525—0960–0104. A representative of a claimant for Social Security benefits must file either a fee petition or a fee agreement with SSA in order to charge a fee for representing a claimant in proceedings before SSA. The representative uses form SSA–1560–U4 to petition SSA for authorization to charge and collect a fee. A claimant may also use the form to agree or disagree with the requested fee amount or other information the representative provides on the form. SSA uses the information to determine a reasonable fee that a representative may charge and collect for his or her services. The respondents are claimants, their attorneys and other persons representing them.

Type of Request: Emergency.

Number of Respondents: 34,624.

Frequency of Response: 1.

Average Burden Per Response: 30 minutes.

Estimated Annual Burden: 17,312 hours.

2. Appointment of Representation—20 CFR 404.1707, 404.1720, 404.1725, 410.684 and 416.1507—0960–0527. The information collected by SSA on form SSA–1696–U4 is used to verify the applicant's appointment of a representative. It allows SSA to inform the representative of items which affect the applicant's claim. The affected public consists of applicants who notify SSA that they have appointed a person to represent them in their dealings with SSA when claiming a right to benefits.

Type of Request: Emergency.

Number of Respondents: 551,520.

Frequency of Response: 1.

Average Burden Per Response: 10 minutes.

Estimated Annual Burden: 91,920 hours.

Dated: December 3, 2004.

Elizabeth A. Davidson,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 04–26998 Filed 12–9–04; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at St. Petersburg-Clearwater International Airport, Clearwater, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at St. Petersburg-Clearwater International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before January 10, 2005.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Orlando Airports District Office, 5950 Hazeltine National Drive, Suite 400; Orlando, Florida 32822.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Noah Lagos, Airport Director of the Board of County Commissioners of Pinellas County at the following address: St. Petersburg-Clearwater International Airport, 14700 Terminal Blvd., Suite 221, Clearwater, Florida 33762.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Pinellas County under section 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: Mr. Vernon P. Rupinta, Program Manager, Orlando Airports District Office, 5950 Hazeltine National Drive, Suite 400; Orlando, Florida 32822, (407) 812–6331, Extension 124. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at St. Petersburg-Clearwater International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and part 158 of the Federal aviation Regulations (14 CFR part 158).

On December 3, 2004, the FAA determined that the application to impose and use the revenue from a PFC submitted by Board of County Commissioners of Pinellas County was substantially complete within the requirement of section 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than February 16, 2005.

The following is a brief overview of the application.

PFC Application No.: 05–01–C–00–PIE.

Level of the proposed PFC: $3.00.

Proposed charge effective date: April 1, 2005.

Proposed charge expiration date: October 1, 2007.

Total estimated net PFC revenue: $3,357,639.

Brief description of proposed project(s): Overlay of Terminal Ramp and Taxiways A, C, & D; Water Rescue Craft Acquisition & Firehouse Expansion; Airfield Guidance Signs Installation; Airport & Airfield Lighting Control Panel Relocation; 107.14 Security Access System Installation; Terminal Building Expansion & Renovation (Phases 1 & 2); Taxiway T Relocation; Runway 17–35 Lighting Rehabilitation (Plans and Specifications—Phase 1 & 2); Baggage Claims Expansion (Phase 1); Security Fence Improvement; Runway 17–35 Marking; Runway 17L–35R Environmental Assessment Study; 2003 Master Plan Update, Stormwater Plan, & Benefit-Cost Analysis for Runway Extension; Runway 17L–35R Threshold Relocation; Land Acquisition—Runway 35R; Security Fencing & Enhancements; Runway 17L–35R Rehabilitation; Terminal Apron Rehabilitation, ARFF Fire Trucks, Rescue Boat, and Airport Sweeper; Additional Environmental Assessment & Pre-Permitting Runway 17L–35R Extension; Runway 17L–35R Extension/Safety Areas & Related Land Acquisition; Taxiway M Lighting Rehabilitation; Security Enhancements; Environmental Assessment & Benefit Cost Analysis for Parallel General Aviation Runway; Terminal Expansion—Baggage Processing Area; PFC Application No. 1 Development and PFC Audits.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Air Taxi/Commercial Operator (ATCO) Filing FAA Form 1800–31.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT.**

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Board of County Commissioners of Pinellas County.

Issued in Orlando, Florida on December 3, 2004.

W. Dean Stringer,

Manager, Orlando Airports District Office, Southern Region.

[FR Doc. 04–27095 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Draft Programmatic Environmental Impact Statement; Garfield, Eagle, Summit, Clear Creek and Jefferson Counties, CO

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of availability.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, the FHWA, in cooperation with the Colorado Department of Transportation (CDOT), have prepared a Draft Programmatic Environmental Impact Statement (PEIS)—a Draft Tier 1 EIS—for proposed transportation improvements to Interstate 70 (I–70) between Glenwood Springs and C–470, traversing five counties in north-central Colorado: Garfield, Eagle, Summit, Clear Creek and Jefferson from approximately mileposts 116 to 260. The Draft PEIS identifies 20 Build Alternatives and the No-Action Alternative, and evaluates their associated environmental impacts. Interested citizens are invited to review the Draft PEIS and submit comments. Copies of the Draft PEIS may be obtained by telephoning or writing either of the contact persons listed below under **FOR FURTHER INFORMATION CONTACT.** Public reading copies of the Draft PEIS are available at the locations listed under **SUPPLEMENTARY INFORMATION.**

DATES: A 90-calendar-day public review period will begin on December 10, 2004, and conclude on March 10, 2005. Written comments on the Draft PEIS to be considered must be received by CDOT by March 10, 2005. A series of ten public hearings to receive oral and written comments on the Draft PEIS will be held across the corridor at the locations listed under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: To request information or copies of the Draft PEIS, and to submit written comments on the Draft PEIS, contact Cecelia Joy, Project Manager, Colorado Department of Transportation, Region 1, 18500 East Colfax Avenue, Aurora, CO 80011, telephone (303) 757–9112; or Jean Wallace, Senior Operations Engineer, Federal Highway Administration, 12300 West Dakota Avenue, Suite 180, Lakewood, CO 80228, telephone (720) 963–3015. Written comments may also be submitted via the project Web site at *http://www.i70mtncorridor.com.* Please see the **SUPPLEMENTARY INFORMATION** section for a listing of the available documents, distribution policy and formats in which they may be obtained. The **SUPPLEMENTARY INFORMATION** section also lists locations where copies of the Draft PEIS are available for public inspection and review.

SUPPLEMENTARY INFORMATION: Hearing Dates and Locations:

- Wednesday, January 12, 2005, Clear Creek High School, 5 p.m. to 8 p.m., Evergreen, Colorado.
- Saturday, January 15, 2005, 1 p.m. to 4 p.m. at the Westin Hotel, Westminster, Colorado.
- Wednesday, January 19, 2005, 4 p.m. to 7 p.m. at County Inn of Grand Junction, Grand Junction, Colorado.
- Wednesday, January 26, 2005, Avon Municipal Building, 4 p.m. to 7 p.m., Avon, Colorado.
- Wednesday, February 2, 2005, Marriott Denver South at Park Meadows, 4 p.m. to 7 p.m., Littleton, Colorado.
- Wednesday, February 9, 2005, Rocky Mountain Village/Easter Seals Handicamp, 4 p.m. to 7 p.m., Empire, Colorado.
- Saturday, February 12, 2005, Hotel Colorado, 1 p.m. to 4 p.m., Glenwood Springs, Colorado.
- Wednesday, February 16, 2005, Jefferson County Fairgrounds, 4 p.m. to 7 p.m., Golden, Colorado.
- Wednesday, February 23, 2005, Four Points Sheraton, 4 p.m. to 7 p.m., Silverthorne, Colorado.
- Saturday, February 26, 2005, The Vintage Hotel, 1 p.m. to 4 p.m., Winter Park, Colorado.

Copies of the Draft PEIS are available in hard copy format for public inspection at:

- CDOT Headquarters, Public Information Office, 4201 E. Arkansas Ave., Denver, CO 80222; (303) 757–9228.
- CDOT Region 1, 18500 E. Colfax Ave., Aurora, CO 80011; (303) 757–9371.
- Irving Street Library, 7392 Irving Street, Westminster, CO 80030; (303) 430–2400, ext. 2303.
- Aurora Central Library, Recreation & Cultural Services, 14949 E. Alameda

Parkway, Aurora, CO 80012; (303) 739–6600.

• Denver Public Library, Central Branch, 10 W. Fourteenth Ave. Parkway, Denver, CO 80204; (720) 865–1733.

• Auraria Campus Library, 1100 Lawrence St., Denver, CO 80204; (303) 556–3532.

• Highlands Ranch Library, 9292 Ridgeline Blvd., Highlands Ranch, CO 80129, (303) 791–7703.

• Philip S. Miller Library, 100 S. Wilcox, Castle Rock, CO 80104; (303) 688–7700.

• FHWA Offices, 12300 W. Dakota Ave., Suite 180, Lakewood, CO 80228; (720) 963–3000.

• USDA Forest Service, Regional Office, 740 Simms, Lakewood, CO, 80401; (303) 275–5427.

• Jefferson County Offices, 100 Jefferson County Parkway, Suite 3500, Golden, CO 80419; (303) 271–8470.

• Commissioner's Office, 405 Argentine, Georgetown, CO 80444; (303) 679–2310.

• Tomay Memorial Library, 605 6th Street, Georgetown, CO 80444; (303) 569–2620.

• Clear Creek County Planning Office (Library), 405 Argentine St., Georgetown, CO 80444; (303) 679–2455.

• Gateway Visitor Center, 1491 Argentine St., Georgetown, CO 80444; (303) 569–0289.

• Idaho Springs Heritage Museum and Visitor's Center; 2060 Miner Street, Idaho Springs, CO 80452; (303) 567–4382.

• Idaho Springs Public Library, 219 14th Ave., Idaho Springs, CO 80452; (303) 567–2020.

• U.S. Forest Service, Clear Creek Ranger District, 101 Chicago Creek Road, Idaho Springs, CO 80452; (303) 567–3000.

• Clear Creek High School (Library), 185 Beaver Brook Canyon Road, Evergreen, CO 80439; (303) 679–4601.

• Silver Plume Small Town Hall, 285 Main St., Silver Plume, CO 80476; (303) 569–2363.

• Historic Dumont School House, 150 Dumont Lane, Dumont, CO 80436; open by appointment, (303) 771–3078.

• Fraser Valley Library, 421 Norgren Rd., Fraser, CO 80442; (970) 726–5689.

• Summit County Planning Office, Summit County Commons Bldg. 1st Floor, 37 County Road 1005, Frisco, CO 80443; (970) 668–4200.

• Summit County Public Library, Main Branch, Summit County Commons Bldg., 37 County Road 1005, Frisco, CO 80443; (970) 668–5555.

• Summit County Public Library, North Branch, 651 Center Circle, Silverthorne, CO 80498; (970) 468–5887.

• USDA Forest Service, Dillon Ranger District, 680 River Parkway, Silverthorne, CO 80498; (970) 468–5400.

• Eagle County Engineering Office, 500 Broadway, Eagle, CO 81631; (970) 328–3560.

• Avon Municipal Building, 400 Benchmark Rd., Avon, CO 81620; (970) 748–4035.

• Vail Public Library, 292 W. Meadow Dr., Vail, CO 81657; (970) 479–2185.

• Lake County Public Library, 1115 Harrison Ave., Leadville, CO 80461; (719) 486–0569.

• Pitkin County Library, 120 North Mill St., Aspen, CO 81611; (970) 925–4025.

• CDOT, Region 3, 202 Centennial St., Glenwood Springs, CO 81601; (970) 384–3332.

• Glenwood Springs Public Library, 413 9th St., Glenwood Springs, CO 81601; (970) 945–5958.

• USDA Forest Service, 900 Grand Ave, Glenwood Springs, CO 81602; (970) 945–2521.

• CDOT, Region 3, 222 S. 6th St., Grand Junction, CO 81501; (970) 248–7223.

• Grand Junction Public Library, 530 Grand Ave., Grand Junction, CO 81501; (970) 683–2429.

In addition to the above public repositories, the policy for distribution will be as follows:

• A 2-volume compact disc set will be provided to each entity represented on the Mountain Corridor Advisory Committee (MCAC)/Technical Advisory Committee (TAC), Section 106 consulting parties, and the I–70 Coalition. Upon request, one hard copy of the document will be provided to each entity represented on the MCAC/TAC, the Section 106 consulting parties, and the I–70 Coalition.

The Draft PEIS will also be available for review in the following formats:

• Compact Disc—2 volume set—PDF format (by request).

• Executive Summary only—hard copy (by request).

• The PEIS Web site at *http://www.i70mtncorridor.com.*

Background

This Draft PEIS focuses on broad approaches to address travel demand and performance of transportation systems within the context of the I–70 corridor communities and environmental setting. At this Tier 1 level of analysis, the Draft PEIS provides an evaluation of a broad range of mode choices and general locations of proposed transportation improvements for I–70 between Glenwood Springs and C–470. The study area extends approximately 144 miles across Garfield, Eagle, Summit, Clear Creek and Jefferson Counties. This Draft PEIS includes an examination of the purpose and need, alternatives under consideration, travel demand, and consistent with a programmatic level of analysis, describes the affected environment, environmental consequences, and identifies mitigation policies for the proposed transportation systems under consideration. Twenty build alternatives and a No-Action Alternative are presented in the Draft PEIS. Of these, a group of nine preferred alternatives have been identified and are under consideration by FHWA and CDOT in the Draft PEIS. After a preferred alternative has been identified in the Final Programmatic EIS, and an alternative is selected in the Record of Decision, subsequent design, environmental analysis, documentation, and review will be prepared in a Tier 2 document, which will include site-specific, project level details.

Comments from interested parties on the Draft PEIS are encouraged and may be presented verbally at a public hearing or may be submitted in writing to the CDOT and/or the FHWA.

The FHWA and CDOT invite interested individuals, organizations, and federal, state, and local agencies to comment on the evaluated alternatives and associated social, economic, or environmental impacts related to the alternatives.

Issued on: December 3, 2004.

Douglas Bennett,

Assistant Division Administrator, Federal Highway Administration, Lakewood, Colorado.

[FR Doc. 04–26921 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration, DOT.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and its implementing regulations, the Federal Railroad Administration (FRA) hereby announces that it is seeking approval of the following information collection activities. Before submitting these information collection requirements for clearance by the Office of Management and Budget (OMB), FRA

is soliciting public comment on specific aspects of the activities identified below.

DATES: Comments must be received no later than Feburary 8, 2005.

ADDRESSES: Submit written comments on any or all of the following proposed activities by mail to either: Mr. Robert Brogan, Office of Safety, Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 17, Washington, DC 20590, or Ms. Debra Steward, Office of Information Technology and Productivity Improvement, RAD–20, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 35, Washington, DC 20590. Commenters requesting FRA to acknowledge receipt of their respective comments must include a self-addressed stamped postcard stating, ''Comments on OMB control number 2130–0557. Alternatively, comments may be transmitted via facsimile to (202) 493–6230 or (202) 493–6170, or e-mail to Mr. Brogan at *robert.brogan@fra.dot.gov*, or to Ms. Steward at *debra.steward@fra.dot.gov.* Please refer to the assigned OMB control number or collection title in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 17, Washington, DC 20590 (telephone: (202) 493–6292) or Debra Steward, Office of Information Technology and Productivity Improvement, RAD–20, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 35, Washington, DC 20590 (telephone: (202) 493–6139). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Pub. L. 104–13, § 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to provide 60-days notice to the public for comment on information collection activities before seeking approval by OMB. 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1), 1320.10(e)(1), 1320.12(a). Specifically, FRA invites interested respondents to comment on the following summary of proposed information collection activities regarding (i) whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (ii) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (iii) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (iv) ways for FRA to minimize the burden of information collection activities on the public by automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.*, permitting electronic submission of responses). *See* 44 U.S.C. 3506(c)(2)(A)(i)–(iv); 5 CFR 1320.8(d)(1)(i)–(iv). FRA believes that soliciting public comment will promote its efforts to reduce the administrative and paperwork burdens associated with the collection of information mandated by Federal regulations. In summary, FRA reasons that comments received will advance three objectives: (i) Reduce reporting burdens; (ii) ensure that it organizes information collection requirements in a ''user friendly'' format to improve the use of such information; and (iii) accurately assess the resources expended to retrieve and produce information requested. *See* 44 U.S.C. 3501.

Below is a brief summary of current information collection activities that FRA will submit for clearance by OMB as required under the PRA:

Title: Safety Integration Plans.

OMB Control Number: 2130–0557.

Abstract: The Federal Railroad Administration (FRA) and the Surface Transportation Board (STB), working in conjunction with each other, have issued joint final rules establishing procedures for the development and implementation of safety integration plans (''SIPs'' or ''plans'') by a Class I railroad proposing to engage in certain specified merger, consolidation, or acquisition of control transactions with another Class I railroad, or a Class II railroad with which it proposes to amalgamate operations. The scope of the transactions covered under the two rules is the same. FRA will use the information collected, notably the required SIPs, to maintain and promote a safe rail environment by ensuring that affected railroads (Class Is and some Class IIs) address critical safety issues unique to the amalgamation of large, complex railroad operations.

Form Number(s): N/A.

Affected Public: Railroads.

Respondent Universe: Class I Railroads.

Frequency of Submission: On occasion.

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
244.13—Safety Integration Plans:					
Amalgamation of Operations—SIP Development & Quarterly Meetings.	8 railroads	1 plan	360 hours	360 hours	22,224
244.17—Procedures	8 railroads	25 reports	40 hours/2 hours	92 hours	5,152
—Coordination in Implementing Approved SIP.	8 railroads	50 phone calls	10 minutes	4 hours	224
—Request For Confidential Treatment.	8 railroads	1 request	8 hours	8 hours	1,224
244.19—Disposition					
—Comments on Proposed SIP Amendments.	8 railroads	2 reports	16 hours	32 hours	1,792

Total Responses: 79.

Estimated Total Annual Burden: 496 hours.

Status: Extension of a Currently Approved Collection.

Pursuant to 44 U.S.C. 3507(a) and 5 CFR 1320.5(b), 1320.8(b)(3)(vi), FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Issued in Washington, DC on December 3, 2004.

Kathy A. Weiner,

Director, Office of Information Technology and Support Systems, Federal Railroad Administration.

[FR Doc. 04–27089 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Reports, Forms and Recordkeeping Requirements; Agency Information Collection Activity Under OMB Review

AGENCY: Maritime Administration, DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and approval. The nature of the information collection is described as well as its expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on September 29, 2004. No comments were received.

DATES: Comments must be submitted on or before January 10, 2005.

FOR FURTHER INFORMATION CONTACT: Christopher Krusa, Maritime Administration, 400 7th Street SW., Washington, DC 20590. Telephone: 202–366–2648; FAX: 202–366–3746; or e-mail: *chris.krusa@marad.dot.gov.* Copies of this collection also can be obtained from that office.

SUPPLEMENTARY INFORMATION: Maritime Administration (MARAD).

Title: Supplementary Training Course Application.

OMB Control Number: 2133–0030.

Type of Request: Extension of currently approved collection.

Affected Public: U.S. Merchant Marine Seamen, both officers and unlicensed personnel, and other U.S. citizens employed in other areas of waterborne commerce.

Forms: MA–823.

Abstract: Section 1305(a) of the Maritime Education and Training Act of 1980 indicates that the Secretary of Transportation may provide maritime-related training to merchant mariners of the United States and to individuals preparing for a career in the merchant marine of the United States. This collection provides the information necessary for the maritime schools to plan their course offerings and for applicants to complete their certificate requirements.

Annual Estimated Burden Hours: 25 hours.

ADDRESSES: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention MARAD Desk Officer.

Comments are invited on: 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; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

Authority: 49 CFR 1.66.

Issued in Washington, DC, on December 7, 2004.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 04–27153 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[U.S. DOT Docket Number NHTSA–04–19624]

Reports, Forms, and Recordkeeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Request for public comment on proposed collection of information.

SUMMARY: Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections.

This document describes collection of information for which NHTSA intends to seek OMB approval.

DATES: Comments must be received on or before February 8, 2005.

ADDRESSES: Comments must refer to the docket notice numbers cited at the beginning of this notice and be submitted to Docket Management, Room PL–401, 400 7th Street, SW., Washington, DC 20590. Please identify the proposed collection of information for which a comment is provided, by referencing its OMB clearance Number. It is requested, but not required, that 2 copies of the comment be provided. The Docket Section is open on weekdays from 10 a.m. to 5 p.m.

FOR FURTHER INFORMATION CONTACT: Complete copies of each request for collection of information may be obtained at no charge from Ronald Filbert, NHTSA 400 Seventh Street, SW., room 5125, NTI–200,Washington, DC 20590. Mr. Filbert's telephone number is (202) 366–2701. Please identify the relevant collection of information by referring to its OMB Control Number.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must first publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulation (at 5 CFR 1320.8(d), an agency must ask for public comment on the following:

(i) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) How to enhance the quality, utility, and clarity of the information to be collected;

(iv) How to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks for public

comments on the following proposed collections of information:

(1) *Title:* Highway Safety Program Cost Summary.

OMB Control Number: 2127–0003.

Affected Public: 50 States, District of Columbia, Puerto Rico, U.S. Territories, and Tribal Government.

Form Number: HS–217 Highway Safety Program Cost Summary.

Abstract: The Highway Safety Plan identifies State's traffic safety problems and describes the program and projects to address those problems. In order to account for funds expended, States are required to submit a HS–217 Highway Safety Program Cost Summary. The Program Cost Summary is completed to reflect the state's proposed allocations of funds (including carry-forward funds) by program area, based on the projects and activities identified in the Highway Safety Plan.

Estimated Annual Burden: 570.

Number of Respondents: 57.

(2) *Title:* Uniform Criteria for State Observational Surveys of Seat Belt Use—Section 157.

OMB Control Number: 2127–0597.

Affected Public: The 50 States, The District of Columbia, & Puerto Rico.

Form Number: N/A.

Abstract: This collection would require the respondents, which are the States, the District of Columbia, and Puerto Rico to provide seat belt use survey information to NHTSA before they receive grant money. To be eligible for Incentive grant funding, the surveys must be completed by the end of the calendar year and submitted to NHTSA by March 1 of the following calendar year.

Estimated Annual Burden: 17,972.

Number of Respondents: 52.

(3) *Title:* 23 CFR, Part 1345, Occupant Protection Incentive Grant—Section 405.

OMB Control Number: 2127–0600.

Affected Public: The 50 States, the District of Columbia, Puerto Rico, American Samoa, Guam, Northern Marianas and Virgin Islands.

Form Number: N/A.

Abstract: An occupant protection incentive grant is available to states that can demonstrate compliance with at least four of six criteria. Demonstration of compliance requires submission of copies of relevant seat belt and child passenger protection statutes, plan and/or reports on statewide seatbelt enforcement and child seat education programs and possibly some traffic court records.

Estimated Annual Burden: 1,736.

Number of Respondents: 56.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued on: December 3, 2004.

Marlene Markison,

Associate Administrator for Office of Injury Control Operations and Resources.

[FR Doc. 04–27103 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 2001–10856]

Motor Vehicle Safety; Disposition of Recalled Tires; Agency Information Collection Activity Under OMB Review

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. **Federal Register** notices with a 60-day comment period were published on May 27, 2003, at Vol. 68, No. 101 p. 28876–77 and on April 22, 2004, at Vol. 69, No. 78 p 21881–3.

DATES: Comments must be submitted on or before January 10, 2005.

ADDRESSES: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725–17th Street, NW., Washington, DC 20503, Attention NHTSA Desk Officer.

FOR FURTHER INFORMATION CONTACT: George Person at the National Highway Traffic Safety Administration, Recall Management Division, NVS–215, 400 Seventh Street, SW., Washington, DC 20590, phone 202–366–5210.

SUPPLEMENTARY INFORMATION:

Agency: National Highway Traffic Safety Administration.

Title: Motor Vehicle Safety; Disposition of Recalled Tires.

OMB Number: 2127—0004.

Type of Request: Revision of currently approved collection.

Abstract: Section 7 of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act requires a manufacturer's remedy program for tires to include a plan for preventing, to the extent reasonably within the manufacturer's control, the resale of replaced tires for use on motor vehicles, as well as a plan for the disposition of replaced tires other than in landfills, particularly through methods such as shredding, crumbling, recycling, recovery, or other ''beneficial non-vehicular uses.'' Manufacturers that conduct recalls are already required by 49 CFR part 573 to submit a Defect or Noncompliance Information Report, containing certain information, to the National Highway Traffic Safety Administration (NHTSA). One item of required information is a description of the manufacturer's program for remedying the defect or noncompliance (remedy plan). This information collection adds the requirement for manufacturers to include their plan for disposal of recalled tires in their remedy plan. Further, Section 7 requires manufacturers to include information about the implementation of remedy plans in quarterly reports that they are required to make to NHTSA. Manufacturers are already required to file quarterly reports containing certain information about the progress of recalls. This rule adds a requirement to report to NHTSA in these quarterly reports information about tires which were not disposed of in accordance with the disposal plan.

Affected Public: All manufacturers of recalled tires and all dealers of recalled tires.

Estimated Total Annual Burden: 20 hours increase over the current allotment of 18,204 hours for a total of 18,224 hours. There is no increase in reporting and recordkeeping cost burden.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Departments estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or

other forms of information technology. A comment to OMB is most effective if OMB receives it within 30 days of publication.

Issued in Washington, DC, on December 3, 2004.

Kenneth N. Weinstein,

Associate Administrator for Enforcement.

[FR Doc. 04–27104 Filed 12–9–04; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

December 2, 2004.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

Dates: Written comments should be received on or before January 10, 2005, to be assured of consideration.

Internal Revenue Service

OMB Number: 1545–1476.

Regulation Project Number: INTL–3–95 Final.

Type of Review: Extension.

Title: Source of Income from Sales of Inventory and Natural Resources Produced in One Jurisdiction and Sold in Another Jurisdiction.

Description: The information requested is necessary for the Service to audit taxpayers' returns to ensure taxpayers have properly determined the source of income from sales of inventory produced in one country and sold in another.

Respondents: Business or other for-profit.

Estimated Number of Respondents: 425.

Estimated Burden Hours Respondent: 2 hours, 36 minutes.

Frequency of response: Annually.

Estimated Total Reporting Burden: 1,125 hours.

OMB Number: 1545–1907.

Notice Numbers: Notices 2004–74, 2004–75 and 2004–76.

Type of Review: Extension.

Title: Notice 2004–74: Relief from Certain LIHC (low-income housing credit) Requirements in the State of Alabama Due to Hurricane Ivan; Notice 2004–75: Relief from Certain LIHC Requirements in the State of Ohio Due to Post-Hurricane Severe Storms and Flooding; and Notice 2004–76: Relief from Certain LIHC Requirements in the State of Florida Due to Hurricanes Charley, Frances, Ivan and Jeanne.

Description: The Internal Revenue Service is suspending certain income limitation requirements under section 42 of the Internal Revenue Code for certain low-income housing credit properties in Alabama as a result of Hurricane Ivan, in Florida as a result of Hurricanes Charley, Frances, Ivan and Jeanne, and Ohio as a result of post-hurricane severe storms and flooding from the remnants of Hurricanes Ivan and Frances.

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

Estimated Number of Recordkeepers: 7,750.

Estimated Burden Hours Recordkeeper: 15 minutes.

Estimated Total Reporting Burden: 1,938 hours.

Clearance Officer: R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Treasury PRA Clearance Officer.

[FR Doc. 04–27138 Filed 12–9–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

[Notice No. 26]

Miscellaneous Trade and Technical Corrections Act of 2004; Meeting on New Certification Requirements for Imported Wine

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Notice of meeting.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau will hold a public meeting to provide information on implementation of the new certification requirements for imported wine contained in section 2002 of the Miscellaneous Trade and Technical Corrections Act of 2004. The meeting is open to the public.

DATES: The meeting is scheduled for December 15, 2004, from 2 p.m. to 4 p.m. We must receive written comments regarding implementation of the statute on or before January 15, 2005.

ADDRESSES: The meeting will be held at the Treasury Executive Institute, 801 9th Street, NW., Washington, DC 20220.

You may submit written comments or suggestions at the meeting, or you may send them to any of the following addresses:

- Chief, Regulations and Procedures Division, Alcohol and Tobacco Tax and Trade Bureau, Attn: Notice No. 26, P.O. Box 14412, Washington, DC 20044–4412.
- *nprm@ttb.gov* (e-mail).
- (202) 927–8525 (facsimile). To ensure electronic access to our equipment, we cannot accept faxed comments that exceed five pages.

FOR FURTHER INFORMATION CONTACT: Alcohol and Tobacco Tax and Trade Bureau, International Trade Division, by telephone at (202) 927–8110; by fax at (202) 927–8605; or by e-mail at *itd@ttb.treas.gov.*

SUPPLEMENTARY INFORMATION:

Background

On November 23, 2004, Congress transmitted the Miscellaneous Trade and Technical Corrections Act of 2004 (the Act) to President Bush for signature. Section 2002 of the Act would amend section 5382(a) of the Internal Revenue Code of 1986 (IRC), 26 U.S.C. 5382(a), which sets forth standards regarding what constitutes proper cellar treatment of natural wine. The Alcohol and Tobacco Tax and Trade Bureau (TTB) is responsible for the administration of the IRC provisions relating to wine.

The amendment to section 5382(a) would add a certification requirement regarding production practices and procedures for imported wine. Under the amended statute, for wine produced after December 31, 2004, the Secretary of the Treasury will accept the practices and procedures used to produce the wine, if, at the time of importation, one of the following conditions is met:

1. The Secretary has on file or is provided with a certification from the government of the producing country, accompanied by an affirmed laboratory analysis, that the practices and procedures used to produce the wine constitute proper cellar treatment;

2. The Secretary has on file or is provided with a certification, if any, as may be required by an international agreement or treaty specifying practices and procedures acceptable to the United States; or

3. In the case of an importer that owns or controls or has an affiliate that owns or controls a winery operating under a basic permit issued by the Secretary, the importer certifies that the practices and procedures used to produce the wine constitute proper cellar treatment.

Public Meeting

In anticipation of the President's signing this legislation into law, TTB has determined that it would be appropriate to hold a public meeting to discuss these developments. The purpose of the meeting is to advise the public of TTB's plans for implementation of the new certification requirements and to answer any questions the public may have regarding this provision.

The meeting will be held on December 15, 2004, from 2 p.m. to 4 p.m. at the Treasury Executive Institute, 801 9th Street, NW., Washington, DC 20220. Due to limited space, admittance will be on a first-come basis.

Submission of Comments

No written record of the meeting will be maintained. Therefore, comments or suggestions made at the meeting must be submitted in writing in order to be considered part of the agency record. All written comments and submitted materials are part of the public record and subject to disclosure. Do not provide any material in your comments that you consider confidential or inappropriate for public disclosure.

Members of the public who wish to submit written comments after the meeting must do so no later than January 15, 2005. All comments must include this notice number and your name and mailing address. Your comments must be legible and written in language acceptable for public disclosure. We do not acknowledge receipt of comments, and we regard all comments as originals.

In the near future, TTB anticipates issuing a temporary rule with an opportunity for further comment.

Dated: December 6, 2004.

Arthur J. Libertucci,

Administrator.

[FR Doc. 04–27105 Filed 12–9–04; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds: ALLIED Property and Casualty Insurance Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice

SUMMARY: This is Supplement No. 5 to the Treasury Department Circular 570; 2004 Revision, published July 1, 2004, at 69 FR 40224.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–1661.

SUPPLEMENTARY INFORMATION: A Certificate of Authority as an acceptable surety on Federal bonds is hereby issued to the following Company under 31 U.S.C. 9304 to 9308. Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570, 2004 Revision, on page 40226 to reflect this action:

Company Name: ALLIED Property and casualty Insurance Company.

Business Address: 1100 Locust Street, Des Moines, IA 50391–1100.

Phone: (515) 508–4211. Underwriting Limitation b/: $8,132,00.

Surety Licenses.: AZ, CA, FL, GA, ID, IL IN, IA, KS, KY, MI, MO, MT, NE, NV, NM, ND, OH, SD, TN, TX, UT, VA, WA, WI, WY.

Incorporated in Iowa.

Certificates of Authority expire on June 30 each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (31 CFR part 223). A list of qualified companies is published annually as of July 1 in Treasury Department Circular 570, with details as to underwriting limitations, areas in which licensed to transact surety business and other information.

The Circular may be viewed and downloaded through the Internet at *http://www.fms.treas.gov/c570.* A hard copy may be purchased from the Government Printing Office (GPO) Subscription Service, Washington, DC, and Telephone (202) 512–1800. When ordering the Circular from GPO, use the following stock number. 769–004–04926–1.

Questions concerning this Notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F07, Hyattsville, Md 20782.

Dated: December 3, 2004.

Vivian L. Cooper,

Director, Financial Accounting and Services Division, Financial Management Service.

[FR Doc. 04–27176 Filed 12–9–04; 8:45 am]

BILLING CODE 4810–35–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–105344–01]

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 an existing final regulation, REG–105344–01 (TD 9036), Disclosure of Returns and Return Information by Other Agencies (§ 301.6103(p)(2)(B)–1).

DATES: Written comments should be received on or before February 8, 2005, to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Carol Savage at Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3945, or through the Internet at *CAROL.A.SAVAGE@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Disclosure of Returns and Return Information by Other Agencies.

OMB Number: 1545–1757.

Regulation Project Number: REG–105344–01.

Abstract: In general, under the regulations, the IRS is permitted to authorize agencies with access to returns and return information under section 6103 of the Internal Revenue Code to redisclose returns and return information based on a written request and the Commissioner's approval, to any authorized recipient set forth in

Code section 6103, subject to the same conditions and restrictions, and for the same purposes, as if the recipient had received the information from the IRS directly.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Federal, state, local or tribal governments.

Estimated Number of Respondents: 11.

Estimated Time Per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 11.

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: December 6, 2004.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 04–27164 Filed 12–9–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 2003–45 and Revenue Procedure 2004–48

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, Pub. L. 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Procedure 2003–45, Late Election Relief for S Corporations, and Revenue Procedure 2004–48, Deemed Corporate Election for Late Electing S Corporations.

DATES: Written comments should be received on or before February 8, 2005, to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the revenue procedures should be directed to Carol Savage at Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3945, or through the internet at *CAROL.A.SAVAGE@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Revenue Procedure 2003–45, Late Election Relief for S Corporations, and Revenue Procedure 2004–48, Deemed Corporate Election for Late Electing S Corporations.

OMB Number: 1545–1548.

Revenue Procedure Number: Revenue Procedure 2003–45 and Revenue Procedure 2004–48.

Abstract: Revenue Procedure 2003–45 provides a simplified method for taxpayers to request relief for late S corporation elections, Electing Small Business Trust (ESBT) elections, Qualified Subchapter S Subsidiary (QSub) elections. Generally, this revenue procedure provides that certain eligible entities may be granted relief for failing to file these elections in a timely manner if the request for relief is filed with 24 months of the due date of the election. Revenue Procedure 2004–48 provides a simplified method for taxpayers to request relief for a late S corporation election and a late corporate classification election which was intended to be effective on the same date that the S corporation election was intended to be effective.

Current Actions: There are no changes being made to these revenue procedures at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 50,000.

Estimated Average Time Per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 50,000.

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: December 6, 2004.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 04–27165 Filed 12–9–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–118662–98]

Proposed Collection: Comment Request for Regulation Project; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to notice and request for comments.

SUMMARY: This document contains a correction to a notice and request for comments, which was published in the **Federal Register** on Monday, November 22, 2004 (69 FR 68003).

FOR FURTHER INFORMATION CONTACT: Allan Hopkins, (202) 622–6665 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The notice and request for comments that is the subject of this correction is required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

Need for Correction

As published, the comment request for regulation project contains an error which may prove to be misleading and is need of clarification.

Correction of Publication

Accordingly, the publication of the comment request for regulation project, which was the subject of FR Doc. 04–25873, is corrected as follows:

On page 68003, column 2, under the caption **SUPPLEMENTARY INFORMATION:**, the language, ''*Estimated Time per Respondent:* 1 hr.'' is corrected to read ''*Estimated Time per Respondent:* 1 hr., 16 min''.

Cynthia E. Grigsby,

Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 04–27163 Filed 12–9–04; 8:45 am]

BILLING CODE 4830–01–P

Corrections

Federal Register

Vol. 69, No. 237

Friday, December 10, 2004

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

Correction

In notice document E4–3475 beginning on page 70662 in the issue of Tuesday, December 7, 2004, make the following correction:

On page 70662, in the third column, in the **DATES** section, in the third line, ''2004'' should read ''2005''.

[FR Doc. Z4–3475 Filed 12–9–04; 8:45 am]

BILLING CODE 1505–01–D



Federal Register

Friday,

December 10, 2004

Part II

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 226

Endangered and Threatened Species; Designation of Critical Habitat for Seven Evolutionarily Significant Units of Pacific Salmon (*Oncorhynchus tshawytscha*) and Steelhead (*O. mykiss*) in California; Proposed Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 041123329–4329–01; I.D. No. 110904F]

RIN 0648–AO04

Endangered and Threatened Species; Designation of Critical Habitat for Seven Evolutionarily Significant Units of Pacific Salmon (*Oncorhynchus tshawytscha*) and Steelhead (*O. mykiss*) in California

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

ACTION: Proposed rule; request for comments.

SUMMARY: The National Marine Fisheries Service (NMFS) proposes to designate critical habitat for two Evolutionarily Significant Units (ESUs) of chinook salmon (*Oncorhynchus tshawytscha*) and five ESUs of *O. mykiss* (inclusive of anadromous steelhead and resident rainbow trout) listed under the Endangered Species Act of 1973, as amended (ESA). The specific areas proposed for designation in the rule text set out below include approximately 11,668 miles (18,669 km) of riverine habitat and 947 mi^2 (2,444 km^2) of bay/estuarine habitat (primarily in San Francisco-San Pablo-Suisun Bays) in California. Some of the proposed areas, however, are occupied by two or more ESUs. However, as explained below, we are also considering excluding many of these areas from the final designation based on existing land management plans and policies, voluntary conservation efforts and other factors that could substantially reduce the scope of the final designations. The net economic impacts of ESA section 7 associated with designating the areas described in the proposed rule are estimated to be approximately $83,511,186, but we believe the additional exclusions under review could reduce this impact by up to 57 percent or more. We solicit information and comments from the public on all aspects of the proposal, including information on the economic, national security, and other relevant impacts of the proposed designation. We may revise this proposal and solicit additional comments prior to final designation to address new information received during the comment period.

DATES: Comments on this proposed rule must be received by 5 p.m. P.s.t. on February 8, 2005. Requests for public hearings must be made in writing by January 24, 2005.

ADDRESSES: You may submit comments, identified by docket number [041123329–4329–01] and RIN number [0648–AO04], by any of the following methods:

- E-mail: *critical.habitat.swr@noaa.gov*. Include docket number [041123329–4329–01] and RIN number [0648–AO04] in the subject line of the message.
- Federal e-Rulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web site: *http://ocio.nmfs.noaa.gov/ibrm-ssi/index.shtml*. Follow the instructions for submitting comments at *http://ocio.nmfs.noaa.gov/ibrm-ssi/process.shtml*.
- Mail: Submit written comments and information to: Assistant Regional Administrator, Protected Resources Division, NMFS, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213. You may hand-deliver written comments to our office during normal business hours at the address given above.
- Fax: 562–980–4027

FOR FURTHER INFORMATION CONTACT: Craig Wingert at the above address, at 562–980–4021, or by facsimile at 562–980–4027; or Marta Nammack at 301–713–1401. The proposed rule, maps, and other materials relating to this proposal can be found on our Web site at *http://swr.nmfs.noaa.gov*.

SUPPLEMENTARY INFORMATION:

Background

NMFS is responsible for determining whether species, subspecies, or distinct population segments of Pacific salmon and *O. mykiss* (inclusive of anadromous steelhead and some populations of resident rainbow trout) are threatened or endangered, and for designating constitute critical habitat for them under the ESA (16 U.S.C. 1531 *et seq*). To be considered for ESA listing, a group of organisms must constitute a ''species.'' Section 3 of the ESA defines a species as ''any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.'' Since 1991, NMFS has identified distinct population segments of Pacific salmon and *O. mykiss* by dividing the U.S. populations of each species into evolutionarily significant units (ESUs) which it determines are substantially reproductively isolated and represent an important component in the evolutionary legacy of the biological species (56 FR 58612; November 20, 1991). Using this approach, every Pacific salmon and *O. mykiss* population in the U.S. is part of a distinct population segment that is eligible for listing as a threatened or endangered species under the ESU. In ESA listing determinations for Pacific salmon and *O. mykiss* since 1991 we have identified 52 ESUs in Washington, Oregon, Idaho and California. Presently, 25 ESUs are listed as threatened or endangered. One additional ESU (Oregon Coast coho salmon) was listed as threatened from 1998 to 2004 when it was removed from the list of threatened or endangered species as a result of a Court Order.

In a **Federal Register** document published on June 14, 2004 (69 FR 33101), we proposed to list 27 ESUs as threatened or endangered. The ESUs proposed for listing include 25 that are currently listed, but in most cases the ESUs are being redefined in either of two significant ways: By including hatchery fish that are no more than moderately divergent genetically from naturally spawning fish within the ESU, and in the case of *O. mykiss* species, by including some resident trout populations in the ESUs. We have also proposed to list the previously-listed Oregon Coast coho salmon population which is redefined to include some fish reared in hatcheries, and are proposing to list one new ESU (Lower Columbia River *O. mykiss*, was previously thought to be extinct in the wild). In this document, *O. mykiss* ESUs refer to ESUs that include populations of both anadromous steelhead and resident rainbow trout. Also, references to ''salmon'' in this notice generally include all members of the genus *Oncorhynchus*, including *O. mykiss*.

This **Federal Register** document describes proposed critical habitat designations for the following seven ESUs of Pacific salmon and *O. mykiss* in California: (1) California Coastal chinook salmon; (2) Northern California *O. mykiss*; (3) Central California Coast *O. mykiss*; (4) South-Central California Coast *O. mykiss*; (5) Southern California *O. mykiss*; (6) Central Valley spring run chinook salmon; and (7) Central Valley *O. mykiss*.

Section 3 of the ESA defines critical habitat as ''the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

specific areas outside the geographical area occupied by the species at the time it is listed that are determined by the Secretary to be essential for the conservation of the species.'' Section 3 of the ESA (16 U.S.C. 1532(3)) also defines the terms ''conserve,'' ''conserving,'' and ''conservation'' 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 this chapter are no longer necessary.'' Section 4 of the ESA requires that before designating critical habitat, we must consider economic impacts, impacts on national security and other relevant impacts of specifying any particular area as critical habitat, and the Secretary may exclude any area from critical habitat if the benefits of exclusion outweigh the benefits of inclusion, unless excluding an area from critical habitat will result in the extinction of the species concerned. Once critical habitat for a salmon or *O. mykiss* ESU is designated, section 7(a)(2) of the ESA requires that each Federal agency shall, in consultation with and with the assistance of NMFS, ensure that any action authorized, funded or carried out by such agency is not likely to result in the destruction or adverse modification of critical habitat.

Previous Federal Action and Related Litigation

Many Pacific salmon and *O. mykiss* ESUs in California and the Pacific Northwest have suffered broad declines over the past hundred years. We have conducted several ESA status reviews and status review updates for Pacific salmon and *O. mykiss* in California, Oregon, Washington, and Idaho. The most recent ESA status review and proposed listing determinations were published on June 14, 2004 (69 FR 33101). Six of the currently listed ESUs have final critical habitat designations. Table 1 summarizes the NMFS scientific reviews of West Coast salmon and *O. mykiss* and the ESA listing determinations and critical habitat designations made to date.

TABLE 1.—SUMMARY OF PREVIOUS ESA LISTING ACTIONS AND CRITICAL HABITAT DESIGNATIONS FOR WEST COAST SALMON AND *O. Mykiss*

Evolutionarily significant unit (ESU)	Current endangered species Act (ESA) status	Year listed	Previous ESA listing determinations and critical habitat designations—**Federal Register** citations	Previous scientific viability reviews and updates
Snake River sockeye ESU	Endangered	1991	*Listing Determinations* 69 FR 33102; 06/14/04 (Proposed rule) 56 FR 58619; 11/20/1991 (Final rule) 56 FR 14055; 04/05/1991 (Proposed rule) *Critical Habitat Designations* 58 FR 68543; 12/28/1993 (Final rule) 57 FR 57051; 12/02/1992 (Proposed rule)	NMES 1991a.
Ozette Lake sockeye ESU	Threatened	1999	*Listing Determinations* 69 FR 33102; 06/14/04 (Proposed rule) 64 FR 14528; 03/25/1999 (Final rule) 63 FR 11750; 03/10/1998 (Proposed rule) *Critical Habitat Designations* 68 FR 55900; 09/29/2003 (removal) 65 FR 7764; 02/16/2000 (Final rule) 63 FR 11750; 03/10/1998 (Proposed rule)	NMFS 1998d. NMFS 1997f.
Sacramento River winter-run chinook ESU	Endangered	1994	*Listing Determinations* 69 FR 33102; 06/14/04 (Proposed rule) 59 FR 440; 01/01/1994 (Final rule) 57 FR 27416; 06/19/1992 (Proposed rule) 55 FR 49623; 11/30/1990 (Final rule) 55 FR 12831, 04/06/1990 (Emergency rule) 55 FR 102260; 03/20/1990 (Proposed rule) 54 FR 10260; 08/04/1989 (Emergency rule) 52 FR 6041; 02/27/1987 (Final rule) *Critical Habitat Designations*. 68 FR 55900; 09/29/2003 (removal) 65 FR 7764; 02/16/2000 (Final rule) 63 FR 11482; 03/09/1998 (Proposed rule)	
Central Valley spring-run chinook ESU	Threatened	1999	*Listing Determinations* 69 FR 33102; 06/14/04 (Proposed rule) 64 FR 50394; 09/16/1999 (Final rule) 63 FR 11482; 03/09/1998 (Proposed rule) *Critical Habitat Designations* 68 FR 55900; 09/29/2003 (removal) 65 FR 7764; 02/16/2000 (Final rule) 63 FR 11482; 03/09/1998 (Proposed rule)	NMFS 1998b. NMFS 1999d.
			Listing Determinations 69 FR 33102; 06/14/04 (Proposed rule) 64 FR 50394; 09/16/1999 (Final rule) 63 FR 11482; 03/09/1998 (Proposed rule) *Critical Habitat Designations* 68 FR 55900; 09/29/2003 (removal)	

TABLE 1.—SUMMARY OF PREVIOUS ESA LISTING ACTIONS AND CRITICAL HABITAT DESIGNATIONS FOR WEST COAST SALMON AND *O. Mykiss*—Continued

Evolutionarily significant unit (ESU)	Current endangered species Act (ESA) status	Year listed	Previous ESA listing determinations and critical habitat designations—**Federal Register** citations	Previous scientific viability reviews and updates
			65 FR 7764; 02/16/2000 (Final rule)	NMFS 1998b.
California Coastal chinook ESU	Threatened	1999	63 FR 11482; 03/09/1998 (Proposed rule)	NMFS 1999d.
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			64 FR 14308; 03/24/99 (Final rule)	
			63 FR 11482; 03/09/1998 (Proposed rule)	
			Critical Habitat Designations	
			68 FR 55900; 09/29/2003 (removal)	NMFS 1998b.
			65 FR 7764; 02/16/2000 (Final rule)	NMFS 1998e.
Upper Willamette River chinook ESU	Threatened	1999	63 FR 11482; 03/09/1998 (Proposed rule)	NMFS 1999c.
			Listing Determinations	NMFS 1998e.
Lower Columbia River chinook ESU	Threatened	1999	69 FR 33102; 06/14/04 (Proposed rule)	NMFS 1999c.
			64 FR 14308; 03/24/99 (Final rule)	
			63 FR 11482; 03/09/1998 (Proposed rule)	
			Critical Habitat Designations	
			68 FR 55900; 09/29/2003 (removal)	
			65 FR 7764; 02/16/2000 (Final rule)	
			63 FR 11482; 03/09/1998 (Proposed rule)	
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			64 FR 14308; 03/24/99 (Final rule)	
			63 FR 11482; 03/09/1998 (Proposed rule)	
			Critical Habitat Designations	
			68 FR 55900; 09/29/2003 (removal)	NMFS 1998b.
			65 FR 7764; 02/16/2000 (Final rule)	NMFS 1998e.
Upper Columbia River spring-run chinook ESU.	Endangered.	1999	63 FR 11482; 03/09/1998 (Proposed rule)	NMFS 1998c.
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed NMFS 1999c rule)	
			64 FR 14308; 03/24/99 (Final rule)	
			63 FR 11482; 03/09/1998 (Proposed rule)	
			Critical Habitat Designations	
			68 FR 55900; 09/29/2003 (removal)	NMFS 1998b.
			65 FR 7764; 02/16/2000 (Final rule)	NMFS 1998e.
Puget Sound chinook ESU	Threatened.	1999	63 FR 11482; 03/09/1998 (Proposed rule)	NMFS 1999c.
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			63 FR 1807; 0/12/1998 (Proposal withdrawn)	
			59 FR 66784; 12/28/1994 (Proposed rule)	
			59 FR 42529; 08/18/1994 (Emergency rule)	
			57 FR 23458; 06/03/1992 (Correction)	
			57 FR 14653; 04/22/1992 (Final rule)	
			56 FR 29547; 06/27/1991 (Proposed rule)	NMFS 1991c.
Snake River fall-run chinook ESU	Threatened	1992	*Critical Habitat Designations*	NMFS 1999d.
			58 FR 68543; 12/28/1993 (Final rule)	
			57 FR 57051; 12/02/1992 (Proposed rule)	
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			63 FR 1807; 0/12/1998 (Proposal withdrawn)	
			59 FR 66784; 12/28/1994 (Proposed rule)	
			59 FR 42529; 08/18/1994 (Emergency rule)	
			57 FR 23458; 06/03/1992 (Correction)	
			57 FR 34639; 04/22/92 (Final rule)	
			56 FR 29542; 06/27/1991 (Proposed rule)	
			Critical Habitat Designations	
			58 FR 68543; 12/28/1993 (Final rule)	NMFS 1991b.
Snake River spring/summer-run chinook ESU.	Threatened	1992	57 FR 57051; 12/02/1992 (Proposed rule)	NMFS 1998b.
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			61 FR 56138;–10/31/1996 (Final rule)	
			60 FR 38011; 07/25/1995 (Proposed rule)	
			Critical Habitat Designations	
			64 FR 24049; 05/05/1999 (Final rule)	Bryant 1994.
Central California Coast coho ESU	Threatened	1996	62 FR 62791; 11/25/1997 (Proposed rule)	NMFS 1995a.

TABLE 1.—SUMMARY OF PREVIOUS ESA LISTING ACTIONS AND CRITICAL HABITAT DESIGNATIONS FOR WEST COAST SALMON AND *O. Mykiss*—Continued

Evolutionarily significant unit (ESU)	Current endangered species Act (ESA) status	Year listed	Previous ESA listing determinations and critical habitat designations—**Federal Register** citations	Previous scientific viability reviews and updates
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			62 FR 24588; 05/06/1997 (Final rule)	
			60 FR 38011; 07/25/1995 (Proposed rule)	NMFS 1997a.
			Critical Habitat Designations	NMFS1996c.
			64 FR 24049; 05/05/1999 (Final rule)	NMFS 1996e.
Southern Oregon/Northern California Coast	Threatened	1997	62 FR 62791; 11/25/1997 (Proposed rule)	NMFS 1995a.
				NMFS 1997a.
	Proposed			NMFS 1996b.
Oregon Coast coho ESU	Threatened*	1998	*Listing Determinations*	NMFS 1996d.
			69 FR 33102; 06/14/04 (Proposed rule)	
			69 FR 19975; 04/15/2004 (Candidate list)	
			63 FR 42587; 08/10/1998 (Final rule)	
			62 FR 24588; 05/06/1997 (Proposal withdrawn)	
			61 FR 56138;10/31/1996 (6 mo. extension)	
			60 FR 38011; 07/25/1995 (Proposed rule)	
			Critical Habitat Designations	
			68 FR 55900; 09/29/2003 (removal)	
			65 FR 7764; 02/16/2000 (Final rule)	
			64 FR 24998; 0510/1999 (Proposed rule)	NMFS 1995a.
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			69 FR 19975; 04/15/2004 (Candidate list)	
	Proposed		60 FR 38011; 07/25/1995 (Not warranted)	NMFS 1996e.
			Critical Habitat Designations	NMFS 1995a.
Lower Columbia River coho ESU	Threatened	1995	n/a	BNFS 1991a.
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			64 FR 14508; 03/25/1999 (Final rule)	
			63 FR 11774; 03/10/1998 (Proposed rule)	
			Critical Habitat Designations	
			68 FR 55900; 09/29/2003 (removal)	NMFS 1997e.
			65 FR 7764; 02/16/2000 (Final rule)	NMFS 1999b.
Columbia River chum ESU	Threatened	1999	63 FR 11774; 03/10/1998 (Proposed rule)	NMFS 1999c.
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			64 FR 14508; 03/25/1999 (Final rule)	
			63 FR 11774; 03/10/1998 (Proposed rule)	
			Critical Habitat Designations	NMFS 1996d.
			68 FR 55900; 09/29/2003 (removal)	NMFS 1997e.
			65 FR 7764; 02/16/2000 (Final rule)	NMFS 1999b.
Hood Canal summer-run chum ESU	Threatened	1999	63 FR 11774; 03/10/1998 (Proposed rule)	NMFS 1999c.
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			67 FR 21568; 05/01/2002 (Redefinition of ESU)	
			62 FR 43937; 08/18/1997 (Final rule)	
			61 FR 41541; 08/09/1996 (Proposed rule)	
			Critical Habitat Designations	
			68 FR 55900; 09/29/2003 (removal)	
			65 FR 7764; 02/16/2000 (Final rule)	NMFS 1996b
Southern California *O. mykiss*+ ESU	Endangered	1997	64 FR 5740; 03/10/1999 (Proposed rule)	NMFS 1997b.
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			62 FR 43937; 08/18/1997 (Final rule)	
			61 FR 41541; 08/09/1996 (Proposed rule)	
			Critical Habitat Designations	
			68 FR 55900; 09/29/2003 (removal)	
			65 FR 7764; 02/16/2000 (Final rule)	NMFS 1996b.
South-Central California Coast *O. mykiss* ESU	Threatened	1997	64 FR 5740; 03/10/1999 (Proposed rule)	NMFS 1997b.
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			62 FR 43937; 08/18/1997 (Final rule)	
			61 FR 41541; 08/09/1996 (Proposed rule)	
			Critical Habitat Designations	
			68FR 55900; 09/29/2003 (removal)	

TABLE 1.—SUMMARY OF PREVIOUS ESA LISTING ACTIONS AND CRITICAL HABITAT DESIGNATIONS FOR WEST COAST SALMON AND *O. Mykiss*—Continued

Evolutionarily significant unit (ESU)	Current endangered species Act (ESA) status	Year listed	Previous ESA listing determinations and critical habitat designations—**Federal Register** citations	Previous scientific viability reviews and updates
			65 FR 7764; 02/16/2000 (Final rule)	NMFS 1996b.
Central California Coast *O. mykiss* ESU	Threatened	1997	64 FR 5740; 03/10/1999 (Proposed rule) ..	NMFS 1997b.
			Listing Determinations	
			69 FR 33102; 6/14/04 (Proposed rule)	NMFS 1996b.
			63 FR 13347; 03/19/1998 (Final rule)	NMFS 1997b.
			62 FR 43974; 08/18/1997 (6 mo. extension).	NMFS 1997c.
			61 FR 41541; 08/09/1996 (Proposed rule)	NMFS 1997d.
California Central Valley *O. mykiss* ESU	Threatened	1998	*Critical Habitat Designations*	NMFS 1998a.
			68 FR 55900; 09/29/2003 (removal)	
			65 FR 7764; 02/16/2000 (Final rule)	
			64 FR 5740; 03/10/1999 (Proposed rule)	
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			65 FR 36074; 06/07/2000 (Final rule)	
			65 FR 6960; 02/11/2000 (Proposed rule)	
			63 FR 13347; 03/19/1998 (Not Warranted)	
			62 FR 43974; 08/18/1997 (6 mo. extension)	NMFS 1996b.
			61 FR 41541; 08/09/1996 (Proposed rule)	NMFS 1997c.
			Critical Habitat Designations	NMFS 1998a.
Northern California *O. mykiss* ESU	Threatened	2000	n/a	NMFS 2000
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			64 FR 14517; 03/25/1999 (Final rule)	
			63 FR 11798; 03/10/1998 (Proposed rule)	
			62 FR 43974; 08/18/1997 (6 mo. extension)	
			61 FR 41541; 08/09/1996 (Proposed rule)	
			Critical Habitat Designation	NMFS 1996b.
			68 FR 55900; 09/29/2003 (removal)	NMFS 1997d.
			65 FR 7764; 02/16/2000 (Final rule)	NMFS 1999a.
Upper Willamette River *O. mykiss* ESU	Threatened	1999	64 FR 5740; 03/10/1999 (Proposed rule) ..	NMFS 1999c.
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			63 FR 13347; 03/19/1998 (Final rule)	
			62 FR 43974; 08/18/1997 (6 mo. extension)	
			61 FR 41541; 08/09/1996 (Proposed rule)	
			Critical Habitat Designations	NMFS 1996b.
			68 FR 55900; 09/29/2003 (removal)	NMFS 1997c.
			65 FR 7764; 02/16/2000 (Final rule)	NMFS 1997d.
Lower Columbia River *O. mykiss* ESU	Threatened	1998	64 FR 5740; 03/10/1999 (Proposed rule) ..	NMFS 1998a.
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			64 FR 14517; 03/25/1999 (Final rule)	
			63 FR 11798; 03/10/1998 (Proposed rule)	
			62 FR 43974; 08/18/1997 (6 mo. extension)	
			61 FR 41541; 08/09/1996 (Proposed rule)	
			Critical Habitat Designations	NMFS 1996b.
			68 FR 55900; 09/29/2003 (removal	NMFS 1997d.
			65 FR 7764; 02/16/2000 (Final rule)	NMFS 1999a.
Middle Columbia River *O. mykiss* ESU	Threatened	1999	64 FR 5740; 03/10/1999 (proposed rule) ...	NMFS 1999c.
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			62 FR 43974; 08/18/1997 (Final rule)	
			61 FR 41541; 08/09/1996 (Proposed rule)	
			Critical Habitat Designations	
			68 FR 55900; 09/29/2003 (removal)	
			65 FR 7764; 02/16/2000 (Final rule)	NMFS 1996b.
Upper Columbia River *O. mykiss* ESU	Endangered	1997	64 FR 5740; 03/10/1999 (Proposed rule) ..	NMFS 1997b.
			Listing Determinations	
			69 FR 33102; 06/14/04 (Proposed rule)	
			62 FR 43937; 08/18/1997 (Final rule)	
			61 FR 41541; 08/09/1996 (Proposed rule)	
			Critical Habitat Designations	
			68 FR 55900; 09/29/2003 (removal)	

TABLE 1.—SUMMARY OF PREVIOUS ESA LISTING ACTIONS AND CRITICAL HABITAT DESIGNATIONS FOR WEST COAST SALMON AND *O. Mykiss*—Continued

Evolutionarily significant unit (ESU)	Current endangered species Act (ESA) status	Year listed	Previous ESA listing determinations and critical habitat designations—**Federal Register** citations	Previous scientific viability reviews and updates
Snake River Basin *O. mykiss* ESU	Threatened	1997	65 FR 7764; 02/16/2000 (Final rule) ..... 64 FR 5740; 03/10/1999 (Proposed rule) ..	NMFS 1996b. NMFS 1997b.

* Previously listed as a ''threatened'' species (63 FR 42587, August 10, 1998). Threatened listing set aside in *Alsea Valley Alliance* v. *Evans (Alsea Valley Alliance v. Evans,* 161 F.Supp.2d 1154 (D.Or.2001), *appeals dismissed* 358 F.3d 1181 (9th Cir. 2004).

+ *O. mykiss* ESUs include both anadromous ''steelhead'' and resident ''rainbow trout'' in certain areas (see 69 FR 33101; July 14, 2004).

On February 16, 2000, NMFS published final critical habitat designations for 19 ESUs, thereby completing designations for all 25 ESUs listed at the time (65 FR 7764). The 19 designations included more than 150 river subbasins in Washington, Oregon, Idaho, and California. Within each occupied subbasin, we designated as critical habitat those lakes and river reaches accessible to listed fish along with the associated riparian zone, except for reaches on Indian land. Areas considered inaccessible included areas above long-standing natural impassable barriers and areas above impassable dams, but not areas above ephemeral barriers such as failed culverts.

In considering the economic impact of the February 16, 2000, action, NMFS determined that the critical habitat designations would impose very little or no additional requirements on Federal agencies beyond those already associated with the listing of the ESUs themselves. NMFS reasoned that since it was designating only occupied habitat, there would be few or no actions that destroy or adversely modify critical habitat that did not also jeopardize the continued existence of the species. Therefore, the agency reasoned that there would be no economic impact as a result of the designations (65 FR 7764, 7765; February 16, 2000).

The National Association of Homebuilders (NAHB) challenged the designations in District Court in Washington, DC on the grounds that he agency did not adequately consider economic impacts of the critical habitat designations (*National Association of Homebuilders* v. *Evans*, 2002 WL 1205743 No. 00–CV–2799 (D.D.C.)). NAHB also challenged NMFS' designation of Essential Fish Habitat (EFH) (Pacific Coast Salmon Fishery Management Plan, 2000). While the NAHB litigation was pending, the Court of Appeals for the 10th Circuit issued its decision in *New Mexico Cattlegrowers' Association* v. *U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001) (*NMCA*). In that case, the Court rejected the U.S. Fish and Wildlife Service (FWS) approach to economic analysis, which was similar to the approach taken by NMFS in the final rule designating critical habitat for 19 ESUs of West Coast salmon and *O. mykiss*. The Court ruled that ''Congress intended that the FWS conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes.'' Subsequent to the 10th Circuit decision, we entered into and sought judicial approval of a consent decree resolving the NAHB litigation. That decree provided for the withdrawal of critical habitat designations for the 19 Pacific salmon and *O. mykiss* ESUs and dismissed NAHB's challenge to the EFH designations. The District Court approved the consent decree and vacated the critical habitat designations by Court order on April 30, 2002 (*National Ass'n of Homebuilders* v. *Evans*, 2002 WL 1205743 (D.D.C. 2002)).

Subsequently, in response to a complaint filed in the District of Columbia by the Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, the Center for Biological Diversity, the Oregon Natural Resources Council, the Pacific Rivers Council, and the Environmental Protection Information Center (PCFFA *et al.*) alleging that NMFS had failed to timely designate critical habitat for the 19 ESUs for which critical habitat had been vacated (as well as the Northern California *O. mykiss* ESU), PCFFA and NMFS filed—and the court approved—an agreement resolving that litigation and establishing a schedule for designation of critical habitat. On July 13, 2004, the D.C. District Court approved an amendment to the Consent Decree and Stipulated Order of Dismissal providing for a revised schedule for the submission of proposed and final rules designating critical habitat for the 20 ESUs to the **Federal Register**. For those ESUs that are included on the list of threatened and endangered species as of September 30, 2004, and which fall under the responsibility of the Northwest Regional office of NMFS, proposed rules must be submitted to the **Federal Register** no later than September 30, 2004. For those ESUs that are included on the list of threatened and endangered species as of November 30, 2004, and which fall under the responsibility of NMFS's Southwest Regional office, proposed rules must be submitted to the **Federal Register** for publication no later than November 30, 2004. For those of the 20 ESUs addressed in the proposed rules and included on the lists of threatened and endangered species as of June 15, 2005, final rules must be submitted to the **Federal Register** for publication no later than June 15, 2005. On September 17, 2004, NMFS filed a motion with the Court seeking an additional 60-day extension of the deadline for submitting to the **Federal Register** a proposed rule for the 13 ESUs subject to the September 30, 2004, deadline. On October 7, 2004, the court granted the motion.

Past critical habitat designations have generated considerable public interest. Therefore, in an effort to engage the public early in this rulemaking process, we published an advance notice of proposed rulemaking (ANPR) on September 29, 2003 (68 FR 55926). The ANPR identified issues for consideration and evaluation, and solicited comments regarding these issues and information regarding the areas and species under consideration. We received numerous comments in response to the ANPR and considered them during development of this proposed rulemaking. Where applicable we have referenced these comments in this **Federal Register** document as well as in other documents supporting this proposed rule. We encourage those who submitted comments on the ANPR to review and comment on this proposed rule as well. We will address all comments in the final rule.

Methods and Criteria Used to Identify Proposed Critical Habitat

Salmon Life History

Pacific salmon are anadromous fish, meaning adults migrate from the ocean to spawn in freshwater lakes and streams where their offspring hatch and rear prior to migrating back to the ocean to forage until maturity. The migration and spawning times vary considerably across and within species and populations (Groot and Margolis, 1991). At spawning, adults pair to lay and fertilize thousands of eggs in freshwater gravel nests or ''redds'' excavated by females. Depending on lake/stream 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. Depending on the species and location, juveniles may spend from a few hours to several years 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 in most species. On their journey juveniles must migrate downstream through every riverine and estuarine corridor between their natal lake or stream and the ocean. For example, smolts from Idaho will travel as far as 900 miles from the inland spawning grounds. En route to the ocean the juveniles may spend from a few days to several weeks in the estuary, depending on the species. The highly productive estuarine environment is an important feeding and acclimation area for juveniles preparing to enter marine waters.

Juveniles and subadults typically spend from 1 to 5 years foraging over thousands of miles in the North Pacific Ocean before returning to spawn. Some species, such as coho and chinook salmon, have precocious life history types (primarily male fish known as ''jacks'') that mature and spawn after only several months in the ocean. Spawning migrations known as ''runs'' occur throughout the year, varying by species and location. Most adult fish return or ''home'' with great fidelity to spawn in their natal stream, although some do stray to non-natal streams. Salmon species die after spawning, while anadromous *O. mykiss* may return to the ocean and make repeat spawning migrations. This complex life cycle gives rise to complex habitat needs, particularly during the freshwater phase (see review by Spence *et al.*, 1996). Spawning gravels must be of a certain size and free of sediment to allow successful incubation of the eggs. Eggs also require cool, clean, and well-oxygenated waters for proper development. Juveniles need abundant food sources, including insects, crustaceans, and other small fish. They need places to hide from predators (mostly birds and bigger fish), such as under logs, root wads and boulders in the stream, and beneath overhanging vegetation. They also need places to seek refuge from periodic high flows (side channels and off channel areas) and from warm summer water temperatures (coldwater springs and deep pools). Returning adults generally do not feed in fresh water but instead rely on limited energy stores to migrate, mature, and spawn. Like juveniles, they also require cool water and places to rest and hide from predators. During all life stages salmon require cool water that is free of contaminants. They also require rearing and migration corridors with adequate passage conditions (water quality and quantity available at specific times) to allow access to the various habitats required to complete their life cycle.

The homing fidelity of salmon has created a meta-population structure with distinct populations distributed among watersheds (McElhany *et al.*, 2000). Low levels of straying result in regular genetic exchange among populations, creating genetic similarities among populations in adjacent watersheds. Maintenance of the meta-population structure requires a distribution of populations among watersheds where environmental risks (*e.g.*, from landslides or floods) are likely to vary. It also requires migratory connections among the watersheds to allow for periodic genetic exchange and alternate spawning sites in the case that natal streams are inaccessible due to natural events such as a drought or landslide.

Identifying the Geographical Area Occupied by the Species and Specific Areas within the Geographical Area

In past critical habitat designations, NMFS had concluded that the limited availability of species distribution data prevented mapping salmonid critical habitat at a scale finer than occupied river basins (65 FR 7764; February 16, 2000). Therefore, the 2000 designations defined the ''geographical area occupied by the species at the time of listing'' as all accessible river reaches within the current range of the listed species. Comments received on the ANPR expressed a range of opinions about the appropriate scale for defining occupied areas; many expressed concern that the 2000 designations were overly broad and inclusive and encouraged us to use a finer scale in designating critical habitat for salmon.

In the 2000 designations, NMFS relied on the U.S. Geological Survey's (USGS) identification of subbasins, which was the finest scale mapped by USGS at that time, to define the ''specific areas'' within the geographical area occupied by the species. The subbasin boundaries are based on an area's topography and hydrography, and USGS has developed a uniform framework for mapping and cataloging drainage basins using a unique hydrologic unit code (HUC) identifier (Seaber *et al.* 1986). The code contains separate two-digit identifier fields wherein the first two digits refer to a region comprising a relatively large drainage area (*e.g.*, Region 17 for the entire Pacific Northwest), while subsequent fields identify smaller nested drainages. Under this convention, fourth field hydrologic units contain eight digits and are commonly referred to as ''HUC4s'' or ''subbasins.'' In the 2000 designations, therefore, we identified as critical habitat all areas accessible to listed salmon within an occupied HUC4 subbasin. Since the critical habitat designations in 2000, additional scientific information in the Pacific Northwest has significantly improved our ability to identify freshwater and estuarine areas occupied by salmonids and to group the occupied stream reaches into finer scale ''specific areas'' in the states of Washington, Oregon, and Idaho.

In the Pacific Northwest, we can now be somewhat more precise about the ''geographical area occupied by the species'' because Federal, state, and tribal fishery biologists in the northwest have made progress mapping actual species distribution at the level of stream reaches. The current mapping identifies occupied stream reaches where the species has been observed. It also identifies stream reaches where the species is presumed to occur based on the professional judgement of biologists familiar with the watershed. However, such presumptions may not be sufficiently rigorous or consistent to support a critical habitat designation. Much of these data can now be accessed and analyzed using geographic information systems (GIS) to produce consistent and fine-scale maps. As a result, nearly all salmonid freshwater and estuarine habitats in Washington, Oregon, and Idaho are now mapped and available in GIS at a scale of 1:24,000. Previous distribution data were often compiled at a scale of 1:100,000 or greater.

In California, similar fine-scale species distribution mapping efforts have not been conducted by Federal, State or tribal co-managers on the scale that was needed for the critical habitat designation effort, and therefore, maps of species distribution were not available for the seven ESUs addressed in this rulemaking. Given the need to identify and map occupied habitat more precisely and the lack of fine-scale species distribution mapping in California, the Southwest Regional office embarked on a major effort to compile available information on species distribution, habitat use, and other parameters, and develop species distribution and habitat use maps for all seven ESUs. In order to make this effort manageable, data were compiled for stream hydrography at a scale of 1:100,000 rather than the 1:24,000 scale of data that were available in the Pacific Northwest. Fishery biologists in the Southwest Region were organized into a series of teams tasked with compiling and organizing information available in the literature, from Federal and state agencies, and personal knowledge, regarding the spatial distribution, habitat use (*i.e.* spawning, rearing, and/or migration) and habitat quality on a stream reach basis for each of the seven ESUs in California. This information was organized into a series of databases and then converted to GIS data layers for the analysis of data and generation of distribution maps. The current mapping identifies occupied stream reaches where the various ESUs have been observed, and also identifies stream reaches where the ESUs are presumed to occur based on the professional judgement of biologists familiar with the watersheds. As in the Northwest, such presumptions, however, may not be sufficiently rigorous or consistent to support a critical habitat designation, and we therefore solicit information as to which stream reaches are actually occupied by the various ESUs addressed in this rule. We made use of these finer scale data for the critical habitat designations for the seven California ESUs, and now believe they enable us to make a more accurate delineation of the ''geographical area occupied by the species'' referred to in the ESA definition of critical habitat. The final critical habitat designations will be based on the final listing decisions for these ESUs due by June 2005 and thus will reflect occupancy ''at the time of listing'' as the ESA requires.

NMFS is now able to also identify ''specific areas'' (section 3(5)(a)) and ''particular areas'(section 4(b)(2)) for ESUs in the Pacific Northwest (Oregon, Washington and Idaho) at a finer scale than in 2000. Since 2000, various Federal agencies in the Pacific Northwest have identified fifth field hydrologic units (referred to as ''HUC5s'' or hereafter ''watersheds'') throughout the Pacific Northwest using the USGS mapping conventions referred to above. This information is now generally available from these agencies and via the internet (California Spatial Information Library, 2004; Interior Columbia Basin Ecosystem Management Project, 2003; Regional Ecosystem Office, 2004). For ESUs in the Pacific Northwest, the agency used this information to organize critical habitat information systematically and at a scale that is relevant to the spatial distribution of salmon. Organizing information at this scale is especially relevant to salmonids, since their innate homing ability allows them to return to the watersheds where they were born. Such site fidelity results in spatial aggregations of salmonid populations that generally correspond to the area encompassed by subbasins or HUC5 watersheds (Washington Department of Fisheries *et al.*, 1992; Kostow, 1995; McElhany *et al.*, 2000).

In California, it was not possible to use the USGS's HUC5 watershed framework to organize the biological and other types of information since HUC5s have not been delineated for the entire geographical area occupied by the seven ESUs addressed in this rulemaking. The Southwest Region, therefore, used the State of California's CALWATER watershed classification system (version 2.2), which is similar to the USGS watershed classification system, to organize biological and other types of information. Under the CALWATER watershed classification system, geographic units range from hydrologic regions (the largest) to planning watersheds (the smallest). For the purposes of this critical habitat designation analysis, biological and other types of information were organized primarily by hydrologic subareas (HSAs) that generally correspond to major tributary watersheds and are roughly equivalent in size to USGS HUC5s. These smaller HSA watersheds were then aggregated into larger geographic units called hydrologic units that correspond to major watersheds or sub-regions for purposes of describing critical habitat for each of the seven ESUs in California. However, it must be recognized that even the CALWATER HSA watershed units used for the designations in California are very broad units, often containing several different populations of salmonids which may in fact be largely independent of each other.We therefore solicit information on ways to further improve the geographic precision of our habitat analyis.

Both the USGS and CALWATER systems map watershed units as polygons that bound a drainage area and encompass streams, riparian areas and uplands. Within the boundaries of any such watershed unit (HUC5 or HSA), there are stream reaches not occupied by the species. Land areas within the HUC5 or HSA boundaries are also generally not ''occupied'' by the species (though certain areas such as flood plains or side channels may be occupied at some times of some years). In California, we used the HSA watershed boundaries as a basis for aggregating occupied stream reaches and to delineate ''specific'' areas occupied by the species. This document generally refers to the occupied stream reaches within the watershed boundary as the ''habitat area'' to distinguish it from the entire area encompassed by the watershed boundary.

At the same time, the ESA requires that an area cannot be designated as critical habitat unless at the time of listing it contains physical or biological features essential to the conservation of the species. The ESA does not permit an area lacking such features to be designated as critical habitat in the hope that it may over time acquire such features and therefore aid in the conservation of the species.

The HSA watershed-scale aggregation of stream reaches also allowed us to analyze the impacts of designating a ''particular area,'' as required by ESA section 4(b)(2). As a result of watershed processes, many activities occurring in riparian or upland areas and in non-fish-bearing streams may affect the physical or biological features essential to conservation in the occupied stream reaches. The watershed boundary thus describes an area in which Federal activities have the potential to affect critical habitat (Spence *et al.* 1996). Using HSA watershed boundaries for the economic analysis ensured that all potential economic impacts were considered. Section 3(5) defines critical habitat in terms of ''specific areas,'' and section 4(b)(2) requires the agency to consider certain factors before designating ''particular areas.'' In the case of Pacific salmonids, the biology of the species, the characteristics of its habitat, the nature of the impacts and the limited information currently available at finer geographic scales made it appropriate to consider

''specific areas'' and ''particular areas'' as the same unit.

In addition, HSA watersheds are consistent with the scale of recovery efforts for West Coast salmon. In its review of the long-term sustainability of Pacific Northwest salmonids, the National Research Council's Committee on Protection and Management of Pacific Northwest Anadromous Salmonids concluded that ''habitat protection must be coordinated at landscape scales appropriate to salmon life histories' and that social structures and institutions ''must be able to operate at the scale of watersheds'' (National Research Council, 1996). Watershed-level analyses are now common throughout the West Coast (Forest Ecosystem Management Assessment Team, 1993; Montgomery *et al.*, 1995; Spence *et al.*, 1996). The recent recovery strategy developed for coho salmon in California by the California Department of Fish and Game (CDFG, 2004) organized its watershed assessment and recovery recommendations on the basis of CALWATER HSA watersheds. There are presently more than 400 watershed councils or groups in Washington, Oregon, and California alone (For the Sake of the Salmon, 2004). Many of these groups operate at a geographic scale of one to several watersheds and are integral parts of larger-scale salmon recovery strategies (Northwest Power Planning Council, 1999; Oregon Plan for Salmon and Watersheds, 2001; Puget Sound Shared Strategy, 2002; CALFED Bay-Delta Program, 2003). Aggregating stream reaches into watersheds allowed us to consider ''specific areas,'' within or outside the geographical area occupied by the species, at a scale that often corresponds well to salmonid population structure and ecological processes.

Occupied estuarine and marine areas were also considered with regard to the seven ESUs in California. In previous designations of salmonid critical habitat the agency did not designate marine areas outside of estuaries and Puget Sound. In the Pacific Ocean, we concluded that there may be essential habitat features, but that they did not require special management considerations or protection (see *Physical or Biological Features Essential to the Conservation of the Species* and *Special Management Considerations or Protection* sections below). Several commenters on that previous rule questioned the finding, and we stated that we would revisit the issue (65 FR 7764; February 16, 2000). Since that time we have considered the best available scientific information, and related agency actions, such as the designation of Essential Fish Habitat under the Magnuson-Stevens Fishery Conservation and Management Act.

We now conclude that it is possible to delineate some estuarine areas in California (*e.g.*, the San Francisco-San Pablo-Suisun Bay complex, Humboldt Bay, and Morro Bay) that are occupied and contain essential habitat features that may require special management considerations or protection. Such estuarine areas are crucial for juvenile salmonids, given their multiple functions as areas for rearing/feeding, freshwater-saltwater acclimation, and migration (Simenstad *et al.*, 1982; Marriott *et al.* 2002). In many areas, especially the San Francisco Bay estuary, these habitats are occupied by multiple ESUs. Accordingly, we are proposing to designate specific occupied estuarine areas as defined by a line connecting the furthest land points at the estuary mouth.

Nearshore coastal marine areas may provide important habitat for rearing/feeding and migrating salmonids in California; however, we were not able to identify essential habitat features or conclude that such areas require special management considerations or protection.

For salmonids in marine areas farther offshore, it becomes more difficult to identify specific areas where essential habitat can be found. Links between human activity, habitat conditions and impacts to listed salmonids are less direct in offshore marine areas. Perhaps the closest linkage exists for salmon prey species that are harvested commercially (*e.g.*, Pacific herring) and, therefore, may require special management considerations or protection. However, because salmonids are opportunistic feeders we could not identify ''specific areas'' beyond the nearshore marine zone where these or other essential features are found within this vast geographic area occupied by Pacific salmon. Moreover, prey species move or drift great distances throughout the ocean and would be difficult to link to any ''specific'' areas.

Unoccupied Areas

ESA section 3(5)(A)(ii) defines critical habitat to include ''specific areas outside the geographical area occupied'' if the areas are determined by the Secretary to be ''essential for the conservation of the species.'' NMFS regulations at 50 CFR 424.12(e) emphasize that we ''shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'' NMFS regulations at 50 CFR 424.12(e) emphasize that we ''shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'' We are not proposing to designate any areas not occupied at the time of listing; however, within the range of some ESUs, we have identified unoccupied areas which may be essential to their conservation, and we seek public comment on this issue.

Primary Constituent Elements and Physical or Biological Features Essential to the Conservation of the Species

In determining what areas are critical habitat, agency regulations at 50 CFR 424.12(b) require that we must ''consider those physical or biological features that are essential to the conservation of a given species including space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing of offspring; and habitats that are protected from disturbance or are representative of the historical geographical and ecological distribution of a species.'' The regulations further direct us to ''focus on the principal biological or physical constituent elements * * * that are essential to the conservation of the species,'' and specify that the ''known primary constituent elements shall be listed with the critical habitat description.'' The regulations identify primary constituent elements (PCE) as including, but not limited to: ''roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.'' An area must contain one or more PCEs at the time the species is listed to be eligible for designation as critical habitat; an area lacking a PCE may not be designated in the hope it will acquire one or more PCEs in the future.

NMFS biologists developed a list of PCEs specific to salmon for the ANPR (68 FR 55926; September 29, 2003), based on a decision matrix (NMFS, 1996) that describes general parameters and characteristics of most of the essential features under consideration in this critical habitat designation. As a result of biological assessments supporting this proposed rule (see Critical Habitat Analytical Review

Teams section), we are now proposing slightly revised PCEs.

The ESUs addressed in this proposed rulemaking share many of the same rivers and estuaries and have similar life history characteristics and, therefore, many of the same PCEs. These PCEs include sites essential to support one or more life stages of the ESU (sites for spawning, rearing, migration and foraging). These sites in turn contain physical or biological features essential to the conservation of the ESU (for example, spawning gravels, water quality and quantity, side channels, forage species). Specific types of sites and the features associated with them include:

1. Freshwater spawning sites with water quantity and quality conditions and substrate supporting spawning, incubation and larval development;

2. Freshwater rearing sites with water quantity and floodplain connectivity to form and maintain physical habitat conditions and support juvenile growth and mobility; water quality and forage supporting juvenile development; and natural cover such as shade, submerged and overhanging large wood, log jams and beaver dams, aquatic vegetation, large rocks and boulders, side channels, and undercut banks;

3. Freshwater migration corridors free of obstruction with water quantity and quality conditions and natural cover such as submerged and overhanging large wood, aquatic vegetation, large rocks and boulders, side channels, and undercut banks supporting juvenile and adult mobility and survival;

4. Estuarine areas free of obstruction with water quality, water quantity, and salinity conditions supporting juvenile and adult physiological transitions between fresh- and saltwater; natural cover such as submerged and overhanging large wood, aquatic vegetation, large rocks and boulders, and side channels; and juvenile and adult forage, including aquatic invertebrates and fishes, supporting growth and maturation.

5. Nearshore marine areas free of obstruction with water quality and quantity conditions and forage, including aquatic invertebrates and fishes, supporting growth and maturation; and natural cover such as submerged and overhanging large wood, aquatic vegetation, large rocks and boulders, and side channels.

6. Offshore marine areas with water quality conditions and forage, including aquatic invertebrates and fishes, supporting growth and maturation.

The habitat areas designated in this proposal currently contain PCEs within the acceptable range of values required to support the biological processes for which the ESUs use the habitat. It is important to note that the contribution of the PCEs to the habitat varies by site and biological function, illustrating the interdependence of the habitat elements such that the quality of the elements may vary within a range of acceptable conditions. An area in which a PCE no longer exists because it has been degraded to the point where it no longer functions as a PCE cannot be designated in the hope that its function may be restored in the future.

Special Management Considerations or Protection

An occupied area cannot be designated as critical habitat unless it contains physical and biological features that ''may require special management considerations or protection.'' Agency regulations at 424.02(j) define ''special management considerations or protection'' to mean ''any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species.'' Many forms of human activity have the potential to affect the habitat of listed salmon ESUs including: (1) Forestry; (2) grazing and other associated rangeland activities; (3) agriculture and associated water withdrawals for agriculture; (4) road building/maintenance; (5) channel modifications/diking/stream bank stabilization; (6) urbanization; (7) sand and gravel mining; (8) mineral mining; (9) dams; (10) irrigation impoundments and water withdrawals; (11) wetland loss/removal; (12) exotic/invasive species introductions; and (13) impediments to fish passage. In addition to these, the harvest of salmonid prey species (*e.g.*, herring, anchovy, and sardines) may present another potential habitat-related management activity (Pacific Fishery Management Council, 1999). In recent years the Federal government and many non-Federal landowners have adopted many changes in land and water management practices that are contributing significantly to protecting and restoring the habitat of listed species. Thus, many of the available special management considerations or protections for these areas are already in place and the need for designating such areas as critical habitat is diminished accordingly. We request comment on the extent to which particular areas may require special management considerations or protection in light of existing management constraints. The contributions of these management measures are also relevant to the exclusion analysis under section 4(b)(2) of the ESA, and will be considered further in a later section of this notice.

Military Lands

The Sikes Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete, by November 17, 2001, an Integrated Natural Resource Management Plan (INRMP). An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the installation. Each INRMP includes: an assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species; a statement of goals and priorities; a detailed description of management actions to be implemented to provide for these ecological needs; and a monitoring and adaptive management plan. Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management, fish and wildlife habitat enhancement or modification, wetland protection, enhancement, and restoration where necessary to support fish and wildlife and enforcement of applicable natural resource laws.

The recent National Defense Authorization Act for Fiscal Year 2004 (Public Law 108–136) amended the ESA to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(I) of the ESA (16 U.S.C. 1533(a)(3)(B)(I)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

To address this new provision we contacted the Department of Defense (DOD) and requested information on all INRMPs that might benefit Pacific salmon. In response to the ANPR (68 FR 55926, September 29, 2003) we had already received a letter from the U.S. Marine Corps regarding this and other issues associated with a possible critical habitat designation on its facilities in the range of the Southern California *O. mykiss* ESU. In response to our request, the military services identified 25 installations in California with INRMPs in place or under development. Based on information provided by the military,

as well as GIS analysis of fish distributional information compiled by NMFS'' Southwest Region (NMFS, 2004a) and land use data, we determined that the following facilities with INRMPs overlap with habitat areas under consideration for critical habitat designation in California: (1) Camp Pendleton Marine Corps Base; (2) Vandenberg Air Force Base; (3) Camp San Luis Obispo; (4) Camp Roberts; and (5) Mare Island Army Reserve Center. Two additional facilities are adjacent to, but do not appear to overlap with, habitat areas under consideration for critical habitat in California: (1) Naval Weapons Station, Seal Beach/Concord Detachment; and (2) Point Mugu Naval Air Station. None of the remaining facilities with INRMPs in place overlapped with or were adjacent to habitat under consideration for critical habitat based on the information available to us. All of these INRMPs are final except for the Vandenberg Air Force Base INRMP, which is expected to be finalized in the near term.

We identified habitat of value to listed salmonids in each INRMP and reviewed these plans, as well as other information available regarding the management of these military lands. Our preliminary review indicates that each of these INRMPs addresses habitat for salmonids, and all contain measures that provide benefits to ESA-listed salmon and steelhead. Examples of the types of benefits include actions that control erosion, protect riparian zones, minimize stormwater and construction impacts, reduce contaminants, and monitor listed species and their habitats. Also, we have received some information from the DOD identifying national security impacts at certain sites including the Camp Pendleton Marine Corps Base and Vandenberg Air Force Base. On the basis of this information, therefore, we are not proposing to designate critical habitat in areas subject to the final INRMPs or the draft INRMP for Vandenberg Air Force Base at this time.

Critical Habitat Analytical Review Teams

To assist in the designation of critical habitat, we convened several Critical Habitat Analytical Review Teams (Teams) organized by major geographic areas that roughly correspond to salmon recovery planning domains in California. The Teams consisted of NMFS fishery biologists from the Southwest Region with demonstrated expertise regarding salmonid habitat within the domain. The Teams were tasked with compiling and assessing biological information pertaining to areas under consideration for designation as critical habitat. Each Team worked closely with GIS specialists to develop maps depicting the spatial distribution of habitat occupied by each ESU and the use of occupied habitat on stream hydrography at a scale of 1:100,000.

The Teams examined each habitat area within the watershed to determine whether the stream reaches occupied by the species contain the physical or biological features essential to conservation. The Teams also relied on their experience conducting section 7 consultations to determine whether there are management activities in the area that threaten the currently existing primary constituent elements identified for the species. Where such activities occur, the Teams concluded that there were ''any methods or procedures useful in protecting physical and biological features'' for the area (50 CFR 424.02(j)), and therefore, that the features ''may require special management considerations or protection.''

However, the Teams were not asked to evaluate the effects of existing management protections on the species, or analyze the usefulness of protective methods or procedures in addressing risks to PCEs. Thus, the Teams' evaluations do not reflect the extent to which an area will contribute to conservation of the species in the absence of a critical habitat designation.

In addition to occupied areas, the definition of critical habitat also includes unoccupied areas if we determine that area is essential for conservation of a species. Accordingly the Teams were next asked whether there were any unoccupied areas within the historical range of the ESUs that may be essential for conservation. For the seven ESUs addressed in this rulemaking, the Teams did not have information available that would allow them to conclude that specific unoccupied areas were essential for conservation; however, in many cases they were able to identify areas they believed may be determined essential through future recovery planning efforts. These are identified under the Species Descriptions and Area Assessments section, and we are specifically requesting information regarding such areas under Public Comments Solicited.

The Teams were next asked to determine the relative conservation value of each occupied area or watershed for each ESU. The Teams scored each habitat area based on several factors related to the quantity and quality of the physical and biological features. They next considered each area in relation to other areas and with respect to the population occupying that area. Based on a consideration of the raw scores for each area, and a consideration of that area's contribution to conservation in relation to other areas and in relation to the overall population structure of the ESU, the Teams rated each habitat area as having a ''high,'' ''medium'' or ''low'' conservation value.

The rating of habitat areas as having a high, medium, or low conservation value provided information useful for the discretionary balancing consideration in ESA section 4(b)(2). The higher the conservation value for an area, the greater may be the likely benefit of the ESA section 7 protections. The correlation is not perfect because the Teams did not take the additional step of separately considering two factors: how likely are section 7 consultations in an area (that is, how strong is the ''Federal nexus''), and how much protection would exist in the absence of a section 7 consultation (that is, how protective are existing management measures and would they likely continue in the absence of section 7 requirements). We considered the Team's ratings one useful measure of the ''benefit of designating a particular area as critical habitat'' as contemplated in section 4(b)(2). We are soliciting public comments on approaches that would better refine this assessment.

As discussed earlier, the scale chosen in California for the ''specific area'' referred to in the definition of critical habitat was an HSA watershed as delineated by the CALWATER classification system. This delineation required us to adapt the approach for some areas. In particular, a large stream or river might serve as a rearing and migration corridor to and from many watersheds, yet be embedded itself in a watershed. In any given watershed through which it passes, the stream may have a few or several tributaries. For rearing/migration corridors embedded in a watershed, the Teams were asked to rate the conservation value of the watershed based on the tributary habitat. We assigned the rearing/migration corridor the rating of the highest-rated watershed for which it served as a rearing/migration corridor. The reason for this treatment of migration corridors is the role they play in the salmon's life cycle. Salmon are anadromous—born in fresh water, migrating to salt water to feed and grow, and returning to fresh water to spawn. Without a rearing/migration corridor to and from the sea, salmon cannot complete their life cycle. It would be illogical to consider a spawning and

rearing area as having a particular conservation value and not consider the associated rearing/migration corridor as having a similar conservation value.

Preliminary ESU mapping results and some of the preliminary HSA watershed conservation assessments developed by the Teams were shared with the CDFG for review and comment. In some instances, their reviews and comments resulted in changes to the ESU distribution maps, and in some cases changes in the conservation assessments. Because of time constraints, however, this comanager review process was limited in duration and focused on identifying major discrepancies in the mapping products developed by the Teams. These revised preliminary assessments, along with this proposed rulemaking, will once again be made available to these comanagers, as well as the general public and peer reviewers, during the public comment period leading up to the final rule. The Teams will be reconvened to review the comments and any new information that might bear on their assessments before the agency publishes final critical habitat designations.

Lateral Extent of Critical Habitat

In past designations NMFS described the lateral extent of critical habitat in various ways ranging from fixed distances to ''functional'' zones defined by important riparian functions (65 FR 7764, February 16, 2000). Both approaches presented difficulties, and this was highlighted in several comments (most of which requested that we focus on aquatic areas only) received in response to the ANPR (68 FR 55926; September 29, 2003). Designating a set riparian zone width will (in some places) accurately reflect the distance from the stream on which PCEs might be found, but in other cases may over- or understate the distance. Designating a functional buffer avoids that problem, but makes it difficult for Federal agencies to know in advance what areas are critical habitat. To address these issues we are proposing to define the lateral extent of designated critical habitat as the width of the stream channel defined by the ordinary high-water line as defined by the U.S. Army Corps of Engineers (Corps) in 33 CFR 329.11. In areas for which the ordinary high-water line has not been defined pursuant 33 CFR 329.11, the width of the stream channel shall be defined by its bankfull elevation. Bankfull elevation is the level at which water begins to leave the channel and move into the floodplain (Rosgen, 1996) and is reached at a discharge which generally has a recurrence interval of 1 to 2 years on the annual flood series (Leopold *et al.*, 1992). Such an interval is commensurate with nearly all of the juvenile freshwater life phases of most salmon and *O. mykiss* ESUs. Therefore, it is reasonable to assert that for an occupied stream reach this lateral extent is regularly ''occupied.'' Moreover, the bankfull elevation can be readily discerned for a variety of stream reaches and stream types using recognizable water lines (*e.g.*, marks on rocks) or vegetation boundaries (Rosgen, 1996).

As underscored in previous critical habitat designations, the quality of aquatic habitat within stream channels is intrinsically related to the adjacent riparian zones and floodplain, to surrounding wetlands and uplands, and to non-fish-bearing streams above occupied stream reaches. Human activities that occur outside the stream can modify or destroy physical and biological features of the stream. In addition, human activities that occur within and adjacent to reaches upstream (*e.g.*, road failures) or downstream (*e.g.*, dams) of designated stream reaches can also have demonstrable effects on physical and biological features of designated reaches.

In estuarine areas we believe that mean extreme high water is the best descriptor of lateral extent. We are proposing the area inundated by extreme high tide because it encompasses habitat areas typically inundated and regularly occupied during the spring and summer when juvenile salmonids are migrating in nearshore estuarine areas. However, it may be more appropriate to use the ordinary high water level in estuarine nearshore areas and we request comment on this issue. As noted above for stream habitat areas, human activities that occur outside the area inundated by extreme or ordinary high water can modify or destroy physical and biological features of the nearshore habitat areas and Federal agencies must be aware of these important habitat linkages as well.

Species Descriptions and Area Assessments

This section provides descriptions of the seven Pacific salmon and *O. mykiss* ESUs addressed in this rulemaking and summarizes the Teams' assessment of habitat areas for each ESU. The Teams' assessments addressed PCEs in the habitat areas within occupied CALWATER HSA watersheds (as well as rearing/migration corridors for some ESUs). For ease of reporting and reference these HSA watersheds have been organized into ''units'' based on their associated subbasin or CALWATER Hydrologic Unit (HU).

California Coastal (CC) Chinook Salmon ESU

The CC chinook salmon ESU was listed as a threatened species in 1999 (64 FR 50394). The ESU includes all naturally spawned populations of chinook salmon from rivers and streams south of the Klamath River to and including the Russian River. Following completion of an updated status review (NMFS, 2003a) and review of hatchery populations located within the range of the ESU (NMFS, 2003b), NMFS recently proposed that the ESU remain listed as a threatened species and that seven hatchery populations be included as part of the ESU (69 FR 33102; June 14, 2004). Major watersheds occupied by naturally spawning fish in this ESU include Redwood Creek, Mad River, Eel River, several smaller coastal watersheds, and the Russian River. A Technical Recovery Team has been formed and is in the process of identifying the historical and extant population structure of this ESU; however, this is still in progress.

The Team's assessment for this ESU addressed habitat areas within 45 occupied watersheds or CALWATER HSAs that occur in 8 associated subbasins or CALWATER HUs (NMFS, 2004b). In addition to the 45 HSA watershed units, conservation assessments were also made for Humboldt Bay and the Eel River Estuary. As part of its assessment, the Team considered the conservation value of each habitat area in the context of the productivity, spatial distribution, and diversity of habitats across the range of the ESU. The Team evaluated the conservation value of habitat areas on the basis of the physical and biological habitat requirements of CC chinook salmon, consistent with the PCEs identified for Pacific salmon and *O. mykiss* described under Methods and Criteria Used to Identify Proposed Critical Habitat

Unit 1. Redwood Creek Subbasin (HU #1107)

The Redwood Creek HU is located in the northern portion of the ESU and includes the Redwood Creek drainage. The HU encompasses approximately 294 mi^2 (758 km^2) and includes three occupied HSA watersheds. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 107 miles (171 km) of occupied riverine and estuarine habitat in the occupied HSA watersheds (NMFS, 2004a). The Team concluded that all occupied areas contain one or

more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified several management activities that may affect the PCEs, including forestry, sand and gravel mining, agricultural water withdrawals and impoundments, grazing, and channelization. Of the three occupied HSA watersheds, two were rated as having high conservation value and one as having medium conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 2. Trinidad Subbasin (HU #1108)

The Trinidad HU is located in the northern portion of the ESU and includes Big Lagoon and Little River. The HU encompasses approximately 131 mi^2 (338 km^2) and contains two HSA watersheds both of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 26 miles (42 km) of occupied riverine and estuarine habitat in the occupied HSAs (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.* spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including forestry, agriculture, non-agricultural and agricultural water withdrawals, and grazing. Of the two occupied HSA watersheds, one was rated as having low conservation value and one as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for conservation of the ESU.

Unit 3. Mad River Subbasin (HU #1109)

The Mad River HU is located in the northern portion of the ESU and includes the Mad River drainage. The HU encompasses approximately 499 mi^2 (1287 km^2) and includes four HSA watersheds, three of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 53 miles (85 km) of occupied riverine and estuarine habitat in the occupied HSA watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.* spawning, rearing, or migratory habitat) for this ESU and identified several management activities that may affect the PCEs, including forestry, agriculture, and grazing. All of the occupied HSA watersheds were rated as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 4. Eureka Plain Subbasin (HU #1110)

The Eureka Plain HU is located in the vicinity of Eureka and surrounds Humboldt Bay. The HU encompasses approximately 224 mi^2 (578 km^2) and contains a single HSA which is occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 74 miles (118 km) of occupied riverine and estuarine habitat in this HSA watershed (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified several management activities that may affect the PCEs, including urbanization, flood control channelization, and road building and maintenance. This single occupied HSA watershed was rated as having high conservation value to the ESU (NMFS, 2004b). The Team also evaluated Humboldt Bay into which most of these freshwater streams in this subbasin drain as a separate habitat unit. Humboldt Bay contains approximately 25 mi^2 (65 km^2) of estuarine habitat which the Team found contained PCEs for rearing and migration and was of high conservation value since it provides migratory connectivity for juveniles and adults between high value freshwater spawning and rearing habitat and the ocean. The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 5. Eel River Subbasin (HU #1111)

The Eel River HU is located in the northern and central portion of the ESU and includes the Eel River and Van Duzen River drainages. This HU, which is the largest in the ESU, encompasses approximately 3,682 mi^2 (9,500 km^2) and contains 19 occupied HSA watersheds. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 841 miles (1,345 km) of occupied riverine and estuarine habitat in the occupied HSA watersheds (NMFS, 2004a). The Team concluded that these occupied habitat areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified several management activities that may affect the PCEs including agriculture, forestry, sand and gravel mining, grazing, exotic/invasive species, agricultural and non-agricultural water withdrawals, and urbanization. Of these occupied HSA watersheds, three were rated as having low conservation value, four were rated as having medium conservation value, and twelve were rated as having high conservation value to the ESU (NMFS, 2004b). The Team also evaluated the Eel River estuary as a separate habitat unit and concluded it contained PCEs for rearing and migration and is of high conservation value since it provides migratory connectivity for juveniles and adults between high value freshwater spawning and rearing habitat and the ocean. The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 6. Cape Mendocino Subbasin (HU #1112)

The Cape Mendocino HU is located in the central portion of the ESU and includes the Bear River and Mattole River drainages. This HU encompasses approximately 499 mi^2 (1,287 km^2) and contains three HSA watersheds, two of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 173 miles (277 km) of occupied riverine and estuarine habitat in the occupied HSAs (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified several management activities that may affect the PCEs, including agriculture, grazing, forestry, and agricultural water withdrawals. Both occupied HSA watersheds were rated as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 7. Mendocino Coast Subbasin (HU #1113)

The Mendocino Coast HU is located in the southern portion of the ESU and includes several smaller coastal streams including the Ten Mile, Noyo, Albion, Navarro, and Garcia Rivers. This HU encompasses approximately 1,598 mi^2 (4,123 km^2) and contains eighteen HSA watersheds, seven of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 204 miles (326 km) of occupied riverine and estuarine habitat in the occupied HSAs (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.* spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including forestry, grazing, urbanization, agriculture, and agricultural and non-agricultural water withdrawals. Of the occupied HSA

watersheds, the Team rated two as low in conservation value, three as medium in conservation value, and two as high in conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 8. Russian River Subbasin (HU #1114)

The Russian River HU is located in the southernmost portion of the ESU and includes the Russian River drainage and its tributaries. The HU encompasses approximately 1,482 mi^2 (3,824 km^2) and contains ten HSA watersheds within the range of the ESU, nine of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 133 miles (212 km) of occupied riverine and estuarine habitat in the occupied HSAs (NMFS, 2004a). The Team concluded these occupied HSA areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified several management activities that may affect the PCEs, including urbanization, agriculture, forestry, sand and gravel mining, grazing, flood control channelization, and agricultural water withdrawals. Of the occupied HSA watersheds, the Team rated three as low in conservation value, two as medium in conservation value, and four as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Northern California (NC) *O. mykiss* ESU

The NC *O. mykiss* ESU was listed as a threatened species in 2000 (65 FR 36074; June 7, 2000). The ESU includes all naturally spawned populations of *O. mykiss* in coastal river basins from Redwood Creek south to and including the Gualala River. Major watersheds occupied by naturally spawning fish in this ESU include Redwood Creek, Mad River, Eel River, several smaller coastal watersheds on the coast south to the Gualala River. *O. mykiss* within this ESU include both winter and summer run types, including what is presently considered to be the southernmost population of summer run *O. mykiss* in the Middle Fork Eel River (NMFS, 1996). The half-pounder life history type also occurs in the ESU, specifically in the Mad and Eel Rivers. Based on an updated status review (NMFS, 2003a) and an assessment of hatchery populations located within the range of the ESU (NMFS, 2003b), NMFS recently proposed that the ESU remain listed as a threatened species and that resident *O. mykiss* co-occurring with anadromous populations below impassible barriers (both natural and man-made) as well as two artificial propagation programs (Yager Creek Hatchery and North Fork Gualala River Hatchery) also be included in the ESU (69 FR 33102; June 14, 2004). A Technical Recovery Team has been formed and is in the process of identifying the historical and extant independent population structure of this ESU and associated population viability parameters for each population.

The Team's assessment for this ESU addressed habitat areas within 50 occupied watersheds or CALWATER HSAs that occur in 7 associated subbasins or CALWATER HUs. In addition to the 50 HSA watershed units, conservation assessments were also made for Humboldt Bay and the Eel River Estuary. As part of its assessment, the Team considered the conservation value of each habitat area in the context of the productivity, spatial distribution, and diversity of habitats across the range of the ESU. The Team evaluated the conservation value of habitat areas on the basis of the physical and biological habitat requirements of NC *O. mykiss*, consistent with the PCEs identified for Pacific salmon and *O. mykiss* described under Methods and Criteria Used to Identify Proposed Critical Habitat.

Unit 1. Redwood Creek Subbasin (HU #1107)

The Redwood Creek HU is located in the northern portion of the ESU and includes the Redwood Creek drainage. The HU encompasses approximately 294 mi^2 (758km^2) and includes three HSA watersheds, all of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 138 (220 km) of occupied riverine and estuarine habitat in the three occupied HSAs (NMFS, 2004a). The Team concluded that these occupied HSA watersheds contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified several management activities that may affect the PCEs, including forestry, sand and gravel mining, agricultural water withdrawals and impoundments, grazing and channelization. Of the three occupied HSA watersheds, one was rated as medium and two were rated as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 2. Trinidad Subbasin (HU #1108)

The Trinidad HU is located in the northern portion of the ESU and includes Big Lagoon and Little River. The HU encompasses approximately 131 mi^2 (338 km^2) and contains two HSA watersheds, both of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 66 miles (106 km) of occupied riverine and estuarine habitat in the occupied HSAs (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified several management activities that may affect the PCEs, including forestry, agriculture, non-agricultural and agricultural water withdrawals and grazing. Of the two HSA watersheds, one was rated by the Team as having medium conservation value and one was rated as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for conservation of the ESU.

Unit 3. Mad River Subbasin (HU #1109)

The Mad River HU is located in the northern portion of the ESU and includes the Mad River drainage. The HU encompasses approximately 499 mi^2 (1,287 km^2) and contains four HSA watersheds, all of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 169 miles (270 km) of occupied riverine and estuarine habitat in these occupied habitat areas (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified several management activities that may affect the PCEs, including forestry, agriculture, and grazing. Of these occupied HSA watersheds, one was rated as having low conservation value and three were rated by the Team as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 4. Eureka Plain Subbasin (HU #1110)

The Eureka Plain HU is located in the vicinity of Eureka and includes Humboldt Bay. The HU encompasses approximately 224 mi^2 (578 km^2) and contains a single HSA which is occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 122 miles (195 km) of occupied riverine and estuarine

habitat in the occupied HSA watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.* spawning, rearing, or migratory habitat) for this ESU and identified several management activities that may affect the PCEs, including urbanization, flood control channelization, and road building and maintenance. The single HSA watershed in the subbasin was rated by the Team as having high conservation value to the ESU. The Team also evaluated Humboldt Bay into which most of these freshwater streams in this subbasin drain as a separate habitat unit. Humboldt Bay contains approximately 25 mi^2 (65 km^2) of estuarine habitat which the Team found contained PCEs for rearing and migration and was of high conservation value since it provides migratory connectivity for juveniles and adults between high value freshwater spawning and rearing habitat and the ocean. The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 5. Eel River Subbasin (HU #1111)

The Eel River HU is located in the north central portion of the ESU and includes the Eel River and Van Duzen River drainages. The HU encompasses approximately 3,682 mi^2 (9,500 km^2) and contains nineteen HSA watersheds, all of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 1,269 miles (2,030 km) of occupied riverine and estuarine habitat in the occupied HSA watersheds (NMFS, 2004a). The Team concluded that these occupied watershed areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified several management activities that may affect the PCEs, including agriculture, forestry, sand and gravel mining, grazing, exotic/invasive species, agricultural and non-agricultural water withdrawals, and urbanization. Of these nineteen occupied watersheds, nine were rated by the Team as medium in conservation value and ten were rated as high in conservation value to the ESU (NMFS, 2004b). The Team also evaluated the Eel River estuary as a separate habitat unit and concluded it contained PCEs for rearing and migration and is of high conservation value since it provides migratory connectivity for juveniles and adults between high conservation value freshwater spawning and rearing habitat and the ocean. The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 6. Cape Mendocino Subbasin (HU #1112)

The Cape Mendocino HU is located in the central portion of the ESU and includes the Bear River and Mattole River drainages. This HU encompasses approximately 499 mi^2 (1,287 km^2) and contains three HSA watersheds which are all occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 342 miles (547 km) of occupied riverine and estuarine habitat in the occupied HSA watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified several management activities that may affect the PCEs, including agriculture, grazing, forestry, and agricultural water withdrawals. Of these watersheds, the Team rated two as having low conservation value and one as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 7. Mendocino Coast Subbasin (HU #1112)

The Mendocino Coast HU is located in the southern portion of the ESU and includes several smaller coastal streams such as Ten Mile, Noyo, Albion, Navarro, and Garcia Rivers. This HU encompasses approximately 1,598 mi^2 (4,123 km^2) and contains eighteen HSA watersheds that are all occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 1,022 miles (1,635 km) of occupied riverine and estuarine habitat in these watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified several management activities that may affect the PCEs, including forestry, grazing, urbanization, agriculture, and agricultural and non-agricultural water withdrawals. Of these occupied HSA watersheds, the Team rated five as low in conservation value, four as medium in conservation value, and nine as high in conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Central California Coast (CCC) O. mykiss ESU

The CCC *O. mykiss* ESU was listed as a threatened species in 1997 (62 FR 433937; August 18, 1997). The ESU includes all naturally spawned populations of *O. mykiss* in coastal river basins from the Russian River southward to and including Aptos Creek, as well as naturally spawned populations of *O. mykiss* in drainages of San Francisco and San Pablo Bay eastward to but excluding the Sacramento-San Joaquin Delta. Major coastal watersheds occupied by naturally spawning fish in this ESU include the Russian River, Lagunitas Creek, and San Lorenzo River. Important watersheds occupied by naturally spawning fish within the San Francisco Bay/San Pablo Bay area include Alameda Creek, Coyote Creek, Guadelupe Creek, Petaluma River, and the Napa River. Based on an updated status review (NMFS, 2003a) and an assessment of hatchery populations located within the range of the ESU (NMFS, 2003b), NMFS recently proposed that the ESU remain listed as a threatened species (69 FR 33102; June 14, 2004). In addition, NMFS proposed that: (1) Resident *O. mykiss* occurring with anadromous populations below impassable barriers (both natural and man made); (2) two artificially propagated populations (Don Clausen Fish Hatchery in the Russian River basin and the Kingfisher Flat Hatchery/Scott Creek hatchery in Scott Creek south of San Francisco); and (3) three resident *O. mykiss* sub-populations above Dam 1 on Alameda Creek also be included in the CCC *O. mykiss* ESU. For the purposes of this re-designation proposal, therefore, the watershed units occupied by resident *O. mykiss* in upper Alameda Creek were considered occupied. A Technical Recovery Team has been formed and is in the process of identifying the historical and extant independent population structure of this ESU as well as the associated viability criteria for these populations.

The Team's assessment for this ESU addressed habitat areas within 47 occupied watersheds or CALWATER HSAs that occur in 10 associated subbasins (or CALWATER HUs). Five of these HSAs encompass the San Francisco—San Pablo—Suisun Bay complex which constitutes migratory and rearing habitat for several Bay area tributary stream populations in this ESU. As part of this assessment, the Team considered the conservation value of each habitat area in the context of the productivity, spatial distribution, and diversity of habitats across the range of the ESU. The Team evaluated the conservation value of habitat areas on the basis of the physical and biological habitat requirements of the CCC *O. mykiss* ESU, consistent with the PCEs

identified for Pacific salmon and *O. mykiss* described under Methods and Criteria Used to Identify Proposed Critical Habitat.

Unit 1. Russian River Subbasin (HU #1114)

The Russian River HU is located in the northern portion of the ESU and includes the Russian River drainage and its tributaries. The HU encompasses approximately 1,482 mi^2 (3,824 km^2) and contains eleven HSA watersheds, ten of which are occupied. The unoccupied HSA does not contain fish because it is located above Coyote Dam, which is an impassable fish barrier used to facilitate water diversions from the Eel River and delivery downstream for agricultural and municipal purposes. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 713 miles (1,141 km) of occupied riverine and estuarine habitat in the 10 occupied HSA watersheds (NMFS, 2004a). The Team concluded that these occupied HSAs watersheds contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified several management activities that may affect the PCEs, including urbanization, agriculture, grazing, flood control channelization, road building and maintenance, agricultural and non-agricultural water withdrawals, and non-hydro dams. Of the occupied HSA watersheds, the Team rated one as low in conservation value, two as medium in conservation value, and seven as high in conservation value to the ESU (NMFS, 2004b). The Team did not identify and unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 2. Bodega Bay Subbasin (HU #1115)

The Bodega Bay HU is located in the north central portion of the ESU and includes several small streams as well as Bodega Harbor. The HU encompasses approximately 147 mi^2 (411 km^2) and contains four HSA watersheds, two of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 18 miles (29 km^2) of occupied riverine or estuarine habitat in the occupied HSAs (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified management activities that may affect the PCEs, including grazing, urbanization, agriculture, and agricultural water withdrawals. The Team rated one occupied HSA watershed as low in conservation value and one as medium in conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 3. Marin Coastal Subbasin (HU #2201)

The Marin Coastal HU is located in the central portion of the ESU along the coast and includes several small watersheds including Lagunitas Creek. The HU encompasses approximately 327 mi^2 (844 km^2) and contains five HSA watersheds, four of which are occupied. The unoccupied HSA lacks satisfactory habitat and is of high gradient. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 74 miles (118 km) of occupied riverine or estuarine habitat in the occupied HSAs (NMFS, 2004a). The Team concluded that these occupied habitat areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified management activities that may affect the PCEs, including grazing, urbanization, forestry, agricultural and non-agricultural water withdrawals, and non-hydro dams. Of the occupied HSA watersheds, the Team rated two as low in conservation value, one as medium in conservation value, and one as high in conservation value to the ESU. The Team did not identify any unoccupied areas in this subbasin that may be essential to the conservation of the ESU.

Unit 4. San Mateo Subbasin (HU #2202)

The San Mateo HU is located on the coast immediately south of the Golden Gate Bridge and includes several small creeks including San Gregorio and Pescadero Creeks. The HU encompasses approximately 257 mi^2 (663 km^2) and contains six HSA watersheds, five of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 146 miles (234 km) of occupied riverine or estuarine habitat in the occupied watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agriculture, agricultural and non-agricultural water withdrawals, urbanization, non-hydro dams, and road building and maintenance. Of these occupied HSA watersheds, one is low in conservation value, two are medium in value, and two are high in conservation value to the ESU (NMFS, 2004b). The Team did not identify and unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 5. Bay Bridges Subbasin (HU #2203)

The Bay Bridges HU is located in the central portion of the ESU and includes portions of northern San Francisco Bay, San Pablo Bay, and some associated watersheds. The HU encompasses approximately 191 mi^2 (493 km^2) and contains four HSA watersheds, three of which are occupied. The San Francisco Bayside HSA is unoccupied by this ESU due to intense urbanization and lack of stream habitat. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 46 miles (74 km) of occupied riverine and estuarine habitat in the occupied HSA watersheds (NMFS, 2004a). One of the occupied HSAs (HSA #220312; Bay Waters) includes that portion of San Francisco Bay bounded by the Bay Bridge, the Golden Gate Bridge, and the Richmond Bridge, and encompasses an area of approximately 83 mi^2 (214 km^2). This occupied estuarine habitat area constitutes important migratory and rearing habitat and access to the ocean for some populations within this ESU. The Team concluded that these occupied habitat areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including urbanization, channel modification, flood control channelization, road building and maintenance, and wetland loss. Of the occupied watersheds, one each is rated low, medium and high, respectively, in conservation value to the ESU. The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 6. South Bay Subbasin (HU #2204)

The South Bay HU is located in the southern portion of the ESU and includes South San Francisco Bay and associated tributaries such as Alamada Creek. This HU encompasses approximately 1,220 mi^2 (3.148 km^2) and contains four occupied HSA watersheds. One of these four watersheds (Upper Alameda Creek; HSA #220430) is not accessible to anadromous fish at this time, but is nonetheless considered occupied for the purposes of this critical habitat designation because genetic evidence indicates the resident O. mykiss that reside there are closely related to local anadromous steelhead (Nielsen 2003) and we have proposed to include these fish in the listed ESU (69 FR 33102; June 14, 2004). Fish distribution and

habitat use data compiled by NMFS biologists identify approximately 172 miles (275 km) of occupied riverine and estuarine habitat in the occupied watersheds (NMFS, 2004a), including the Upper Alameda Creek HSA (#220430). One of the occupied HSAs (Bay Channel; HSA #220410) includes that portion of San Francisco Bay south of the Bay Bridge to the Dumbarton Bridge, and encompasses an area of approximately 173 mi^2 (446 km^2). This occupied estuarine habitat area constitutes important migratory and rearing habitat and access to the ocean for some populations within this ESU. The Team concluded that these occupied habitat areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including urbanization, flood control channelization, non-hydro dams, channel modification, and non-agricultural water withdrawals. Of these occupied HSAs, the Team rated one as low in conservation value, one as medium in conservation value, and two as high in conservation value to the ESU. The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 7. Santa Clara Subbasin (HU #2205)

The Santa Clara HU is located in the southern portion of the ESU and includes part of South San Francisco Bay and associated tributaries including Coyote Creek and the Guadalupe River. This HU encompasses approximately 840 mi^2 (2,167 km^2) and contains five HSA watersheds, four of which are occupied. The remaining HSA is unoccupied due to lack of stream habitat and intense urbanization. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 135 miles (216 km) of occupied riverine or estuarine habitat in the occupied watersheds (NMFS, 2004a). One of the occupied HSAs (Dumbarton South; HSA #220510) includes that portion of San Francisco Bay south of the Dumbarton Bridge, and encompasses an area of approximately 15 mi^2 (39 km^2). This occupied estuarine habitat area constitutes important migratory and rearing habitat and access to the ocean for some populations within this ESU. The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including road building and maintenance, urbanization, wetland loss, flood control channelization, non-hydro dams, and non-agricultural water withdrawals. Of the occupied watersheds, the Team rated one as low in conservation value, two as medium in conservation value, and one as high in conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 8. San Pablo Subbasin (HU #2206)

The San Pablo HU is located in the central portion of the ESU and includes part of San Pablo Bay as well as several associated tributaries including the Petaluma River, Sonoma Creek, and the Napa River. This HU encompasses approximately 1,018 mi^2 (2,626 km^2) and contains six occupied HSA watersheds. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 392 miles (627 km) of occupied riverine and estuarine habitat in the occupied watersheds (NMFS, 2004a). One of the occupied HSAs (San Pablo Bay; HSA #220610) includes San Pablo Bay from the Richmond Bridge to the Carquinez Bridge, and encompasses an area of approximately 115 mi^2 (297 km^2). This occupied estuarine habitat area constitutes important migratory and rearing habitat and access to the ocean for some populations within this ESU. The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including urbanization, road building and maintenance, channel modification, flood control channelization, agriculture, wetland loss, and non-hydro dams. Of these occupied watersheds, the Team rated two as low, one as medium, and three as high in conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 9. Suisun Bay Subbasin (HU #2207)

The Suisun Bay HU is located in the easternmost portion of the ESU and includes Suisun Bay and associated tributaries including Mount Diablo Creek and Suisun Creek. This HU encompasses approximately 653 mi^2 (1,684 km^2) and contains eight HSA watersheds, five of which are occupied. The remaining three HSA watersheds are unoccupied due to unsuitable habitat and/or barriers and urbanization. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 86 miles (138 km) of occupied riverine and estuarine habitat in these watersheds (NMFS, 2004a). One of the occupied HSAs (Suisun Bay; HSA #220710) includes Suisun Bay which encompasses an area of approximately 56 mi^2 (143 km^2). This occupied estuarine habitat area constitutes important migratory and rearing habitat and access to the ocean for some populations within this ESU. The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including urbanization, road building and maintenance, wetland loss, non-hydro dams, flood control channelization, and agricultural and non-agricultural water withdrawals. Of the occupied watersheds, the Team rated four as low and one as medium in conservation value for the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 10. Big Basin Subbasin (HU #3304)

The Big Basin HU is located in the southernmost coastal portion of the ESU south of the Golden Gate Bridge and includes several small coastal streams such as Gazos Creek, Waddell Creek, Scott Creek, the San Lorenzo River, Soquel Creek and Aptos Creek. This HU encompasses approximately 367 mi^2 (947 km^2) and contains four occupied HSA watersheds. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 220 miles (352 km) of occupied riverine and estuarine habitat in these watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including road building and maintenance, forestry, agricultural and non-agricultural water withdrawals, and non-hydro dams. Of these occupied watersheds, the Team rated one as medium and three as high in conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

South-Central California Coast (SCCC) O. mykiss ESU

The SCCC *O. mykiss* ESU was listed as a threatened species in 1997 (62 FR 43937). The ESU includes all naturally spawned populations of *O. mykiss* in

coastal river basins from the Pajaro River southward to, but not including, the Santa Maria River. The major watersheds occupied by naturally spawning fish in this ESU include the Pajaro River, Salinas River, Carmel River, and numerous smaller rivers and streams along the Big Sur coast and southward. Most of the rivers in this ESU drain the Santa Lucia Range, the southernmost unit of the California Coast Range, and only winter steelhead are found in this ESU. The climate is drier and warmer than in the north, as reflected in vegetational changes from coniferous forest to chapparral and coastal scrub. The mouths of many rivers and streams in this ESU are seasonally closed by sand berms that form during periods of low flow in the summer. Based on an updated status review (NMFS, 2003a), NMFS recently proposed that the ESU remain listed as a threatened species and that resident *O. mykiss* co-occurring with anadromous populations below impassible barriers (both natural and man-made) be included in the ESU (69 FR 33102; June 14, 2004). A Technical Recovery Team has been formed and is in the process of identifying the historical and extant independent population structure of this ESU and associated population viability criteria. The time frame for completion of this work is uncertain.

The Team's assessment for this ESU addressed habitat areas within 30 occupied watersheds or CALWATER HSAs that occur in 8 associated subbasins (or CALWATER HUs). In addition to 29 HSA watershed units, a conservation assessment was also made for Morro Bay (a separate HSA unit) which provides rearing and migration PCEs for this ESU. As part of its conservation assessment, the Team considered the conservation value of each habitat area in the context of the productivity, spatial distribution, and diversity of habitat across the range of the ESU. The Team evaluated the conservation value of habitat areas on the basis of the physical and biological habitat requirements of the SCCC *O. mykiss* ESU, consistent with the PCEs identified for Pacific salmon and *O. mykiss* described under Methods and Criteria Used to Identify Proposed Critical Habitat.

Unit 1. Pajaro River Subbasin (HU #3305)

The Pajaro River HU is located in the northern part of the ESU and includes the Pajaro River and its tributaries. The HU encompasses approximately 1,311 mi^2 (3,382 km^2) and contains five occupied HSA watersheds, although a portion of one HSA is located outside the boundary of the ESU. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 296 miles (474 km) of occupied riverine and/or estuarine habitat in the occupied HSA watersheds (NMFS, 2004a). The Team concluded that these occupied HSAs contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified several management activities that may affect the PCEs, including flood control channelization, agricultural and non-agricultural water withdrawals, road building and maintenance, and non-hydro dams. Of the five occupied watersheds, the Team rated three as medium in conservation value and two as high in conservation value to the ESU (NMFS, 2004b).

The Team also concluded that inaccessible habitat above Uvas Dam in Uvas Creek (a tributary to the Pajaro River) may be essential to the conservation of the ESU. The Team concluded that this unoccupied habitat area may be essential for conservation because: (1) It supports *O. mykiss* native to the Pajaro River watershed and contains habitat suitable for spawning and rearing; and (2) efforts are underway to implement a long-standing agreement between the South Santa Clara Valley Water Conservation District and the State of California to provide fish passage past this dam. We seek comment on whether this unoccupied area should be proposed as critical habitat.

Unit 2. Bolsa Neuva Subbasin (HU #3306)

The Bolsa Neuva HU is a small watershed unit located in the northern part of the ESU which includes Elkhorn Slough. The HU encompasses approximately 51 mi^2 (132 km^2) and contains one HSA watershed and approximately 63 miles of streams (at 1:100,000 hydrography). Fish distribution and habitat use data compiled by NMFS biologists indicate that this watershed is not occupied (NMFS, 2004a). The Team did not identify this unoccupied HSA as a habitat area that was essential for the conservation of the ESU. Because this HU did not contain occupied habitat or unoccupied habitat that the Team believed may be essential for the conservation of the ESU, it was not considered further in the designation process.

Unit 3. Carmel River Subbasin (HU #3307)

The Carmel River HU is located in the northwestern portion of the ESU and includes the Carmel River watershed. The HU encompasses approximately 256 mi^2 (660 km^2) and contains only one HSA which is occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 136 miles (218 km) of occupied riverine and estuarine habitat in this watershed (NMFS, 2004a). The Team concluded that this occupied watershed contained habitat areas with one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified management activities that may affect the PCEs, including flood control channelization, non-hydro dams, and non-agricultural water withdrawals. The Team rated this watershed as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for conservation of the ESU.

Unit 4. Santa Lucia Subbasin (HU #3308)

The Santa Lucia HU is located along the Big Sur coastal area and includes the Big Sur River and Little Sur River watersheds. The HU encompasses approximately 302 mi^2 (779 km^2) and contains only a single HSA which is occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 102 miles (163 km) of occupied riverine and estuarine habitat in this watershed (NMFS, 2004a). The Team concluded that this occupied watershed contained one or more PCEs (*i.e.* spawning, rearing, or migratory habitat) and identified at least one management activity that may affect the PCEs, including road building and maintenance. The Team rated this watershed as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 5. Salinas River Subbasin (HU #3309)

The Salinas River HU is located in the north-central portion of the ESU and includes the Salinas River watershed which is the largest in the ESU. The Salinas River HU encompasses approximately 3,527 mi^2 (9,099km^2) and contains twelve HSA watersheds, seven of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 375 miles (600 km) of occupied riverine and estuarine habitat in the occupied HSA watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified management activities

that may affect the PCEs, including agriculture, flood control channelization, wetland loss, road building and maintenance, non-hydro dams, and agricultural water withdrawals. Of the occupied watersheds, the Team rated four as having low conservation value, one as having medium conservation value, and two as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 6. Estero Bay (HU #3310)

The Estero Bay HU is located along the southern coast of the ESU and includes several relatively small coastal streams including Arroyo De La Cruz, San Simeon Creek, Santa Rosa Creek, Morro Creek, Chorro Creek, San Luis Obispo Creek, and Arroyo Grande Creek. The HU encompasses approximately 751 mi^2 (436 km^2) and contains seventeen HSA watersheds, sixteen of which are occupied. One of these occupied watersheds is Morro Bay into which the Morro Creek and Chorro Creek watersheds drain. Morro Bay proper encompasses an area of approximately 3 mi^2 (8 km^2) and is an important rearing and migratory habitat for populations that occupy the watersheds that drain into the Bay. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 352 miles (563 km) of occupied riverine habitat in the occupied watersheds (NMFS, 2004a). The Team concluded that these occupied habitat areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified management activities that may affect the PCEs, including grazing, agriculture, urbanization, non-hydro dams, road building and maintenance, and agricultural water withdrawals. Of the occupied HSA watersheds, the Team rated two as low, seven as medium, and seven as high in conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Units 7 (Santa Maria HU #3312) and 8 (Estrella HU #3317)

Portions of the Santa Maria and Estrella HUs are within the geographic range of this ESU, but do not contain occupied riverine or estuarine habitat. The Santa Maria HU includes a single HSA (Guadalupe; 331210) which is divided by the ESU boundary. All occupied habitat within this HSA occurs within the range of the Southern California steelhead ESU. The Estrella HU contains a single HSA (Estrella River; 331700) which is unoccupied. The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU. Because these areas did not contain occupied habitat or unoccupied habitat that may be essential for the conservation of the ESU, they were not considered further in the designation process.

Southern California (SC) O. mykiss ESU

The SC *O. mykiss* ESU was listed as an endangered species in 1997 (62 FR 3937; August 18, 1997). In 2002, the status of the ESU was updated and its range extended based on new information indicating that anadromous *O. mykiss* had re-colonized watersheds from which it was thought to have been extirpated (67 FR 21586; May 1, 2002). The SC *O. mykiss* ESU includes all naturally spawned populations of *O. mykiss* in coastal river basins from the Santa Maria River in San Luis Obispo County southward to the U.S.—Mexican Border (67 FR 21586). Major coastal watersheds occupied by naturally spawning fish in this ESU include the Santa Maria, Santa Ynez, Ventura, and Santa Clara Rivers. Several smaller streams in Santa Barbara, Ventura and northern Los Angeles County also support naturally spawning steelhead, as do two watersheds (San Juan Creek and San Mateo Creek) in southern Orange County and northern San Diego County. These southernmost populations are disjunct in distribution and are separated from the northernmost populations by approximately 80 miles (128 km). Based on an updated status review (NMFS, 2003a), NMFS recently proposed that the ESU remain listed as an endangered species (69 FR 33102; June 14, 2004). In addition, NMFS proposed that resident *O. mykiss* occurring with anadromous populations below impassable barriers (both natural and man made) also be included in the ESU. A Technical Recovery Team has been formed for the South-Central coast of California and is in the process of identifying the historical and extant independent population structure of this ESU and the SCCC *O. mykiss* ESU, as well as the associated viability criteria for these populations.

The Team's assessment for this ESU addressed habitat areas within 37 occupied watersheds or CALWATER HSAs that occur in 8 associated subbasins or CALWATER HUs. As part of its assessment, the Team considered the conservation value of each habitat area (or HSA) in the context of the productivity, spatial distribution, and diversity of habitats across the range of the ESU. The Team evaluated the conservation value of habitat areas on the basis of the physical and biological habitat requirements of the SC *O. mykiss*, consistent with the PCEs identified for Pacific salmon and *O. mykiss* described under Methods and Criteria Used to Identify Proposed Critical Habitat.

Unit 1. Santa Maria River Subbasin (HU #3312)

The Santa Maria River HU is located in the northwestern portion of the ESU and includes the Santa Maria River and its upstream tributaries, the Sisquoc and Cuyama Rivers. The HU encompasses an area of approximately 704 mi^2 (1816 km^2) and contains three occupied HSA watersheds. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 219 miles (350 km) of occupied riverine and estuarine habitat in these watersheds (NMFS, 2004a). The Team concluded that these occupied HSA watersheds contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified several management activities that may affect the PCEs, including non-hydro dams, water withdrawals, sand and gravel mining, and grazing. Of the occupied watersheds, the Team rated two as low and one as high in conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 2. Santa Ynez River Subbasin (HU #3314)

The Santa Ynez River HU is located in the northwestern portion of the ESU and includes the Santa Ynez River watershed. The HU encompasses an area of approximately 485 mi^2 (1,251 km^2) and contains six HSA watersheds, five of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 138 miles (221 km) of occupied riverine and estuarine habitat in the occupied watersheds (NMFS, 2004a). The Team concluded that these occupied watersheds contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified several management activities that may affect the PCEs, including grazing, water withdrawals, non-hydro dams, urbanization, barriers to migration, and road building and maintenance. Of these occupied watersheds, the Team rated one as low, two as medium, and two as high in conservation value to the ESU (NMFS, 2004b).

The Team also concluded that inaccessible reaches of the Santa Ynez River and its tributaries above Bradbury Dam may be essential to the conservation of this ESU. The Team reached this conclusion because historical records indicate that the upper portion of the Santa Ynez watershed above Bradbury Dam provided the principal spawning and rearing habitat for a historically large anadromous *O. mykiss* population within this river system prior to construction of the dam. In addition, most of these unoccupied river reaches are located on lands under public ownership and management, primarily the Los Padres National Forest. Because of the large size of the Santa Ynez river system, it is likely to have historically supported one or more independent populations which contributed to the resiliency of the ESU and served as a buffer against extinction. The currently occupied habitat areas within the range of the SC *O. mykiss* ESU are relatively small in number and size, and in many cases are isolated from other occupied habitats, thus the re-establishment of larger populations such as the one that historically occurred in the Santa Ynez River may be necessary to reduce the extinction probability of this ESU. We seek comment on whether unoccupied areas above Bradbury Dam should be proposed as critical habitat.

Unit 3. South Coast Subbasin (HU #3315)

The South Coast HU is located in the northwestern portion of the ESU and includes several small coastal streams such as Jalama Creek, Arroyo Hondo, Mission Creek, and Carpinteria Creek. The HU encompasses an area of approximately 375 mi^2 (968 km^2) and contains five occupied HSAs. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 152 miles (243 km) of occupied riverine and estuarine habitat in the occupied watersheds (NMFS, 2004a). The Team concluded that these occupied HSA watersheds contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified several management activities that may affect the PCEs, including agriculture, migration barriers or impediments, water withdrawals, urbanization, road building and maintenance, and wetland loss. Of the occupied watersheds, the Team rated all five as high in conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 4. Ventura River Subbasin (HU #4402)

The Ventura River HU is located in the northwestern portion of the ESU and includes the Ventura River and its associated tributaries. The HU encompasses an area of approximately 162 mi^2 (259 km^2) and contains four occupied HSA watersheds. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 68 miles (109 km) of occupied riverine and estuarine habitat in the occupied watersheds (NMFS, 2004a). The Team concluded that these occupied HSAs contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified several management activities that may affect the PCEs, including urbanization, agriculture, water withdrawals, non-hydro dams, barriers or impediments, and exotic or invasive species. Of these occupied watersheds, the Team rated two as medium and two as high in conservation value (NMFS, 2004b).

The Team also concluded that inaccessible reaches of Matilija Creek and its tributaries above Matilija Dam and inaccessible reaches of Coyote and Santa Ana Creeks above Casitas Dam may be essential to the conservation of this ESU. The Team reached this conclusion because historical records indicate that the inaccessible habitat reaches above Matilija and Casitas Dams provided the principal spawning and rearing habitat for a historically large anadromous *O. mykiss* population within the Ventura River watershed prior to construction of the dams. In addition, most of these unoccupied river reaches are located on lands under public ownership and management, primarily the Los Padres National Forest. Because of the relatively large size of the Ventura River watershed, it is likely to have historically supported one or more independent populations prior to dam construction which contributed to the resiliency of the ESU and served as a buffer against extinction. The currently occupied habitat areas within the range of the SC *O. mykiss* ESU are relatively small in number and size, and in many cases are isolated from other occupied habitats. Thus the re-establishment of larger populations such as the ones that historically occurred in the Ventura River watershed may be necessary to reduce the extinction probability of this ESU. We seek comment on whether unoccupied areas above Matilija and Casitas Dams should be proposed as critical habitat.

Unit 5. Santa Clara—Calleguas Subbasin (HU #4403)

The Santa Clara—Calleguas HU is located in the northwestern portion of the range of the ESU and includes the Santa Clara River and its tributaries including Sespe Creek. That portion of the HU within the range of the ESU encompasses a large area of approximately 1,236 mi^2 (3,189 km^2) and contains 14 HSA watersheds, only 6 of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 182 miles (291 km) of occupied riverine and estuarine habitat in the occupied watersheds (NMFS, 2004a). The Team concluded that these occupied HSAs contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified several management activities that may affect the PCEs, including agriculture, irrigation water withdrawals, barriers and impediments, dams, urbanization, and exotic/invasive species. Of these occupied watersheds, the Team rated one as medium and five as high in conservation value (NMFS, 2004b).

The Team also concluded that inaccessible reaches of Piru Creek and its tributaries above Santa Felicia Dam may be essential to the conservation of this ESU. The Team reached this conclusion because historical records indicate that the inaccessible habitat reaches above Santa Felicia Dam provided the principal spawning and rearing habitat for a historically large anadromous *O. mykiss* population within the Santa Clara River watershed prior to construction of the dam. In addition, most of these unoccupied river reaches are located on lands under public ownership and management, primarily the Los Padres National Forest. Because of the large size of the Santa Clara River watershed, it is likely to have historically supported one or more independent populations prior to dam construction which contributed to the resiliency of the ESU and served as a buffer against its extinction. The currently occupied habitat areas within the range of the SC *O. mykiss* ESU are relatively small in number and size, and in many cases are isolated from other occupied habitats, thus the re-establishment of larger populations such as the one that historically occurred in the Santa Clara River watershed may be necessary to reduce the extinction probability of this ESU. We seek comment on whether unoccupied areas above Santa Felicia Dam should be proposed as critical habitat.

Unit 6. Santa Monica Bay Subbasin (HU #4404)

The Santa Monica Bay HU is located in the northwestern portion of the ESU and includes Topanga Creek, Malibu Creek, and Arroyo Sequit. That portion of the HU within the ESU encompasses approximately 328 mi^2 (846 km^2) and includes 29 HSA watersheds, only 3 of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify only approximately 11 miles (18 km) of occupied riverine and estuarine habitat in the 3 occupied watersheds (NMFS, 2004a). The Team concluded that these occupied watersheds contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified several management activities that may affect the PCEs, including road building and maintenance, urbanization, barriers and impediments, and flood control and other channel modifications. Of these occupied watersheds, the Team rated all three as high in conservation value to the ESU (NMFS, 2004b).

The Team also concluded that inaccessible reaches of Malibu Creek above Rindge Dam may be essential to the conservtion of this ESU. The Team reached this conclusion because historical records indicate that the inaccessible habitat reaches above Rindge Dam provided the principal spawning and rearing habitat for an important anadromous *O. mykiss* population within the Malibu River watershed prior to construction of the dam. Because of the size of this watershed, it is likely to have historically supported an independent population prior to dam construction which contributed to the resiliency of the ESU and served as a buffer against its extinction. The currently occupied habitat areas within the range of the SC *O. mykiss* ESU are relatively small in number and size, and in many cases are isolated from other occupied habitats, thus the re-establishment of larger populations such as the one that historically occurred in Malibu Creek may be necessary to reduce the extinction probability of this ESU. We seek comment on whether unoccupied areas above Rindge Dam should be proposed as critical habitat.

Unit 7. Calleguas Subbasin (HU #4408)

The Calleguas HU is located in the northwestern portion of the ESU and includes Calleguas Creek and estuary. That portion of the HU within the range of the ESU encompasses a large area of approximately 344 mi^2 (888 km^2) and 12 HSA watersheds, only 2 of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify only approximately 1 mile (1.6 km) of occupied freshwater and estuarine habitat in the occupied HSA watersheds (NMFS, 2004b). The Team concluded that the occupied watersheds contained one or more PCEs (*i.e.*, rearing and migratory habitat) and identified management activities that may affect the PCEs, including agriculture, channel modifications, and barriers or impediments. The Team also concluded that both watersheds have a low conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas that may be essential to the conservation of the ESU.

Unit 8. San Juan Subbasin (HU #4901)

The San Juan HU is located in the southern portion of the ESU and includes the San Juan Creek and San Mateo Creek watersheds which have recently been re-colonized by anadromous *O. mykiss*. That portion of the HU within the range of the ESU encompasses an area of approximately 496 mi^2 (1,280 km^2) and contains 18 HSA watersheds, 9 of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 66 miles (106 km) of occupied riverine and estuarine habitat in the occupied watersheds (NMFS, 2004a). The Team concluded that the occupied watersheds contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified several management activities that may affect the PCEs, including urbanization, road building and maintenance, barriers and impediments, channel modifications or flood control structures, agriculture, agricultural and non-agricultural water withdrawals, and exotic/invasive species. Of these occupied watersheds, the Team rated one as low, one as medium, and seven as high in conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas that may be essential for the conservation of the ESU.

Within the range of the SC *O. mykiss* ESU, which extends from the Santa Maria River southward to the U.S.—Mexico border, there are a large number of HSA watersheds and their associated subbasins (or HUs) that are not occupied. These unoccupied subbasins include the San Gabriel River, Los Angeles River, Santa Ana River, Santa Margarita River, San Luis Rey River, San Dieguito River, San Diego River, Sweetwater River, Otay River and Tijuana River. Because these areas are unoccupied and were not considered essential for conservation of the ESU by the Team, they were not considered further in the designation process.

Central Valley (CV) Spring-Run Chinook ESU

The CV spring-run chinook ESU was listed as a threatened species in 1999 (64 FR 50394). The ESU includes all naturally spawned populations of spring-run chinook salmon in the Sacramento River and its tributaries. The agency recently conducted a review to update the ESU's status, taking into account new information and considering the net contribution of artificial propagation efforts in the ESU. A single artificially propagated spring-run chinook stock resides within the historical geographic range of the ESU (Feather River Hatchery spring-run chinook program), but it is not considered part of the ESU because of introgression with fall-run chinook salmon. NMFS has recently proposed that the CV spring-run chinook ESU remain listed as a threatened species (69 FR 33102; June 14, 2004). No artificial propagation programs were proposed for listing.

A Technical Recovery Team has been established for the Central Valley recovery planning domain, and it has identified historic and extant demographically independent populations of spring chinook (NMFS, 2004; NOAA Technical Memorandum NOAA–TM–NMFS–SWFSC–370). The TRT divided the range of the spring-run chinook ESU into four geographic groups. Geographic areas in each group inhabit similar environments based on a principle components analysis of environmental variables. The four geographic groups are the southern Cascades, northern Sierra, southern Sierra, and Coast Range. The TRT identified at least 18 historically demographically independent populations of spring-run chinook distributed among these four geographic areas, plus an additional seven likely dependent populations that may have been strongly influenced by adjacent independent population. Three of the 18 independent populations are extant (Mill, Deer and Butte Creek populations) and all occur in the Southern Cascade geographic area. Several extant dependent populations have intermittent runs of spring chinook including Big Chico, Antelope, and Beegum Creeks. Recovery planning will likely emphasize the need for having viable populations distributed across the range of the identified geographic areas (Ruckelshaus *et al.*, 2002; McElhany *et al.*, 2003). Recovery planning efforts are currently focused on working with the CalFed and Central

Valley Project Improvement Act programs to implement habitat restoration projects and other recovery related efforts in the Central Valley. The Team considered the TRT products in rating each watershed and also solicited input from the TRT on the distributional and habitat use information that was compiled as well as the conservation assessment of occupied HSAs.

The Team's assessment for this ESU addressed habitat areas within 37 occupied watersheds or CALWATER HSAs that occur in 15 associated subbasins or CALWATER HUs. This assessment also included four HSAs that encompass the San Francisco-San Pablo-Suisun Bay complex, which constitutes rearing and migration habitat for this ESU. This complex is treated as a separate unit in the following ESU description even though it is not a CALWATER HU. As part of its assessment, the Team considered the conservation value of each habitat area (or HSA) in the context of the productivity, spatial distribution, and diversity of habitats across the range of the ESU. The Team evaluated the conservation value of habitat areas on the basis of the physical and biological habitat requirements of the CV spring-run chinook, consistent with the PCEs identified for Pacific salmon and *O. mykiss* described under Methods and Criteria Used to Identify Proposed Critical Habitat.

Unit 1. Tehama Subbasin (HU #5504)

The Tehama HU is located in the north central portion of the ESU and includes portions of the mainstem Sacramento River, the lower portions of two westside tributaries (Thomes and Stony Creeks) and the lower portions of three eastside tributaries (Mill Creek, Deer Creek, and Pine Creek). The HU encompasses an area of approximately 1,119 square miles (2,887 km^2) and contains two HSA watersheds, both of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 250 miles (400 km) of occupied riverine habitat in the occupied watersheds (NMFS, 2004a). The Team concluded that these occupied watersheds contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified several management activities that may affect the PCEs, including agricultural water withdrawals, fish passage impediments, stream bank stabilization for flood control, dam operations, urbanization, rangeland management, diking, and point and non-point source water pollution. Of these occupied watersheds, the Team rated one as medium and one as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 2. Whitmore Subbasin (HU #5507)

The Whitmore HU is located in the north eastern portion of the ESU and includes portions of upper Battle Creek (North and South Forks), upper Bear Creek, and the Cow Creek watershed. The HU encompasses an area approximately 913 mi^2 (2,355 km^2) and contains seven HSA watersheds, four of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 58 miles (93 km) of occupied riverine habitat in the occupied HSAs (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.,* spawning, rearing, or migratory habitat) and identified management activities that may affect the PCEs, including agricultural and no-agricultural water withdrawals, forestry, rangeland management, hydropower diversions, urbanization, and fish passage impediments. Of these watersheds, the Team rated three as having low conservation value and one as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 3. Redding Subbasin (HU #5508)

The Redding HU is located in the northernmost portion of the ESU and includes portions of the upper Sacramento River mainstem, westside tributaries including Cottonwood Creek (portions of both the Middle and South Forks) and Clear Creek, and the lower portions of several eastside tributaries (Cow Creek, Bear Creek, and lower Battle Creek). The HU encompasses an area of approximately 705 mi^2 (1,818 km^2) and contains two occupied HSA watersheds. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 159 miles (254 km) of occupied riverine habitat in these watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.,* spawning, rearing, or migratory habitat) and identified management activities that may affect the PCEs, including rangeland management, gravel mining, fish passage impediments, dam operations and flood control water storage, and agricultural water withdrawals. The Team rated both occupied watersheds as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 4. Eastern Tehama Subbasin (HU #5509)

The Eastern Tehama HU is located in the northeastern portion of the ESU and includes portions of several important populations including Mill Creek, Deer Creek, Antelope Creek, and the upper portion of Big Chico Creek. The HU encompasses an area of approximately 896 mi^2 (2,311 km^2) and contains ten HSA watersheds, four of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 117 miles (187 km) of occupied riverine habitat in the occupied watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.,* spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including forestry, rangeland management, fish passage impediments, road building and maintenance, and agricultural water withdrawals. Of the occupied watersheds, the Team rated them all high in conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin may be essential for the conservation of the ESU.

Unit 5. Sacramento Delta Subbasin (HU #5510)

The Sacramento Delta HU is located in the southern portion of the ESU and includes portions of the mainstem Sacramento River and the Deep Water Ship Channel. The HU encompasses an area of approximately 446 mi^2 (1,150 km^2) and contains a single HSA which is occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 180 miles (288 km) of occupied riverine habitat in this watershed (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.,* spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural water withdrawals, point and non-point water pollution, invasive/non-native species, diking, and streambank stabilization for flood control. The Team rated this watershed as high in conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied habitat areas in the subbasin that may be essential for conservation of the ESU.

Unit 6. Valley Putah-Cache Subbasin (HU #5511)

The Valley Putah-Cache HU is located in the southern portion of the ESU and includes portions of Putah and Cache Creeks. This HU encompasses an area of approximately 961 mi^2 (2,479 km^2) and contains two HSA watersheds within the range of the ESU, one of which is occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 16 miles (26 km) of occupied riverine habitat in this watershed (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.,* spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including urban development, agricultural water withdrawals, and impediments to fish passage. The Team rated the occupied watershed as high in conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied habitat areas in this subbasin that may be essential for the conservation of the ESU.

Unit 7. Marysville Subbasin (HU #5515)

The Marysville HU is located in the central portion of the ESU and includes portions of the lower Feather and Yuba Rivers. This HU encompasses an area of approximately 417 mi^2 (1,076 km^2) and contains three HSA watersheds, two of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify only 58 miles (93 km) of occupied riverine habitat in these occupied watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.,* spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural water withdrawals, hydroelectric and municipal water diversions, water storage for flood control, dam operations, streambank stabilization for flood control, diking, and fish passage impediments. The Team rated both occupied watersheds as high in conservation value to the ESU (NMFS, 2004b).

The Team did not identify any unoccupied habitat areas in this subbasin that may be essential for the conservation of the ESU; however, the Team did conclude that inaccessible stream reaches in the Upper Feather River above Oroville Dam in the adjacent subbasin (HU #5518) may be essential to the conservation of this ESU. Specifically, the Team identified the following stream reaches above Oroville Dam that may be essential for conservation of this ESU: from Oroville Dam upstream along the West Branch of the Feather River to the vicinity of Kimshew Falls; along the North Fork of the Feather River upstream of the location of Lake Almanor; along the East Branch of the NF Feather River including Indian Creek and Spanish Creek; the South Middle Fork of the Feather River, and the South Fork of the Feather River upstream to the first natural impassible barrier. Both spring-run chinook and steelhead historically occurred in the Upper Feather River prior to Pacific Gas and Electric's hydroelectric development in the North Fork watershed and the construction of Oroville Dam. Construction of Oroville Dam extirpated both the spring-run chinook and steelhead populations in this upper watershed. The Team concluded that spawning, rearing, and migratory habitat occurs above Oroville Dam in these inaccessible reaches, but it is in better condition for steelhead than spring-run chinook salmon. The feasibility of providing fish passage past Oroville Dam is currently being evaluated through the ongoing FERC relicensing process for this facility. The Team concluded this inaccessible habitat may be essential for the conservation of this ESU because the genetic integrity of spring-run chinook in the Lower Feather River has been compromised by Feather River Hatchery practices (*i.e.,* introgression of spring and fall runs in the hatchery), and providing access to the unoccupied habitat above the dam would allow for expansion of the population in this watershed. We seek comment on whether this unoccupied habitat should be proposed as critical habitat.

Unit 8. Yuba River Subbasin (HU #5517)

The Yuba River HU is located in the central and eastern portion of the ESU and includes part of the upper Yuba River watershed. This HU encompasses an area of approximately 1,436 mi^2 (3,704 km^2) and contains sixteen HSA watersheds, only four of which are occupied. Virtually all of these watersheds, however, are outside the previously identified boundary of the ESU. Fish distribution and habitat use data compiled by NMFS biologists identify only approximately 22 miles (35 km) of occupied riverine habitat in the occupied watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.,* spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural and non-agricultural water withdrawals, fish passage impediments, and dam operations. Of these occupied watersheds, the Team rated one as low, one as medium, and two as high in conservation value to the ESU (NMFS, 2004b).

The Team concluded that inaccessible stream reaches on the Upper Yuba River above Englebright Dam may be essential to the conservation of this ESU, including those upstream reaches on the North Yuba to New Bullards Bar Dam, on the Middle Yuba to Milton Dam, and on the South Yuba to Lake Spaulding. All three forks of the Upper Yuba River historically supported populations of spring chinook and steelhead (Yoshiyama *et al.,* 1995). The Team considered this area to be essential for conservation because it provides one of the largest areas of suitable habitat in the Central Valley that can be accessed by providing passage at one relatively small dam. The Lower Yuba is also considered to have a good ''seed'' population of both spring chinook and steelhead and both populations are considered relatively free of hatchery influence. A large, multi-million dollar study program is underway through the CALFED Ecological Restoration Program to evaluate the feasibility of restoring anadromous salmonid populations to the Upper Yuba River. We seek comment on whether this unoccupied habitat should be proposed as critical habitat.

Unit 9. Valley-American Subbasin (HU #5519)

The Valley-American HU is located in the south-central and eastern portion of the ESU and includes portions of the Lower American River, the mainstem Sacramento River, and the lower Feather River. This HU encompasses an area of approximately 958 mi^2 (2,471 km^2) and contains four HSA watersheds, only two of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify only approximately 61 miles (98 km) of occupied riverine habitat in these watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.,* spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural and municipal water withdrawals, point source and non-point source water pollution, streambank stabilization for flood control, fish passage impediments, water storage for flood control, dam operations, and urbanization. The Team rated one watershed as medium in conservation value and one as high in conservation value to the ESU (NMFS, 2004b). The Team did not identify any

unoccupied habitat areas in this subbasin that may be essential for the conservation of the ESU.

Unit 10. Colusa Basin Subbasin (HU #5520)

The Colusa Basin HU is located in the central portion of the ESU and includes portions of the mainstem Sacramento River, lower Butte Creek, and the Butte Creek-Sutter Bypass. This HU encompasses an area of approximately 2,767 mi^2 (7,139 km^2) and contains five HSA watersheds, four of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 230 miles of occupied riverine habitat, including the Butte Creek-Sutter Bypass, in these watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.,* spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural and municipal water withdrawals, fish passage impediments, point and non-point source pollution, diking, wildlife habitat management, flood control operations, and non-native/invasive species. The Team rated all four occupied watersheds as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied habitat areas in this subbasin that may be essential for the conservation of the ESU.

Unit 11. Butte Creek Subbasin (HU #5521)

The Butte Creek HU is located in the northeastern portion of the ESU and includes portions of upper Butte Creek. This HU encompasses an area of approximately 207 mi^2 (534 km^2) and contains three HSA watersheds, only one of which is occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 15 miles (24 km) of occupied riverine habitat in the watershed (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.,* spawning, rearing, or migratory habitat) for this ESU and identified water diversions for hydroelectric power as the principal management activity that may affect the PCEs. The Team rated this occupied watershed as high in conservation value to the ESU (NMFS, 2004b).

The Team also concluded that inaccessible reaches of Upper Butte Creek above Centerville Dam upstream to Butte Meadow may be essential to the conservation of this ESU. It is uncertain whether this area was historically used by the ESU, but spawning, rearing, and migration is present in the inaccessible areas and is thought to be in good condition. The Team believed this area may be essential for conservation because current spring run chinook and steelhead spawning in this watershed is all below an elevation of 1,000 ft and other spring-run chinook populations within the ESU typically spawn above 2,000 ft. High water temperatures in the lower portion of Butte Creek have led to significant spring-run chinook pre-spawning mortalities in recent years, and the Team concluded that improved fish passage over the Centerville Diversion Dam would increase the range of this ESU and reduce the risk of adult losses in the lower stream reaches. The Team expects that feasibility of passage at the Centerville Diversion Dam will be evaluated through the upcoming FERC relicensing process for the facility. We seek comment on whether these unoccupied habitat areas should be proposed as critical habitat.

Unit 12. Ball Mountain Subbasin (HU #5523)

The Ball Mountain HU is located in the northwestern portion of the ESU and includes a portion of upper Thomes Creek. This HU encompasses an area of approximately 334 mi^2 (862 km^2) and contains three HSAs, only one of which is occupied primarily in the Thomes Creek watershed. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 15 miles (24 km) of occupied riverine habitat in the single occupied HSA watershed (NMFS, 2004a). The Team concluded that the occupied areas in this watershed contained one or more PCEs (*i.e.,* spawning, rearing, or migratory habitat) for this ESU and identified rangeland management as the principal activity that may affect the PCEs. The Team rated this single occupied watershed as low in conservation value to the ESU (NMFS, 2004b). The Team did not identify any occupied habitat areas in this subbasin that may be essential for the conservation of the ESU.

Unit 13. Shasta Bally Subbasin (HU #5524)

The Shasta Bally HU is located in the northwestern portion of the ESU and includes portions of South Fork Cottonwood Creek and Beegum Creek. This HU encompasses an area of approximately 905 mi^2 (2,335 km^2) and contains nine HSA watersheds, four of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 50 miles (80 km) of occupied riverine habitat in these watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including forestry, rangeland management, road building and maintenance, water diversion for hydroelectric power generation, water storage for flood control, dam operations, gravel mining, and fish passage impediments. The Team rated one watershed as low in conservation value and three as high in conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied habitat in this subbasin that is essential for the conservation of the ESU.

Unit 14. North Diablo Range Subbasin (HU #5543)

The North Diablo Range HU is located in the southernmost portion of the ESU near the Delta and includes only a small portion of the south-central Delta. This HU encompasses an area of approximately 315 mi^2 (812 km^2) and only a single HSA which is partially occupied. Fish distribution and habitat use data compiled by NMFS biologists identify only approximately 4 miles (6 km) of occupied riverine or estuarine habitat in this HSA (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, rearing and migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural and municipal water withdrawals, fish passage impediments, and invasive/non-native species. The Team rated this single watershed as medium in conservation value (NMFS, 2004b). The Team did not identify any unoccupied habitat areas in this subbasin that may be essential for the conservation of the ESU.

Unit 15. San Joaquin Delta Subbasin (HU #5544)

The San Joaquin Delta HU is located in the southernmost portion of the ESU and includes portions of the central and south Delta. This HU encompasses an area of approximately 628 mi^2 (1,620 km^2) and contains a single HSA watershed which is occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 142 miles (227 km) of occupied estuarine habitat in this HSA (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural and municipal water

withdrawals, fish passage impediments, invasive/non-native species, and entrainment and flow alterations. The Team rated this single watershed as low in conservation value (NMFS, 2004b). The Team did not identify any unoccupied habitat areas in this subbasin that may be essential for the conservation of the ESU.

Unit 16. Suisun Bay (HU #2207), San Pablo Bay (HU #2206) and San Francisco Bay (HU #s 2203 and 2204)

Portions of four HUs (2207, 2206, 2203, 2204) comprise the Suisun Bay-San Pablo-San Francisco Bay complex that is utilized by this ESU. These four HUs contain both estuarine habitat in the Bay complex as well as freshwater tributaries to the Bay complex, but only the 4 HSAs (HSAs: 220710, 220610, 220410, and 220312) that comprise the estuarine Bay complex are occupied by this ESU. These four HSAs encompass approximately 427 mi^2 (1,102 km^2) of estuarine habitat that serves as a rearing and migratory corridor providing connectivity between freshwater spawning, rearing, and migratory habitats for this ESU in the Sacramento-San Joaquin basin and the ocean. The Team concluded that these four HSAs were occupied and contained PCEs for migratory habitat that support this ESU, and identified management activities that may affect the PCEs, including agricultural and municipal water withdrawals, point and non-point source water pollution, diking, streambank stabilization activities, industrial development, invasive/non-native species, wetland/estuary management, and habitat restoration. Of these occupied HSAs, the Team rated one as having low conservation value (#220410) and three as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in the San Francisco-San Pablo-Suisun Bay complex that may be essential for the conservation of this ESU.

Unoccupied Habitat Outside the ESU Range That May Be Essential to Conservation

The Team identified several unoccupied habitat areas in the Central Valley that are outside the current range of the CV spring-run chinook ESU, but that may be essential for its conservation. We seek comment on whether these unoccupied areas should be proposed as critical habitat. These areas are identified below:

(1) *Lower and Upper Mokelumne River.* The Team concluded that currently unoccupied portions of the Lower Mokelumne River from its confluence with the San Joaquin River upstream to Comanche Dam may be essential for the conservation of this ESU. In addition, the Team concluded that inaccessible reaches of the Upper Mokelumne River above Comanche Dam up to Bald Rock Falls (which is 7 miles above Electra Dam) may be essential to the conservation of this ESU. The Mokelumne River historically supported large runs of spring run chinook salmon (Yoshiyama *et al.*, 1995) which have been extirpated. The lower portion of the Mokelumne River would be essential as a migratory corridor for spring chinook access to the upper watershed above Comanche Dam. Suitable habitat exists above Comanche Dam, but it has been altered by Comanche and Pardee reservoirs. The Central Valley Technical Recovery Team identifies this as a historically independent population and indicates that multiple independent populations of this ESU distributed throughout the Central Valley may be required to recover this ESU.

(2) *Lower and Middle Stanislaus River.* The Team concluded that currently unoccupied reaches of the Lower Stanislaus River from its confluence with the San Joaquin River up to Goodwin Dam may be essential for the conservation of this ESU. The Team also concluded that inaccessible habitat reaches in the Middle Stanislaus River from Goodwin Dam to New Melones Dam may be essential to the conservation of this ESU. The Stanislaus River historically supported a large population of spring-run chinook salmon (McEwan 1996; Yoshiyama 1996) which was extirpated with the construction of Goodwin Dam. The lower portion of the Stanislaus River would be essential as a migratory corridor for spring chinook access to the upper watershed above Goodwin Dam. Depending upon dam operations and resulting instream water temperatures, rearing and spawning habitat might be available in this lower reach. Suitable habitat exists above Goodwin Dam and fish passage at the Dam is thought to be feasible. The Central Valley Technical Recovery Team identifies this as a historically independent population and indicates that multiple independent populations of this ESU distributed throughout the Central Valley may be required to recover this ESU.

(3) *Lower and Middle Tuolumne River.* The Team concluded that currently unoccupied reaches of the Lower Tuolumne River from its confluence with the San Joaquin River up to LaGrange Dam may be essential for the conservation of this ESU. The Team also concluded that inaccessible habitat reaches in the Middle Tuolumne River between LaGrange and New Don Pedro Dams may be essential to the conservation of this ESU. The Tuolumne River historically supported a large population of spring-run chinook salmon (McEwan 1996; Yoshiyama 1996) which was extirpated with the construction of LaGrange Dam. The lower portion of the Stanislaus River would be essential as a migratory corridor for spring chinook access to the upper watershed above LaGrange Dam. Depending upon dam operations and resulting instream water temperatures, rearing and spawning habitat might be available in this lower reach. Suitable habitat is thought to exist above LaGrange Dam for this ESU although feasibility of providing passage above the dam is uncertain. The Central Valley Technical Recovery Team identifies this as a historically independent population that is now extirpated and indicates that multiple independent populations of this ESU distributed throughout the Central Valley may be required to recover this ESU.

(4) *Lower and Middle Merced River.* The Team concluded that currently unoccupied reaches of the Lower Merced River from its confluence with the San Joaquin River up to Crocker-Huffman Dam may be essential for the conservation of this ESU. The Team also concluded that inaccessible habitat reaches in the Middle Merced River between Crocker-Huffman and Exchequer Dams may be essential to the conservation of this ESU. The Merced River historically supported a large population of spring-run chinook salmon (Yoshiyama 1996) which was extirpated with the construction of Crocker-Huffman Dam. The lower portion of the Merced River would be essential as a migratory corridor for spring-chinook access to the upper watershed above Crocker-Huffman Dam. Depending upon dam operations and resulting instream water temperatures, rearing and spawning habitat might be available in this lower reach. Suitable habitat is thought to exist above Crocker-Huffman Dam for this ESU although passage at the Dam is thought to be feasible because of its low height. The Central Valley Technical Recovery Team identifies this as a historically independent population that is now extirpated and indicates that multiple independent populations of this ESU distributed throughout the Central Valley may be required to recover this ESU.

Central Valley (CV) O. mykiss ESU

The CV *O. mykiss* ESU was listed as a threatened species in 1998 (63 FR

13347; March 19, 1998). The ESU includes all naturally spawned populations of *O. mykiss* in the Sacramento and San Joaquin Rivers and their tributaries, but excludes *O. mykiss* from San Francisco and San Pablo Bays and their tributaries. Based on an updated status review (NMFS 2003a) and an assessment of hatchery populations located within the range of the ESU (NMFS 2003b), NMFS recently proposed that the ESU remain listed as a threatened species (69 FR 33102; June 14, 2004). In addition, NMFS proposed that resident *O. mykiss* occurring with anadromous populations below impassable barriers (both natural and man made) and two artificially propagated populations (Coleman National Fish Hatchery on Battle Creek and Feather River Hatchery on the Feather River) also be included in the CV *O. mykiss* ESU. Two artificially propagated *O. mykiss* stocks reside within the historical geographic range of the ESU (Nimbus Fish Hatchery on the American River and Mokelumne River Hatchery on the Mokelumne River), but are not considered part of the ESU because they are derived from out-of-ESU broodstock (69 FR 33102; June 14, 2004). A Technical Recovery Team has been established for the Central Valley recovery planning domain and is in the process of identifying the historical and extant independent population structure of this ESU as well as the associated viability criteria for these populations.

The Team's assessment for the CV *O. mykiss* ESU addressed habitat areas within 67 occupied watersheds or CALWATER HSAs that occur in over 25 associated subbasins or CALWATER HUs. This assessment also included four HSAs that encompass the San Francisco-San Pablo-Suisun Bay complex which constitutes rearing and migration habitat for this ESU. This complex is treated as a separate unit in the following ESU description even though it is not a CALWATER HU. As part of its assessment, the Team considered the conservation value of each habitat area (or HSA) in the context of the productivity, spatial distribution, and diversity of habitat across the range of the ESU. The Team evaluated the conservation value of habitat areas on the basis of the physical and biological habitat requirements of the CV *O. mykiss* ESU, consistent with the PCEs identified for Pacific salmon and *O. mykiss* described under Methods and Criteria Used to Identify Proposed Critical Habitat.

Unit 1. Tehama Subbasin (HU #5504)

The Tehama HU is located in the north central portion of the ESU and includes portions of the mainstem Sacramento River, the lower portions of two westside tributaries (Thomes and Stony Creeks), and the lower portions of three eastside tributaries (Mill Creek, Deer Creek, and Pine Creek). The HU encompasses an area approximately 1,119 mi^2 (2,887 km^2) and contains two HSAs, both of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 228 miles (365 km) of occupied riverine habitat in the occupied watersheds (NMFS, 2004a). The Team concluded that these occupied HSA watersheds contained one or more PCEs (*i.e.*, spawning, rearing, and/or migratory habitat) and identified several management activities that may affect the PCEs, including agricultural and municipal water withdrawals, dam operations, diking activities, streambank stabilization for flood control, rangeland management, fish passage impediments, and urban development. Of the occupied HSA watersheds, the Team rated one as medium and one as high in conservation value (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 2. Whitmore Subbasin (HU #5507)

The Whitmore HU is located in the north eastern portion of the ESU and includes portions of upper Battle Creek (North and South Forks), upper Bear Creek, and the Cow Creek watershed. The HU encompasses an area approximately 913 mi^2 (2,355km^2) and contains seven HSA watersheds, all of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 177 miles (283 km) of occupied riverine habitat in the occupied HSAs (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified management activities that may affect the PCEs, including agricultural and municipal water withdrawals, forest management, rangeland management, fish passage impediments, urban development, and hydropower diversions. Of these seven occupied watersheds, the Team rated two as having low conservation value, two as medium in conservation value, and three as high in conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of this ESU.

Unit 3. Redding Subbasin (HU #5508)

The Redding HU is located in the northern most portion of the ESU and includes portions of the upper Sacramento River mainstem, westside tributaries including Cottonwood Creek (portions of both the Middle and South Forks) and Clear Creek, and the lower portions of several eastside tributaries (Cow Creek, Bear Creek, and lower Battle Creek). The HU encompasses an area of approximately 705 mi^2 (1,818 km^2) and contains two HSA watersheds, both of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 233 miles (373 km) of occupied riverine habitat in these watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) and identified management activities that may affect the PCEs, including dam operations and water storage for flood control, fish passage impediments, point and non-point source water pollution, gravel mining, agricultural water withdrawals, and rangeland management. The Team rated both occupied watersheds as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of this ESU.

Unit 4. Eastern Tehama Subbasin (HU #5509)

The Eastern Tehama HU is located in the northeastern portion of the ESU and includes portions of several important watersheds including Mill Creek, Deer Creek, Antelope Creek, and the upper portion of Big Chico Creek. The HU encompasses an area of approximately 896 mi^2 (2,311 km^2) and contains ten HSA watersheds, six of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 151 miles (242 km) of occupied riverine habitat in the occupied HSAs (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including forest management, rangeland management, fish passage impediments, road building and maintenance, and agricultural water withdrawals. Of the six occupied watersheds, the Team rated one as low, one as medium, and four as high in conservation value to the ESU (NMFS, 2004b).

The Team also concluded that inaccessible stream reaches in Upper

Deer Creek above Upper Deer Creek Falls may be essential for the conservation of this ESU. Historically, *O. mykiss* (steelhead) had access to this area when conditions allowed fish to pass the falls. A ladder was constructed in the late 1940s but it provides poor attraction and passage conditions and has been closed since 2001. Deer Creek currently supports a population of steelhead and improved passage conditions into this reach would increase the amount of spawning, rearing and migration habitat available to the ESU. We seek comment on whether this unoccupied habitat area should be proposed as critical habitat.

Unit 5. Sacramento Delta (HU #5510)

The Sacramento Delta HU is located in the central portion of the ESU and includes portion of the mainstem Sacramento River and the Deep Water Ship Channel. The HU encompasses an area of approximately 446 mi^2 (1,150km^2) and contains a single HSA which is occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 194 miles (310 km) of occupied riverine habitat in this HSA (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural water withdrawals, point and non-point source water pollution, invasive/non-native species, diking activities, and streambank stabilization for flood control. The Team rated this watershed as high in conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied habitat areas in this subbasin that may be essential to the conservation of the ESU.

Unit 6. Valley Putah-Cache Subbasin (HU #5511)

The Valley Putah-Cache HU is located in the southern portion of the Sacramento river basin includes a portion of the Yolo Bypass and portions of west side tributaries Putah, Ulatis, and Alamo Creeks. This HU encompasses an area of approximately 961 mi^2 (2,479 km^2) and contains three HSA watersheds, two of which are occupied. Portions of the occupied HSAs are outside the boundary of ESU and the unoccupied HSA is completely outside the ESU boundary. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 83 miles (133 km) of occupied riverine habitat in the occupied HSAs (NMFS, 2004a). The Team concluded that the occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including urban development, impediments to fish passage, and agricultural water withdrawals. The Team rated both occupied watersheds as having medium conservation value to the ESU (NMFS, 2004b).

Within this subbasin, the Team also concluded that unoccupied stream reaches in Middle Putah Creek from Solano Irrigation Dam to Monticello Dam may be essential to the conservation of this ESU. Steelhead are thought to have historically utilized the upper watershed above Monticello Dam. There is currently a very small opportunistic population of steelhead in Lower Putah Creek, but habitat conditions in this area are not suitable for spawning or rearing. The provision of fish passage past the Solano Irrigation Dam would provide access to suitable habitat for this ESU and efforts are currently underway to investigate the feasibility of providing passage beyond this dam. The Team concluded that this unoccupied area may be essential to conservation of the ESU because populations of steelhead in the Central Valley are constrained by the lack of accessible habitat and access to this area would provide cold water rearing and spawning habitat for this population. We seek comments on whether these unoccupied areas should be proposed as critical habitat.

Unit 7. American River Subbasin (HU #5514)

The American River HU is located in the eastern portion of the ESU and includes portions of upper Coon Creek, Doty Creek, and Auburn Ravine. This HU encompasses an area of approximately 1,642 mi^2 (4,236 km^2) and contains fifteen HSA watersheds, all of which are outside the range of the ESU, and only one of which is partially occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 20 miles of occupied riverine habitat in the occupied HSA (NMFS, 2004a). The Team concluded that the occupied watershed contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified urban development as the primary management activity that may affect the PCEs. The Team rated this occupied watershed as having medium conservation value (NMFS, 2004b) and did not identify any unoccupied habitat in this subbasin that may be essential for the conservation of the ESU.

Unit 8. Marysville Subbasin (HU #5515)

The Marysville HU is located in the central portion of the ESU and includes portions of the Feather and Yuba Rivers. This HU encompasses an area of approximately 417 mi^2 (1,076 km^2) and contains three HSA watersheds, all of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 75 miles (120 km) of occupied riverine habitat in these watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural and municipal water withdrawals, point and non-point water pollution, diking, streambank stabilization activities, dam operations and water storage for flood control, and fish passage impediments. The Team rated one occupied watershed as low in conservation value and two as having high conservation value to the ESU (NMFS, 2004b).

The Team did not identify any unoccupied habitat areas in this subbasin that may be essential for the conservation of the ESU. However, the Team did conclude that inaccessible stream reaches in the adjacent subbasin (in HU #5518) which contains the Upper Feather River above Oroville Dam may be essential to the conservation of this ESU. Specifically, the Team identified the following stream reaches above Oroville Dam that may be essential for conservation of this ESU: from Oroville Dam upstream along the West Branch of the Feather River to the vicinity of Kimshew Falls; along the North Fork of the Feather River upstream of the location of Lake Almanor; along the East Branch of the NF Feather River including Indian Creek and Spanish Creek; the South Middle Fork of the Feather River, and the South Fork of the Feather River upstream to the first natural impassible barrier. Both steelhead and spring-run chinook salmon historically occurred in the Upper Feather River prior to Pacific Gas and Electric's hydroelectric development in the North Fork watershed and the construction of Oroville Dam. Construction of Oroville Dam extirpated both the steelhead and spring-run chinook populations in this upper watershed. The Team concluded that spawning, rearing, an migratory habitat is available above Oroville Dam in these inaccessible stream reaches, but it is in better condition for steelhead than spring-run chinook salmon. The feasibility of providing fish passage past

Oroville Dam is currently being evaluated through the ongoing FERC relicensing process for this facility. The Team concluded this inaccessible habitat may be essential for the conservation of this ESU because the natural production of steelhead in the lower Feather River is limited by the substantial lack of suitable spawning and rearing habitat below Oroville Dam, and access to the unoccupied habitat above the dam would allow for expansion of the population in this watershed.

Unit 9. Yuba River Subbasin (HU #5517)

The Yuba River HU is located in the central and eastern portion of the ESU and includes part of the upper Yuba River watershed (Dry and Deer Creeks). This HU encompasses an area of approximately 1,436 mi^2 (3,704 km^2) and contains sixteen HSA watersheds, most of which are outside the recognized ESU boundary; however, four of these watersheds are partially occupied. Fish distribution and habitat use data compiled by NMFS biologists identify only approximately 22 miles (35 km) of occupied riverine habitat in these occupied watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural and municipal water withdrawals, fish passage impediments, and dam operations. The Team rated two of these watersheds as having low conservation value, and two as having high conservation value to the ESU (NMFS, 2004b).

The Team concluded that inaccessible stream reaches of the Upper Yuba River above Englebright Dam may be essential to the conservation of this ESU, including those upstream reaches on the North Yuba to New Bullards Bar Dam, on the Middle Yuba to Milton Dam, and on the South Yuba to Lake Spaulding. All three forks of the Upper Yuba River historically supported populations of spring chinook and steelhead (Yoshiyama *et al.*, 1995). The Team considered this area to be essential for conservation because it provides one of the largest areas of suitable habitat in the Central Valley that can be accessed by providing passage at one relatively small dam. The Lower Yuba is also considered to have a good ''seed'' population of both spring chinook and steelhead and both populations are considered relatively free of hatchery influence. A large, multi-million dollar study program is underway through the CALFED Ecological Restoration Program to evaluate the feasibility of restoring anadromous salmonid populations to the Upper Yuba River. We seek comment on whether this unoccupied habitat should be proposed as critical habitat.

Unit 10. Valley-American Subbasin (HU #5519)

The Valley-American HU is located in the central-eastern portion of the ESU and includes portions of the American River and lower Auburn Ravine. This HU encompasses an area of approximately 958 mi^2 (2,471 km^2) and contains four HSA watersheds, only two of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 190 miles (304 km) of occupied riverine habitat in these watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, agricultural and municipal water withdrawals, point and non-point source water pollution, streambank stabilization activities, fish passage impediments, diking, urban development, and dam operations and water storage for flood control. The Team rated both occupied watersheds as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential to the conservation of the ESU.

Unit 11. Colusa Basin Subbasin (HU #5520)

The Colusa Basin HU is located in the central portion of the ESU and includes portions of the mainstem Sacramento River, lower Butte Creek, the Butte Creek-Sutter Bypass and Little Chico Creek. This HU encompasses an area of approximately 2,767 mi^2 (7,138 km^2) and contains five HSA watersheds, three of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 285 miles (456 km) of occupied riverine habitat, including the Sutter Bypass, in the occupied watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural water withdrawals, point and non-point water pollution, diking, fish passage impediments, streambank stabilization activities, wildlife habitat management, and invasive/non-native species management. The Team rated all three occupied watersheds as having high conservation value to the ESU (NMFS, 2004b) and did not identify any unoccupied habitat areas in this subbasin that may be essential to the conservation of the ESU.

Unit 12. Butte Creek Subbasin (HU #5521)

The Butte Creek HU is located in the northeastern portion of the ESU and contains portions of Butte Creek and Little Chico Creek. This HU encompasses an area of approximately 207 mi^2 (534 km^2) and contains three HSA watersheds all of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 38 miles (61 km) of occupied riverine habitat in the occupied watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including urban development, rangeland management, agricultural water withdrawals, and hydroelectric water diversions. The Team rated two of these watersheds as having low conservation value and one as having high conservation value to the ESU (NMFS, 2004b).

The Team also concluded that inaccessible reaches of Upper Butte Creek above Centerville Dam upstream to Butte Meadow may be essential to the conservation of this ESU. It is uncertain whether this area was historically used by the steelhead, but resident rainbow trout were historically present and still occur above Centerville Diversion Dam. Spawning, rearing, and migration is present and thought to be in good condition. The Team believed this area may be essential for conservation because current spring-run chinook and steelhead spawning in this watershed is all below an elevation of 1,000 ft. High water temperatures in the lower portion of Butte Creek has led to significant spring-run chinook pre-spawning mortalities in recent years, and the Team concluded that improved fish passage over the Centerville Diversion Dam would increase the range for both the spring run chinook and steelhead ESUs, as well as reduce the risk of adult losses in the lower stream reaches. The Team expects that feasibility of passage at the Centerville Diversion Dam will be evaluated through the upcoming FERC relicensing process for the facility. We seek comment on whether this unoccupied habitat area should be proposed as critical habitat.

Unit 13. Ball Mountain Subbasin (HU #5523)

The Ball Mountain HU is located in the northwestern portion of the ESU and includes a portion of upper Thomes Creek and associated tributaries. This HU encompasses an area of approximately 334 mi^2 (862 km^2) and contains three HSA watersheds, only one of which is occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 41 miles (66 km) of occupied riverine habitat in the single occupied watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including rangeland management, forestry management, agricultural water withdrawals, and municipal water withdrawals. The Team rated this single occupied watershed as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in the subbasin that may be essential for conservation of the ESU.

Unit 14. Shasta Bally Subbasin (HU #5524)

The Shasta Bally HU is located in the northwestern corner of the ESU and includes portions of SF Cottonwood Creek and Beegum Creek among others. This HU encompasses an area of approximately 905 mi^2 (2,335 km^2) and contains nine HSA watersheds, five of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 122 miles (195 km) of occupied riverine habitat in the occupied watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including forestry management, rangeland management, road building and maintenance, hydroelectric power water diversions, water storage for flood control, dam operations, gravel mining, and fish passage impediments. Of the occupied watersheds, the Team rated three as having medium conservation value and two as having high conservation value for the ESU (NMFS, 2004b). The Team did not identify any unoccupied habitat areas in this subbasin that may be essential for the conservation of the ESU.

Unit 15. North Valley Floor Subbasin (HU #5531)

The North Valley Floor HU is located in the southeastern portion of the ESU and includes portions of the Calaveras, Mokelumne, and Cosumnes Rivers. This HU encompasses an area of approximately 1,378 mi^2 (3,555 km^2) and contains five HSA watersheds, three of which are occupied by the ESU. Fish distribution and habitat use data compiled by NMFS biologists identify about 190 miles (304 km) of occupied riverine habitat in these watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural and municipal water withdrawals, fish passage impediments, rangeland management, diking, channelization, streambank stabilization activities, and dam operations. Of these occupied watersheds, the Team rated one as low in conservation value, one as having medium conservation value, and one as having high conservation value to the ESU (NMFS, 2004b).

The Team also concluded that inaccessible stream reaches of the Upper Mokelumne River above Comanche Dam up to Bald Rock Falls (which is 7 miles above Electra Dam) may be essential to the conservation of this ESU, as well as spring-run chinook salmon. Portions of this inaccessible habitat area extend into the Middle Sierra Subbasin (HU #5532). The Upper Mokelumne historically supported large runs of spring-run chinook salmon (Yoshiyama *et al.*, 1995), and since steelhead and spring-run chinook use similar habitats it is assumed this area also supported large runs of steelhead. Suitable habitat exists above Comanche Dam, but it has been altered by Comanche and Pardee reservoirs. The Team concluded that this area may be essential for conservation of the ESU because steelhead have been extirpated from the area above the dam and recovery of this ESU may require the re-establishment of multiple independent populations of steelhead throughout the Central Valley. We seek comment on whether these unoccupied habitat areas should be proposed as critical habitat.

Unit 16. Middle Sierra Subbasin (HU #5532)

The Middle Sierra HU is located in the eastern portion of the ESU and contains portions of the upper Cosumnes River watershed. This HU encompasses an area of approximately 1,424 mi^2 (3,674 km^2) and contains six HSA watersheds, four of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify only about 70 miles (112 km) of occupied riverine habitat in the occupied watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including forestry management, agricultural water withdrawals, rangeland management, and urban development. Of these occupied watersheds, the Team rated all four as having low conservation value to the ESU (NMFS, 2004b). As discussed for Unit 15 (North Valley Floor Subbasin—HU #5531), inaccessible portions of the upper Mokelumne River which may be essential to the conservation of this ESU extend into this subbasin. The Team did not identify any other unoccupied areas in this subbasin that may be essential to the conservation of the ESU.

Unit 17. Upper Calavera Subbasin (HU #5533)

The Upper Calaveras HU is located in the eastern portion of the ESU and contains portions of the Calaveras River. This HU encompasses an area of approximately 362 mi^2 (934 km^2) and contains three HSA watersheds, only one of which is occupied by the ESU. Fish distribution and habitat use data compiled by NMFS biologists identify only about 6 miles of occupied riverine habitat in the HSA (NMFS, 2004a). The Team concluded that occupied areas in this HSA watershed contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural and municipal water withdrawals, gravel mining, and water storage for flood control. The Team rated this single occupied watershed as having high conservation value to the ESU (NMFS, 2004b) and did not identify any unoccupied areas in this subbasin that may be essential for conservation.

Unit 18. Stanislaus River Subbasin (HU #5534)

The Stanislaus River HU is located in the southeastern portion of the ESU and contains portions of the Stanislaus River. This HU encompasses an area of approximately 998 mi^2 (2,575 km^2 and contains eight HSA watersheds; however, only one is in the ESU and occupied. Fish distribution and habitat use data compiled by NMFS biologists identify only about 3 miles of occupied

riverine habitat in this HSA (NMFS, 2004a). The Team concluded that the occupied areas in this watershed contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural water withdrawals, fish passage impediments, dam operations, and water storage for flood control. The Team rated this single occupied watershed as having high conservation value to the ESU (NMFS, 2004b).

Within this subbasin, the Team also concluded that inaccessible stream reaches in the Middle Stanislaus River from Goodwin Dam to New Melones Dam may be essential to the conservation of this ESU. The Stanislaus River historically supported a large population of spring-run chinook salmon and because steelhead utilize similar habitats it is likely that this River system also supported a large population of steelhead. Construction of Goodwin Dam blocked access of steelhead to those portions of the Stanislaus River above the Dam and largely extirpated this population. Recently, however, dam operations have provided conditions that allowed a few steelhead to spawn below Goodwin Dam. Suitable habitat is thought to exist above Goodwin Dam for steelhead and fish passage is considered feasible because of its low height. Based on preliminary technical recovery planning for ESUs in the central valley, recovery of this ESU will likely require the establishment of multiple independent steelhead populations particularly in the San Joaquin portion of the central valley. We seek comment on whether these unoccupied areas should be proposed as critical habitat for this ESU.

Unit 19. San Joaquin Valley Floor Subbasin (HU #5535)

The San Joaquin Valley Floor HU is located in the southeastern portion of the ESU and contains portions of the Merced, Tuolumne, and Stanislaus Rivers. This HU encompasses an area of approximately 1,932 mi^2 (4,985 km^2) and contains nine HSA watersheds, several of which occur outside of or partially outside of the geographic boundary of the ESU. Of these watersheds, seven are occupied and fish distribution and habitat use data compiled by NMFS biologists identify about 159 miles (254 km) of occupied riverine habitat (NMFS, 2004a). The Team concluded that these occupied watersheds contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural and municipal water withdrawals, diking, fish passage impediments, streambank stabilization activities, and urban development. Of these occupied watersheds, the Team rated three as having medium conservation value and four as having high conservation value to the ESU (NMFS, 2004b).

Within this subbasin, the Team also concluded that inaccessible stream reaches in the Middle Tuolumne River (between LaGrange and New Don Pedro Dams) and the Middle Merced River (between Crocker-Huffman and Exchequer Dams) may be essential to the conservation of this ESU. Both rivers historically supported large populations of spring-run chinook salmon and because steelhead utilize similar habitat it is likely that these rivers also supported large populations of steelhead. Although current central valley steelhead populations are considered winter-run, habitat conditions in most San Joaquin basins, including the Tuolumne and Merced, may have historically supported summer steelhead (McEwan, 1996; Yoshiyama, 1996). With construction of LaGrange and Crocker-Huffman Dams, spring-chinook in both basins were extirpated, and most likely steelhead as well. Although steelhead cannot access the upper watersheds in the Tuolumne and Merced Rivers, dam operations in both watersheds have provided conditions allowing steelhead to spawn downstream of LaGrange and Crocker-Huffman Dams. The Team believes that suitable habitat conditions exist above LaGrange and Crocker-Huffman Dams and that there may be opportunities to provide fish passage at each facility. Based on preliminary technical recovery planning for ESUs in the central valley, it is likely that recovery of this ESU will require the establishment of multiple independent steelhead populations particularly in the San Joaquin portion of the central valley. We seek comment on whether these unoccupied areas should be proposed as critical habitat for this ESU.

Units 20 (Tuolumne River; HU #5536) and 21 (Merced River; HU #5537)

The Tuolumne River and Merced River HUs contain portions of the upper Tuolumne and Merced Rivers that are mostly or entirely outside the range of the ESU. These HUs contain eighteen HSA watersheds and over 2,800 miles (4,480 km) of streams (at 1:100,000 hydrography), but all are unoccupied by the ESU. The Team did not identify any areas in these subbasins that may be essential for the conservation of the ESU, and therefore, they were not considered further in the critical habitat designation process.

Unit 22. Delta-Mendota Canal Subbasin (HU #5541)

The Delta-Mendota Canal HU is located in the southernmost portion of the ESU and contains portions of the Delta-Mendota Canal. This HU encompasses an area of approximately 1,220 mi^2 (3,148 km^2) and contains two HSAs, both of which are occupied. Fish distribution and habitat use data compiled by NMFS biologists identify only about 50 miles of occupied riverine habitat in these HSA watersheds (NMFS, 2004a). The Team concluded that these occupied areas contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural and municipal water withdrawals, invasive/non-native species management, urban development, dredging, and point and non-point source water pollution. The Team rated these occupied watersheds as having medium and high conservation value, respectively, to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas in this subbasin that may be essential for the conservation of the ESU.

Unit 23. Middle West Side Subbasin (HU #5542)

The Middle West Side Subbasin is located in the southwestern portion of the ESU in the San Joaquin basin. The HU contains four HSAs and approximately 509 miles (814 km) of streams (at 1:100,000 hydrography), but all are unoccupied by the ESU. The Team did not identify any habitat areas in this subbasin that may be essential for the conservation of the ESU, and therefore, they were not considered further in the critical habitat designation process.

Unit 24. North Diablo Range (HU #5543)

The North Diablo Range HU is located in the southwestern portion of the ESU in the south Delta. This HU encompasses an area of approximately 315 mi^2 (812 km^2) and contains only a single HSA which is partially occupied. Fish distribution and habitat use data compiled by NMFS biologists identify only approximately 4 miles of occupied riverine/estuarine habitat in this HSA (NMFS, 2004a). The Team concluded the occupied areas in this HSA contained one or more PCEs (*i.e.* spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural and water

withdrawals, point and non-point source water pollution, and invasive/non-native species management. The Team rated this watershed as having medium conservation value to the ESU (NMFS, 2004b), and did not identify any unoccupied areas that may be essential to the conservation of the ESU.

Unit 25. San Joaquin Delta Subbasin (HU #5544)

The San Joaquin Delta HU is located in the southwestern portion of the ESU and includes portions of the south and central Delta channel complex. This HU encompasses an area of approximately 628 mi^2 (1,620 km^2) and contains a single HSA which is occupied. Fish distribution and habitat use data compiled by NMFS biologists identify approximately 276 miles (442 km) of occupied riverine and/or estuarine habitat in this HSA (NMFS, 2004a). The Team concluded that the occupied areas in this HSA contained one or more PCEs (*i.e.*, spawning, rearing, or migratory habitat) for this ESU and identified management activities that may affect the PCEs, including agricultural water and municipal water withdrawals, entrainment associated with water diversions, invasive/non-native species management, and point and non-point source water pollution. The Team rated this HSA as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied habitat areas in this subbasin that may be essential for the conservation of this ESU.

Unit 26. Suisun Bay (HU #2207), San Pablo Bay (HU #2206) and San Francisco Bay (HU #s 2203 and 2204)

Portions of four HUs (2207, 2206, 2203, 2204) comprise the Suisun Bay-San Pablo-San Francisco Bay complex that is utilized by this ESU. These four HUs contain both estuarine habitat in the Bay complex as well as freshwater tributaries to the Bay complex, but only the 4 HSAs (HSAs: 220710, 220610, 220410, and 220312) that comprise the Bay complex are occupied by this ESU. These four HSAs encompass approximately 427 mi^2 (1,102 km^2) of estuarine habitat that serves as a rearing and migratory corridor providing connectivity between freshwater spawning, rearing, and migratory habitats for this ESU in the Sacramento-San Joaquin basin and the ocean. Collectively, these HSAs encompass an area of approximately 427 mi^2 (1,102 km^2). The Team concluded that these four HSAs were occupied and contained PCEs for migratory habitat that support this ESU, and identified management activities that may affect the PCEs, including agricultural and municipal water withdrawals, point and non-point source water pollution, diking, streambank stabilization activities, industrial development, invasive/non-native species, wetland/estuary management, and habitat restoration. Of these occupied HSAs, the Team rated one as having low conservation value (#220410) and three as having high conservation value to the ESU (NMFS, 2004b). The Team did not identify any unoccupied areas that may be essential for the conservation as critical habitat for this ESU.

Application of ESA Section 4(b)(2)

The foregoing discussion describes those areas that are eligible for designation as critical habitat—the specific areas that fall within the ESA section 3(5)(A) definition of critical habitat, minus those lands owned or controlled by the DOD, or designated for its use, that are covered by an INRMP that we have determined in writing provides a benefit to the species. The application of section 4(b)(2) was a major concern of those commenting on the ANPR (68 FR 55926; September 29, 2003). Many commenters requested that we describe the process used—in particular the economic analysis—as part of our proposed rulemaking.

Specific areas eligible for designation are not automatically designated as critical habitat. Section 4(b)(2) of the ESA requires that the Secretary first considers the economic impact, impact on national security, and any other relevant impact. The Secretary has the discretion to exclude an area from designation if he determines the benefits of exclusion (that is, avoiding the impact that would result from designation), outweigh the benefits of designation. The Secretary may not exclude an area from designation if exclusion will result in the extinction of the species. Because the authority to exclude is discretionary, exclusion is not required for any areas.

In this proposed rule, the Secretary has applied his statutory discretion to exclude areas from critical habitat for several different reasons. To be consistent, we used CALWATER HSAs or watersheds for ESUs in California as the unit for exclusion in each case. However, the agency is asking for public comment on whether considering exclusions on a stream-by-stream approach would be more appropriate.

Impacts to Tribes

We believe there is very little benefit to designating critical habitat on Indian lands. Although there is a broad array of activities on Indian lands that may trigger section 7 consultation, Indian lands comprise only a minor portion (substantially less than 1 percent) of the total habitat under consideration for these seven California ESUs. Specifically, occupied stream reaches on Indian lands only occur within the range of the California Coastal chinook, Northern California *O. mykiss,* and Central California Coast *O. mykiss* ESUs, and these areas represent less than 0.1 percent of the total occupied habitat under consideration for these three ESUs. Based on our analysis, the remaining four ESUs did not contain any Indian lands that overlapped with occupied stream habitat. These percentages are likely overestimates as they include all habitat area within reservation boundaries.

There are several benefits to excluding Indian lands. The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. Pursuant to these authorities lands have been retained by Indian Tribes or have been set aside for tribal use. These lands are managed by Indian Tribes in accordance with tribal goals and objectives within the framework of applicable treaties and laws.

In addition to the distinctive trust relationship for Pacific salmon in California and in the Northwest, there is a unique partnership between the Federal government and Indian tribes regarding salmon management. Indian tribes in California and the Northwest are regarded as ''co-managers'' of the salmon resource, along with Federal and state managers. This co-management relationship evolved as a result of numerous court decisions clarifying the tribes' treaty right to take fish in their usual and accustomed places.

The benefits of excluding Indian lands from designation include: (1) The furtherance of established national policies, our Federal trust obligations and our deference to the tribes in management of natural resources on their lands; (2) the maintenance of effective long-term working relationships to promote the conservation of salmonids on an

ecosystem-wide basis; (3) the allowance for continued meaningful collaboration and cooperation in scientific work to learn more about the conservation needs of the species on an ecosystem-wide basis; and (4) continued respect for tribal sovereignty over management of natural resources on Indian lands through established tribal natural resource programs.

We believe that the current co-manager process addressing activities on an ecosystem-wide basis across three states is currently beneficial for the conservation of the salmonids. Because the co-manager process provides for coordinated ongoing focused action through a variety of forums, we find the benefits of this process to be greater than the benefits of applying ESA section 7 to Federal activities on Indian lands, which comprise much less than one percent of the total area under consideration for these ESUs. Additionally, we have determined that the exclusion of tribal lands will not result in the extinction of the species concerned. We also believe that maintenance of our current co-manager relationship consistent with existing policies is an important benefit to continuance of our tribal trust responsibilities and relationship. Based upon our consultation with the Round Valley Indian Tribes and the Bureau of Indian Affairs (BIA), we believe that designation of Indian lands as critical habitat would adversely impact our working relationship and the benefits resulting from this relationship.

Based upon these considerations, we have determined to exercise agency discretion under ESA section 4(b)(2) and propose to exclude Indian lands from the eligible critical habitat designation for these ESUs of salmonids. The Indian lands specifically excluded from critical habitat are those defined in the Secretarial Order, including: (1) Lands held in trust by the United States for the benefit of any Indian tribe; (2) land held in trust by the United States for any Indian Tribe or individual subject to restrictions by the United States against alienation; (3) fee lands, either within or outside the reservation boundaries, owned by the tribal government; and (4) fee lands within the reservation boundaries owned by individual Indians. The Indian tribes for which these exclusions apply in California include: Big Lagoon Reservation, Blue Lake Rancheria, Round Valley Indian Tribes, Laytonville Rancheria, Redwood Valley Rancheria, Coyote Valley Reservation, and Manchester—Point Arena Rancheria.

Impacts to National Security

As noted previously (see Military Lands section) the U.S. Marine Corps provided comments in response to the ANPR (68 FR 55926; September 29, 2003) regarding their INRMP for Camp Pendleton Marine Corps Base and potential impacts to national security for this facility, which is within the range of the southern California *O. mykiss* ESU. By letter, NMFS subsequently provided the DOD with information about the areas we were considering to designate as critical habitat for the seven ESUs in California (as well as the 13 ESUs in the Pacific Northwest) and, in addition to a request for information about DOD's INRMPs, requested information about potential impacts to national security as a result of any critical habitat designation. In response to the request concerning national security impacts, Camp Pendleton Marine Corps Base and the Vandenberg Air Force Base provided detailed information on such impacts. Both military agencies concluded that critical habitat designation at either of these sites would likely impact national security by diminishing military readiness. The possible impacts include: (1) Preventing, restricting, or delaying training or testing exercises or access to such sites; (2) restricting or delaying activities associated with space launches; (3) delaying response times for troop deployments and overall operations; and (4) creating uncertainties regarding ESA consultation (*e.g.*, reinitiation requirements) or imposing compliance conditions that would divert military resources. Also, both military agencies cited their ongoing and positive consultation history with NMFS and underscored cases where they are implementing best management practices to reduce impacts on listed salmonids.

The Teams assessing conservation values for the overlap areas of habitat and Camp Pendleton and Vandenberg AFB concluded that all of them were of high conservation value to the respective ESUs. The overlap areas, however, are a small percentage of the total area for the affected ESUs. Designating habitat on these two installations will likely reduce the readiness capability of the Marine Corps and the Air Force, both of which are actively engaged in training, maintaining, and deploying forces in the current war on terrorism. Therefore, we conclude that the benefits of exclusion outweigh the benefits of designation, and we are not proposing to designate these DoD sites as critical habitat.

We anticipate working with DOD to obtain and review any additional information regarding national security impacts to other military installations before issuing a final critical habitat designation for the seven ESUs that are the subject of this proposed rulemaking. We will analyze any information we receive and prepare findings that will be made available for public review and comment through a notice of availability in the **Federal Register**.

Other Potential Exclusions

As discussed above, in 2001 the Tenth Circuit issued a ruling in *NMCA*, which criticized the historic approach that FWS and NMFS had taken towards the economic analysis required in the critical habitat designation process. As a result of this ruling, both agencies engaged in a long-term process of reevaluating existing critical habitat designations consistent with the Tenth Circuit's ruling. NMFS's critical habitat designations for steelhead and salmon ESUs and FWS's designations for bull trout are the first to fully evaluate the economic impacts of the designations for aquatic species on a broad landscape scale. As a result, many of the critical issues faced by the two agencies are issues of first impression.

On October 6, 2004, the FWS issued a final rule designating critical habitat for the bull trout, a species in many respects co-extensive in distribution with listed salmon and steelhead ESUs in the Pacific Northwest. Necessarily, the FWS had to make determinations on many of these novel issues. The Secretary of the Interior found that a number of conservation measures designed to protect salmon and steelhead on Federal, state, tribal and private lands would also have significant beneficial impacts to bulltrout. Therefore, the Secretary of the Interior determined that the benefits of excluding those areas exceeded the benefits of including those areas as critical habitat.

The Secretary of Commerce has reviewed the bull trout rule and has recognized the merits of the approach taken by the Secretary of the Interior with these emerging issues. As a result, the Secretary of Commerce is considering the following exclusions because the benefits of exclusion may outweigh the benefits of inclusion and expects the final rule will include some or all of these exclusions. However, given the time constraints associated with this rule making and the broader geographic range of the potential salmon and steelhead designations in California and the Pacific Northwest, the Secretary of Commerce has not had an

opportunity to fully evaluate all of the potential exclusions, the geographical extent of such exclusions, or compare the benefits of these exclusions to the benefits of inclusion. As a result, the proposed designations included in this rule generally represent an upper bound to the area that the Secretary is considering designating as critical habitat and do not include the following additional exclusions that the Secretary is considering:

A set of exclusions based on existing land management plans adopted and currently implemented by Federal agencies within the relevant geographic area: These plans are the Northwest Forest Plan, PACFISH and INFISH which are implemented by the U.S. Forest Service (USFS) and the Bureau of Land Management (BLM) in parts of California and the Pacific Northwest. The Secretary is considering excluding from critical habitat all Federal lands subject to these plans. We may make these exclusions on a fifth field watershed basis or a stream-by-stream basis and we invite comment on the appropriate method. Each of these plans is designed to provide very substantial conservation benefits to salmonid species including areas occupied by each of the seven California ESUs, while permitting provision of other multiple uses on those Federal lands to the extent compatible with the provisions of the plan. Imposing an overlay of critical habitat in these areas could threaten the provision of the other multiple used contemplated by these plans and potentially impede vital land restoration activities while potentially offering a negligible conservation benefit in light of the other existing conservation measures provided by the plans. The threat to forest restoration activities (forest thinning and brush clearing to reduce catastrophic fire risks), economic activities (*e.g.* grazing and timber production) and recreational uses on public lands may outweigh the benefit of a critical habitat designation in these areas.

Federal land managed by the Forest Service and BLM constitutes a relatively lesser proportion of the land ownership within the range of the seven California ESUs (4–25 percent) compared with private land (71–88 percent). However, the estimated annualized economic impacts attributable to section 7 consultations on Federal land management activities comprise a disproportionately large portion of the total annual costs for several of the California ESUs. This relationship is most pronounced for the California Coastal chinook and Northern California *O. mykiss* ESUs. For example, Federal lands comprise only 16 percent of the land ownership within the California Coastal chinook ESU, but approximately 77 percent of the annualized section 7 economic impacts are attributable to Federal land management. Similarly, Federal lands comprise only 18 percent of the land ownership within the Northern California *O. mykiss* ESU, but approximately 87 percent of the annualized section 7 economic impacts are attributable to Federal land management. Section 7 related economic impacts associated with Federal land management also constitute a significant portion of the total annual economic impact for the South-Central California Coast *O. mykiss* (44 percent) and Southern California *O. mykiss* (69 percent) ESUs.

An exclusion of areas covered by conservation commitments by state and private landowners: Another set of exclusions is based on conservation commitments by state and private landowners reflected in habitat conservation plans (HCPs) and cooperative agreements approved by NMFS. In California, we have not identified any state conservation commitments that would apply, but seek public comment on this issue. With regard to private lands, however, the HCP adopted by the Pacific Lumber Company would constitute such a commitment. Lands managed under the existing Pacific Lumber Company HCP are relatively limited in comparison to the broad geographic area addressed in this rulemaking, but do occur within the geographic range of the California Coastal chinook and Northern California *O. mykiss* ESUs. Several other HCPs are under development in California, but they have not yet been adopted and therefore their conservation benefits are uncertain.

An exclusion for intermingled lands: If a large part of a watershed is determined to warrant exclusion, the Secretary is considering excluding the entire watershed. For example, if a large proportion of a watershed consists of Federal land to be excluded based on an existing management plan, the entire watershed could be excluded. There may be little policy justification for designating non-Federal lands as critical habitat in a watershed dominated by excluded Federal lands. As noted above, Federal lands do not constitute a large portion of the land ownership in any of the seven California ESUs under consideration. However, there are areas within the range of each of the ESUs where Federal lands are more concentrated and intermingled non-Federal lands occur to a limited extent. Such conditions occur mainly in specific watersheds within the range of the California Coastal chinook, Northern California *O. mykiss*, South-Central California Coast *O. mykiss*, and Southern California *O. mykiss* ESUs.

Accordingly, NMFS specifically asks for public comment on the categories of exclusions discussed above. Specifically, NMFS requests comment on the benefits of excluding:

(1) Other Federal lands subject to protective management provisions for salmonids (*e.g.*, the Aquatic Conservation Strategy of the Northwest Forest Plan, PACFISH, or INFISH);

(2) Other state, tribal, or private lands subject to (or planned to receive) other forms of protective management for salmonids (*e.g.*, private land HCPs, State of California Forest Practices Act lands); and

(3) Other state, tribal, or private lands within watersheds containing a large proportion of Federal, state, tribal or private lands already subject to protective management measures.

Exclusions Primarily Based on Economic Impacts

In this exercise of discretion, the first issue we must address is the scope of impacts relevant to the 4(b)(2) evaluation. As discussed in the Previous Federal Action section, we are re-designating critical habitat for these seven ESUs in California because the previous designations were vacated. (*National Association of Homebuilders* v. *Evans*, 2002 WL 1205743 No. 00–CV–2799 (D.D.C.) (*NAHB*)). The *NAHB* Court had agreed with the reasoning of the Court of Appeals for the Tenth Circuit in *New Mexico Cattle Growers Association* v. *U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). In that decision, the Tenth Circuit stated ''[t]he statutory language is plain in requiring some kind of consideration of economic impact in the critical habitat designation phase.'' The Tenth Circuit concluded that, given the FWS' failure to distinguish between ''adverse modification'' and ''jeopardy'' in its 4(b)(2) analysis, the FWS must analyze the full impacts of critical habitat designation, regardless of whether those impacts are co-extensive with other impacts (such as the impact of the jeopardy requirement).

In re-designating critical habitat for these seven salmon and *O. mykiss* ESUs, we have followed the Tenth Circuit Court's directive regarding the statutory requirement to consider the economic impact of designation. Areas designated as critical habitat are subject to ESA section 7 requirements, which provide that Federal agencies ensure that their actions are not likely to destroy or

adversely modify critical habitat. To evaluate the economic impact of critical habitat we first examined our voluminous section 7 consultation record for these as well as other ESUs of salmon. That record includes consultations on habitat-modifying Federal actions both where critical habitat has been designated and where it has not. We could not discern a distinction between the impacts of applying the jeopardy provision versus the adverse modification provision in occupied critical habitat. Given our inability to detect a measurable difference between the impacts of applying these two provisions, the only reasonable alternative was to follow the recommendation of the Tenth Circuit, approved by the *NAHB* court—to measure the co-extensive impacts; that is, measure the entire impact of applying the adverse modification provision of section 7, regardless of whether the jeopardy provision alone would result in the identical impact.

The Tenth Circuit's opinion only addressed ESA section 4(b)(2)'s requirement that economic impacts be considered. The Court did not address how ''other relevant impacts'' were to be considered, nor did it address the benefits of designation. Because section 4(b)(2) requires a consideration of other relevant impacts of designation, and the benefits of designation, and because our record did not support a distinction between impacts resulting from application of the adverse modification provision versus the jeopardy provision, we are uniformly considering coextensive impacts and coextensive benefits, without attempting to distinguish the benefit of a critical habitat consultation from the benefit that would otherwise result from a jeopardy consultation that would occur even if critical habitat were not designated. To do otherwise would distort the balancing test contemplated by section 4(b)(2).

The principal benefit of designating critical habitat is that Federal activities that may affect such habitat are subject to consultation pursuant to section 7 of the ESA. Such consultation requires every Federal agency to ensure that any action it authorizes, funds or carries out is not likely to result in the destruction or adverse modification of critical habitat. This complements the section 7 provision that Federal agencies ensure that their actions are not likely to jeopardize the continued existence of a listed species. Another benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, and thereby, focus and contribute to conservation efforts by clearly delineating areas of high conservation value for certain species. It is unknown to what extent this process actually occurs and what the actual benefit is, as there are also concerns, noted above, that a critical habitat designation may discourage such conservation efforts.

The balancing test in section 4(b)(2) contemplates weighing benefits that are not directly comparable—the benefit to species conservation balanced against the economic benefit, benefit to national security, or other relevant benefit that results if an area is excluded from designation. Section 4(b)(2) does not specify a method for the weighing process. Agencies are frequently required to balance benefits of regulations against impacts; Executive Order 12866 established this requirement for Federal agency regulation. Ideally such a balancing would involve first translating the benefits and impacts into a common metric. Executive branch guidance from the Office of Management and Budget (OMB) suggests that benefits should first be monetized (*i.e.*, converted into dollars). Benefits that cannot be monetized should be quantified (for example, numbers of fish saved). Where benefits can neither be monetized nor quantified, agencies are to describe the expected benefits (OMB, Circular A–4, September 17, 2003 (OMB, 2003)).

It may be possible to monetize benefits of critical habitat designation for a threatened or endangered species in terms of willingness-to-pay (OMB, 2003). However, we are not aware of any available data that would support such an analysis for salmon. The short statutory time-frames, geographic scale of the designations under consideration, and the statute's requirement to use best ''available'' information suggests such a costly and time-consuming approach is not currently available. In addition, ESA section 4(b)(2) requires analysis of impacts other than economic impacts that are equally difficult to monetize, such as benefits to national security of excluding areas from critical habitat. In the case of salmon designations, impacts to Indian tribes are an ''other relevant impact'' that also may be difficult to monetize.

An alternative approach, approved by OMB, is to conduct a cost-effectiveness analysis. A cost-effectiveness analysis ideally first involves quantifying benefits, for example, percent reduction in extinction risk, percent increase in productivity, or increase in numbers of fish. Given the state of the science, it would be difficult to reliably quantify the benefits of including particular areas in the critical habitat designation. Although it is difficult to monetize or quantify benefits of critical habitat designation, it is possible to differentiate among habitat areas based on their relative contribution to conservation. For example, habitat areas can be rated as having a high, medium or low conservation value. The qualitative ordinal evaluations can then be combined with estimates of the economic costs of critical habitat designation in a framework that essentially adopts that of cost-effectiveness. Individual habitat areas can then be assessed using both their biological evaluation and economic cost, so that areas with high conservation value and lower economic cost might be considered to have a higher priority for designation while areas with a low conservation value and higher economic cost might have a higher priority for exclusion. While this approach can provide useful information to the decision-maker, there is not rigid formula through which this information translates into exclusion decisions. Every geographical area containing habitat eligible for designation is different, with a unique set of ''relevant impacts'' that may be considered in the exclusion process. Regardless of the analytical approach, section 4(b)(2) makes clear that what weight the agency gives various impacts and benefits, and whether the agency excludes areas from the designation, is discretionary.

Assessment of Economic Impacts

Assessment of economic impact generated considerable interest from commenters on the ANPR (68 FR 55926; September 29, 2003). A number of commenters requested that we make the economic analysis available as part of the proposed rulemaking, and some identified key considerations (*e.g.*, sector-specific impacts, direct and indirect costs, ecological services/benefits) that they believed must be taken into account. In a draft report, we have documented our conclusions regarding the economic impacts of designating each of the particular areas found to meet the definition of critical habitat for the seven ESUs addressed in this rulemaking (NMFS, 2004c). This report is available from NMFS (see **ADDRESSES**).

The first step was to identify existing legal and regulatory constraints on economic activity that are independent of critical habitat designation, such as Clean Water Act requirements. Coextensive impacts of the ESA section 7 requirement to avoid jeopardy were not considered part of the baseline. Given the uncertainty that existing

critical habitat designations in California (*i.e.*, Sacramento River winter run chinook salmon, Central California Coast coho salmon, and Southern Oregon/Northern California coho salmon ESUs) will remain in place in their current configuration, we decided not to consider them.

Next, from the consultation record, we identified Federal activities that might affect habitat and that might result in a section 7 consultation. (We did not consider Federal actions, such as the approval of a fishery, that might affect the species directly but not affect its habitat.) We identified nine types of activities including: hydropower dams; non-hydropower dams and other water supply structures; Federal lands management, including grazing (considered separately); transportation projects; utility line projects; in-stream activities, including dredging (considered separately); activities permitted under Environmental Protection Agency's (EPA) National Pollution Discharge Elimination System; sand & gravel mining; and residential and commercial development. Based on our consultation record and other available information, we determined the modifications each type of activity was likely to undergo as a result of section 7 consultation (regardless of whether the modification might be required by the jeopardy or the adverse modification provision). We developed an expected direct cost for each type of action and projected the likely occurrence of each type of project in each watershed, using existing spatial databases (*e.g.*, the Corps 404(d) permit database). Finally, we aggregated the costs from the various types of actions and estimated an annual impact, taking into account the probability of consultation occurring and the likely rate of occurrence of that project type.

This analysis allowed us to estimate the coextensive economic impact of designating each ''particular area'' that was occupied by each ESU (*i.e.* each occupied CALWATER HSA watershed). Expected economic impacts from this analysis ranged from zero to several million dollars per occupied habitat area within the range of the seven ESUs addressed in this rulemaking. Where a watershed included both tributaries and a migration corridor that served other watersheds, we attempted to estimate the separate impacts of designating the tributaries and the migration corridor. We did this by identifying those categories of activities most likely to affect tributaries and those most likely to affect larger migration corridors.

Because of the methods we selected and the data limitations, portions of our analysis both under- and over-estimate the co-extensive economic impact of section 7 requirements. For example, we lacked data on the likely impact on flows at non-Federal hydropower projects, which would increase economic impacts. We also did not have sufficient information currently available allowing us to estimate the likely economic impact of a judicially-imposed ban on pesticide use near salmon-bearing streams. The EPA was recently enjoined from authorizing the application of a set of pesticides within a certain distance of ''salmon supporting waters.'' We have completed a preliminary analysis of these impacts at the ESU level (NMFS, 2004c). Because of existing data limitations of the preliminary nature of the analysis, we determined not to use these estimates in the proposed designations. However, we believe the information presented in this preliminary consideration will aid public comment and assist in the development of a more complete examination of these impacts for the final rule. Finally, we did not have information about potential changes in irrigation flows associated with section 7 consultations. These impacts would increase the estimate of co-extensive costs. On the other hand, we estimated an impact on all activities occurring within the geographic boundaries of a watershed, even though in some cases activities would be far removed from occupied stream reaches and so might not require modification or even consultation. We intend to pursue information prior to issuing a final rule that will allow us to refine our estimates of economic impacts and better inform our analysis under section 4(b)(2).

In addition, we had no information on the costs of critical habitat designation that occur outside the section 7 consultation process, including costs resulting from state or local regulatory burdens imposed on developers and landowners as a result of a Federal critical habitat designation. We solicit information on these subjects during the public comment period.

Exclusion Process

In determining whether the economic benefit of excluding a habitat area (that is, an HSA watershed) might outweigh the benefit of designation to the species, we took into consideration a cost-effectiveness approach giving priority to excluding habitat areas with a relatively lower benefit of designation and a relatively higher economic impact. We believe it is reasonable at this stage of the analysis to assume that all areas containing physical or biological features essential to the conservation of the species are essential to the conservation of the species.

The circumstances of most listed ESUs can make a cost-effectiveness approach useful. Pacific salmon are wide-ranging species and occupy numerous habitat areas with thousands of stream miles. Not all occupied areas, however, are of equal importance to conserving an ESU. Within the currently occupied range there are areas that support highly productive populations, areas that support less productive populations, and areas that support production in only some years. Some populations within an ESU may be more important to long-term conservation of the ESU than other populations. Therefore, in many cases it may be possible to construct different scenarios for achieving conservation. Scenarios might have more or less certainty of achieving conservation, and more or less economic impact. Future applications of this methodology will strive to better distinguish the relative conservation value of habitat areas (*i.e.* HSA watersheds) eligible for designation, which should improve the utility of this approach.

We attempted to consider the effect of excluding areas, either alone or in combination with other areas, on the opportunities for conservation of the ESUs. We preferred exclusions in areas with a lower conservation value to those with a high conservation value. We also recognize that in practice a large proportion of all watersheds received a ''high'' conservation rating, making it difficult to establish priorities within that subgroup. In the second step of the process, we asked the Teams whether excluding any of the habitat areas identified in the first step would significantly impede conservation, recognizing that the breadth of available conservation measures makes such judgements necessarily subjective. The Teams considered this question in the context of all of the areas eligible for exclusion as well as the information they had developed in providing the initial conservation ratings. The following section describes the results of applying this process to each ESU. The results are discussed in greater detail in a separate report that is available for public review and comment (NMFS, 2004d). While the possible effect on conservation was useful information, it was not determinative in deciding whether to propose the exclusion of an area. The only determinative limitation is the statutory bar on excluding any area that ''will result in the extinction of the species concerned.''

Critical Habitat Designation

Not including any of the additional categories of potential exclusions identified above, we are proposing to designate approximately 11,668 mi (18,669 km) of riverine habitat and 947 mi² (2,444 km²) of estuarine habitat within the geographical areas presently occupied by the seven ESUs (Table 2). This proposal excludes approximately 1,109 mi (1,774 km) of occupied riverine habitat as a result of economic considerations, 36 mi (22 km) of occupied riverine habitat on Tribal lands, and 41 mi (66 km) of occupied riverine habitat on DOD lands. In addition, the proposal excludes approximately 229 mi² (591 km²) of estuarine habitat in San Francisco Bay. Some of these areas proposed for designation or exclusion overlap substantially with two or more ESUs. For example, the CC chinook and NC *O. mykiss* ESUs have similar geographic distributions in coastal watersheds north of San Francisco Bay, the CV spring-run chinook and CV *O. mykiss* ESUs have overlapping distributions in the Sacramento River watershed and Delta within the central valley, and the CV spring-run chinook, CV *O. mykiss*, and CCC *O. mykiss* ESUs have overlapping distributions in portions of the San Francisco-San Pablo-Suisun Bay estuarine complex. As described previously, NMFS is not proposing to designate Tribal lands with occupied habitat or DOD controlled lands with occupied habitat that are subject to INRMPs that benefit the listed ESUs. The net economic impacts (coextensive with ESA section 7) associated with the areas proposed for designation for all ESUs combined are estimated to be approximately $83,511,186. This estimate does not account for reductions that occur as a result of excluding Indian lands or military lands. Moreover, as discussed previously, we are soliciting comment on additional exclusions which, if adopted, would further reduce the estimate of coextensive costs.

The proposed designated habitat areas, summarized below by ESU, contain physical and biological features essential to the conservation of the species and that may require special management considerations or protection. Some of the areas proposed for designation are likely to be excluded in the final rule after consideration of the additional three categories of potential exclusions identified above.

TABLE 2.—APPROXIMATE QUANTITY OF PROPOSED CRITICAL HABITAT* AND OWNERSHIP WITHIN WATERSHEDS CONTAINING HABITAT AREAS PROPOSED FOR DESIGNATION

ESU	Streams (mi) (km)	Estuary habitat (sq mi) (sq km)	Federal	Tribal	State/local	Private
California Coastal Chinook	1,513	25	16.4	0.4	3.4	79.8
	2,421	65				
Northern California *O. mykiss*	2,989	25	18.8	0.5	3.7	77.1
	4,782	65				
Central California Coast *O. mykiss*	1,675	386	4.5	0.0	7.2	88.3
	2,680	996				
South-Central California *O. mykiss*	1,240	3	16.3	0.0	2.2	81.6
	1,984	8				
Southern California *O. mykiss*	784		25.0	1.0	2.4	71.6
	1,254					
Central Valley spring-run Chinook	1,150	254	12.1	0.0	3.3	84.5
	1,840	655				
Central Valley *O. mykiss*	2,317	254	8.6	0.0	3.1	88.3
	3,707	655				

*These estimates are the total amount proposed for each ESU. They do not account for overlapping areas proposed for multiple ESUs.

California Coastal Chinook Salmon ESU

There are 45 occupied HSA watersheds within the freshwater and estuarine range of this ESU. For ease of reference these watersheds have been aggregated into 8 larger subbasin units (or CALWATER HUs). Eight HSA watersheds received a low rating, 10 received a medium rating, and 27 received a high rating of conservation value to the ESU (NMFS, 2004b). Two estuarine habitat areas used for rearing and migration (Humboldt Bay and the Eel River Estuary) that are not CALWATER HSAs were also evaluated and received a high conservation value rating.

HSA watershed habitat areas in this ESU include approximately 1,638 mi (2,635 km) of occupied stream habitat and 25 mi² (65 km²) of occupied estuarine habitat (Humboldt Bay). Approximately 12 mi (19 km) of occupied stream habitat is within the boundaries of Indian reservations and proposed for exclusion. We have not calculated the potential reduction in estimated economic impact as a result of these Indian land exclusions, but expect it would be small given the small percentage of stream miles these exclusions represent (less than 0.1 percent of all occupied stream miles).

As a result of the balancing process for economic impacts described above, the Secretary is currently proposing to exclude from the designation, at a minimum, the habitat areas (or HSAs) shown in Table 3. Of the areas eligible for designation, no fewer than approximately 113 stream miles (180 km) are proposed for exclusion because the economic benefits of exclusion outweigh the benefits of designation. The total potential estimated economic impact, with no exclusions, would be $11,651,723. The exclusions set forth in Table 3 would reduce the total estimated economic impact to $7,586,559. However, as indicated above, the Secretary is considering a number of additional exclusions which may further reduce this economic impact by a substantial amount. For this ESU, a preliminary analysis of the economic impact of designating critical habitat after considering some of these additional exclusions (primarily the exclusion of watersheds with a large percentage of Federal lands) indicates cost impacts could be reduced to about $3,200,000.

TABLE 3.—HSA WATERSHEDS OCCUPIED BY THE CALIFORNIA COASTAL CHINOOK SALMON ESU AND PROPOSED FOR EXCLUSION FROM CRITICAL HABITAT

Subbasin/hydrologic unit	Watershed (HSA) code	Watershed (HSA) name	Area proposed for exclusion
Unit 1. Eel River HU	111122	Bridgeville	Entire watershed.
	111171	Eden Valley	Entire watershed.
	111173	Black Butte River	Entire watershed.
	111174	Wilderness	Entire watershed
Unit 8. Russian River HU	111422	Santa Rosa	Entire watershed.

Northern California O. mykiss ESU

There are 50 occupied HSA watersheds within the freshwater and estuarine range of this ESU. For ease of reference these watersheds have been aggregated into seven larger subbasin units (or CALWATER HUs) within which the HSA watersheds are nested. Nine watersheds received a low rating, 14 received a medium rating, and 27 received a high rating of conservation value to the ESU (NMFS, 2004b). Two estuarine habitat areas used for rearing and migration (Humboldt Bay and the Eel River Estuary) that are not CALWATER HSAs were also evaluated and received a high conservation value rating.

HSA watershed habitat areas in this ESU include approximately 3,128 mi (5,005 km) of occupied stream habitat and 25 mi^2 (65 km^2) of occupied estuarine habitat (Humboldt Bay). Approximately 23 mi (37 km) of stream habitat are within the boundaries of Indian reservations and are proposed for exclusion. We have not calculated the potential reduction in estimated economic impact as a result of these Indian land exclusions, but expect it would be small given the small percentage of stream miles these exclusions represent.

As a result of the balancing process for economic impacts described above, the Secretary is currently proposing to exclude from the designation, at a minimum, the habitat areas (or HSAs) shown in Table 4. Of the areas eligible for designation, no fewer than approximately 116 mi (185 km) are proposed for exclusion because the economic benefits of exclusion outweigh the benefits of designation. Total potential estimated economic impact, with no exclusions, is $10,842,357. The exclusions set forth in Table 4 would reduce the total estimated economic impact to $6,688,254. However, as indicated above, the Secretary is considering a number of additional exclusions which may further reduce this economic impact by a substantial amount. For this ESU, a preliminary analysis of the economic impact of designating critical habitat after considering some of these additional exclusions (primarily the exclusion of watersheds with a large percentage of Federal lands) indicates the cost impact could be reduced to about $1,900,000.

TABLE 4.—HSA WATERSHEDS OCCUPIED BY THE NORTHERN CALIFORNIA O. MYKISS ESU AND PROPOSED FOR EXCLUSION FROM CRITICAL HABITAT

Subbasin/unit	Watershed code	Watershed name	Area proposed for exclusion
Unit 3. Mad River HU	110940	Ruth	Entire watershed.
Unit 5. Eel River HU	111150	North Fork Eel	Entire watershed.
	111163	Lake Pillsbury	Entire watershed.

Central California Coast O. mykiss ESU

There are 47 occupied HSA occupied watersheds within the freshwater and estuarine range of this ESU, including the Upper Alameda Creek watershed which supports a resident *O. mykiss* population that is proposed for listing. For ease of reference these watersheds have been aggregated into10 larger subbasin units (or CALWATER Hus) within which the HSA watersheds are nested. Fourteen HSA watersheds received a low rating, 13 received a medium rating, and 20 received a high rating of conservation value to the ESU (NMFS, 2004b). Five of these HSA watershed units comprise portions of the San Francisco-San Pablo-Suisun Bay complex which constitutes rearing and migratory habitat for this ESU.

HSA watershed habitat areas in this ESU include approximately 2,002 miles (3,203 km) of occupied stream habitat and 442 mi^2 (1,140 km^2) of occupied estuarine habitat in the San Francisco Bay complex. Approximately 1.0 mi (2.0 km) of occupied stream habitat is within the boundaries of Indian reservations and proposed for exclusion. We have not calculated the potential reduction in estimated economic impact as a result of these Indian land exclusions, but expect it would be small given the small percentage of stream miles these exclusions represent.

As a result of the balancing process for economic impacts described above, the Secretary is currently proposing to exclude from the designation, at a minimum, the HSA habitat areas shown in Table 5. Of the areas eligible for designation, no fewer than approximately 326 mi (522 km) of stream habitat and 56 mi^2 (144 km^2) of estuarine habitat in Suisun Bay (HSA 220710) are proposed for exclusion because the economic benefits of exclusion outweigh the benefits of designation. The total potential estimated economic impact, with no exclusions, is $9,327,996. The exclusions set forth in Table 5 would reduce the total estimated economic impact to $5,452,712. However, as indicated above, the Secretary is considering a number of additional exclusions which may further reduce this economic impact. For this ESU, a preliminary analysis of the economic impact of designating critical habitat after considering some of these additional exclusions (primarily the exclusion of watersheds with a large percentage of Federal lands), indicates the cost impact could be reduced to approximately $5,000,000.

TABLE 5.—HSA WATERSHEDS OCCUPIED BY THE CENTRAL CALIFORNIA COAST O. MYKISS ESU AND PROPOSED FOR FULL OR PARTIAL EXCLUSION FROM CRITICAL HABITAT

Subbasin/hydrologic unit	Watershed (HSA) code	Watershed name	Area proposed for exclusion
Unit 1. Russian River HU	111422	Santa Rosa	Entire watershed.
	111431	Ukiah	Tributaries.
Unit 5. Bay Bridges HU	220330	San Rafael	Entire watershed.
Unit 6. South Bay HU	220440	San Mateo Bayside	Entire watershed.
	220420	Eastbay Cities	Tributaries.
Unit 7. Santa Clara HU	220540	Guadelupe River	Entire watershed.
Unit 8. San Pablo HU	220620	Novato	Entire watershed.
	220660	Pinole	Entire watershed.
Unit 9. Suisun HU	220710	Suisun Bay	Entire unit.
	220721	Benecia	Entire watershed.
	220731	Pittsburg	Entire watershed.
	220733	Martinez	Entire watershed.

Watersheds for which tributaries only are excluded contain rearing/migration corridors necessary for conservation.

South-Central California Coast O. mykiss ESU

There are 30 occupied HSA watersheds within the freshwater and estuarine range of this ESU. For ease of reference these watersheds have been organized into eight larger subbasin units (or CALWATER HUs) within which the HSA watersheds are nested. Six watersheds received a low conservation rating, 11 received a medium rating, and 13 received a high rating of conservation value to the ESU (NMFS, 2004b). One of these occupied watershed units is Morro Bay which is rearing and migratory habitat for those populations which spawn and rear in tributaries to the Bay. Of the 1,261 mi (2,018 km) of occupied riverine habitat and 3 mi^2 (8 km^2) of occupied estuarine habitat (Morro Bay) in the ESU, approximately 21 mi (34 km) are not proposed for designation because they are within lands controlled by the military (Camp San Luis Obispo and Camp Roberts) that have qualifying INRMPs.

As a result of the balancing process for economic impacts described above, the Secretary is not proposing to exclude any areas from the habitat that is eligible for designation. The total potential estimated economic impact of the designation, without exclusions, would be $10,084,293. However, as indicated above, the Secretary is considering a number of additional exclusions which may reduce this economic impact by a substantial amount. For this ESU, a preliminary analysis of the economic impact of designating critical habitat after considering some of these additional exclusions (primarily the exclusion of watersheds with a large percentage of Federal lands) indicates the cost impacts could be reduced to about $4,300,000.

Southern California O. mykiss ESU

There are 37 occupied HSA watersheds within the freshwater and estuarine range of this ESU. For ease of reference these watersheds have been aggregated into eight subbasin units (or CALWATER HUs) within which the HSA watersheds are nested. Six HSA watersheds received a low rating, 6 received a medium rating, and 25 received a high rating of conservation value to the ESU (NMFS, 2004b).

There are 837 mi (1,339 km) of occupied stream habitat in the 37 HSA watersheds comprising this ESU. Of these, approximately 20 mi (32 km) occupied stream miles (30.0 km) occur on Vandenberg AFB and Camp Pendleton Marine Corps Base which are not proposed for designation because they are within lands controlled by the military that have qualifying INRMPs.

As a result of the balancing process for economic impacts described above, the Secretary is currently proposing to exclude from the designation, at a minimum, the habitat areas shown in Table 6. Of the areas eligible for designation, no fewer than 33 mi (53km) are proposed for exclusion because the economic benefits of exclusion outweigh the benefits of designation. The total potential estimated economic impact, with no exclusions, would be $21,008,746. The exclusions set forth in Table 6 would reduce the total estimated economic impact to $12,716,386. However, as indicated above, the Secretary is considering a number of additional exclusions which may further reduce this economic impact by a substantial amount for this ESU. For this ESU, a preliminary analysis of the economic impact of designating critical habitat after considering some of these additional exclusions (primarily the exclusion of watersheds with a large percentage of Federal lands) indicates that impacts could be reduced to about $3,600,000.

TABLE 6.—HSA WATERSHEDS OCCUPIED BY THE SOUTHERN CALIFORNIA O. MYKISS ESU AND PROPOSED FOR EXCLUSION FROM CRITICAL HABITAT

Subbasin/hydrologic unit	Watershed code	HSA watershed name	Area proposed for exclusion
Unit 1. Santa Maria River HU	331210	Guadelupe	Tributaries only.
	331230	Cuyama Valley	Entire watershed.
Unit 2. Santa Ynez HU	331430	Buelton	Tributaries only.
	331451	Santa Cruz Creek	Entire watershed
Unit 7. Calleguas HU	440811	East of Oxnard	Entire watershed.

Central Valley Spring-Run Chinook Salmon ESU

There are 37 occupied HSA watersheds within the freshwater and estuarine range of this ESU. For ease of reference these watersheds have been aggregated into 15 subbasin units (or CALWATER HUs) within which the HSA watersheds are nested. Four of these HSA watershed units comprise the San Francisco-San Pablo-Suisun Bay complex through which this ESU migrates to and from the ocean, and these HSAs were aggregated into a separate unit for descriptive purposes. Eight HSA watersheds received a low rating, 4 received a medium rating, and 25 received a high rating of conservation value to the ESU (NMFS, 2004b). Occupied habitat areas or HSA watersheds for this ESU include approximately 1,381 mi (2,212 km) of riverine habitat, in addition to approximately 427 mi^2 (1,102 km^2) of estuarine habitat in the San Francisco-San Pablo-Suisun Bay complex.

As a result of the balancing process for economic impacts described above, the Secretary is currently proposing to exclude from the designation, at a minimum, the habitat areas (or HSAs) shown in Table 7. Of the areas eligible for designation, no fewer than approximately 231 mi (369 km) of stream habitat and 173 mi^2 (446 km^2) of estuarine habitat in San Francisco Bay are proposed for exclusion because the economic benefits of exclusion outweigh the benefits of designation. The total potential estimated economic impact, with no exclusions, is $23,577,391. The exclusions set forth in Table 7 would reduce the total estimated economic impact to 16,787,737. However, the Secretary is considering a number of additional exclusions which may further reduce this economic impact by a substantial amount. For this ESU, a preliminary analysis of the economic impact of designating critical habitat after considering some of these additional exclusions (primarily the exclusion of watersheds with a large percentage of Federal lands) indicates the cost impact could be reduced to about $12,900,000.

TABLE 7.—HSA WATERSHEDS OCCUPIED BY THE CENTRAL VALLEY SPRING-RUN CHINOOK SALMON ESU AND PROPOSED FOR EXCLUSION FROM CRITICAL HABITAT

Subbasin/hydrologic unit	Watershed code	HSA watershed name	Area proposed for exclusion
Unit 2. Whitmore HU	550731	South Cow Creek	Entire watershed.
Unit 5. Sacramento Delta HU	551000	Sacramento Delta	Partial.
Unit 8. Yuba River HU	551713	Mildred Lake	Entire watershed.
Unit 9. Valley American HU	551921	Lower American	Entire watershed.
Unit 12. Ball Mountain HU	552310	Thomes Creek	Entire watershed.
Unit 13. Shasta Bally HU	552433	South Fork	Entire watershed.
Unit 14. No. Diable Range HU	554300	No. Diablo Range	Entire watershed.
Unit 15. San Joaquin Delta HU	554400	San Joaquin Delta	Entire watershed.
Unit 16 South SF Bay HU	220410	South SF Bay	Entire unit.

Central Valley O. mykiss ESU

There are 67 occupied HSA watersheds within the freshwater and estuarine range of this ESU. For ease of reference these watersheds have been aggregated into 25 subbasin units (or CALWATER HUs) within which the HSA watersheds are nested. Four of these HSA watershed units comprise the San Francisco-San Pablo-Suisun Bay complex through which this ESU migrates to and from the ocean, and these HSAs were aggregated into a separate unit for descriptive purposes. Fourteen HSA watersheds received a low rating, 16 received a medium rating, and 37 received a high rating of conservation value to the ESU (NMFS, 2004b). Occupied habitat areas or HSA watersheds for this ESU include approximately 2,607 mi (4,171 km) of stream habitat, in addition to approximately 427 mi^2 (1,102 km^2) of estuarine habitat in the San Francisco-San Pablo-Suisun Bay complex.

As a result of the balancing process for economic impacts described above, the Secretary is proposing to exclude from the designation, at a minimum, the habitat areas (or HSAs) shown in Table 8. Of the areas eligible for designation, no fewer than approximately 290 mi (464 km) of stream and 173 mi^2 (446 km^2) of estuarine habitat in San Francisco Bay are proposed for exclusion because the economic benefits of exclusion outweigh the benefits of designation. The total potential estimated economic impact, with no exclusions, is $29,187,888. The exclusions set forth in Table 8 would reduce the total estimated economic impact to $24,195,245. However, as indicated above, the Secretary is considering a number of additional exclusions which may further reduce this economic impact by a substantial amount. For this ESU, a preliminary analysis of the economic impact of designating critical habitat after considering some of these additional exclusions (primarily the exclusion of watersheds with a large percentage of Federal lands) indicates that economic impacts could be reduced to about $18,500,000.

TABLE 8.—HSA WATERSHEDS OCCUPIED BY THE CENTRAL VALLEY O. MYKISS ESU AND PROPOSED FOR EXCLUSION FROM CRITICAL HABITAT

Subbasin/hydrologic unit	Watershed (HSA) code	Watershed name	Area proposed for exclusion
Unit 5. Sacramento Delta HU	551000	Sacramento Delta	Partial watershed.
Unit 6. Valley-Putah Cache HU	551110	Elmira	Entire watershed.
Unit 8. Marysville HU	551510	Lower Bear River	Entire watershed.
Unit 9. Yuba River HU	551713	Mildred Lake	Entire watershed.
	551720	Nevada City	Entire watershed.
Unit 12. Butte Creek HU	552110	Upper Dry Creek	Entire watershed.

TABLE 8.—HSA WATERSHEDS OCCUPIED BY THE CENTRAL VALLEY O. MYKISS ESU AND PROPOSED FOR EXCLUSION FROM CRITICAL HABITAT—Continued

Subbasin/hydrologic unit	Watershed (HSA) code	Watershed name	Area proposed for exclusion
Unit 15. North Valley Floor HU	553111	Herald	Entire watershed.
	553120	Lower Mokelumne	Partial watershed.
Unit 16. Middle Sierra	553221	Big Canyon Creek	Entire watershed.
	553223	NF Cosumnes	Entire watershed.
	553224	Omo Ranch	Entire watershed.
	553240	Sutter Creek	Entire watershed.
Unit 21. No. Diablo Range	554300	No. Diablo Range	Entire watershed.
Unit 23. So. SF Bay	220410	So. SF Bay	Entire unit.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7 of the ESA requires Federal agencies, including NMFS, to ensure that actions they fund, authorize, permit, or carry out do not destroy or adversely modify critical habitat. In agency regulations at 50 CFR 402.02, we define destruction or adverse modification as ''a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to: Alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.'' However, in a March 15, 2001, decision of the United States Court of Appeals for the Fifth Circuit (*Sierra Club* v. *U.S. Fish and Wildlife Service*, 243 F.3d 434 (5th Cir. 2001), and an August 9, 2004 decision of the United States Court of Appeals for the Ninth Circuit (*Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife*, No. 03–35279, the courts have found the agencies' definition of destruction or adverse modification to be invalid. In response to this decision, we are reviewing this regulatory definition.

Section 7(a) of the ESA requires Federal agencies, including NMFS, 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 proposed or designated. Regulations implementing this provision of the ESA are codified at 50 CFR part 402. Section 7(a)(4) of the ESA requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in the destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory.

We may issue a formal conference report if requested by a Federal agency. Formal conference reports include an opinion that is prepared according to 50 CFR 402.14, as if the species were listed or critical habitat designated. We may adopt the formal conference report as the biological opinion when the species is listed or critical habitat designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)).

If a species is listed or critical habitat is designated, ESA section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. 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. Through this consultation, we would review actions to determine if they would destroy or adversely modify critical habitat.

If we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we will also provide reasonable and prudent alternatives to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that we believe would avoid destruction or adverse modification of 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 critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

Activities on Federal lands that may affect these ESUs or their critical habitat will require ESA section 7 consultation. Activities on private or state lands requiring a permit from a Federal agency, such as a permit from the Corps under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from NMFS, or some other Federal action, including funding (*e.g.*, Federal Highway Administration (FHA) or Federal Emergency Management Agency (FEMA) funding), will also be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal and private lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Activities Affected by Critical Habitat Designation

Section 4(b)(8) of the ESA requires that we evaluate briefly and describe, in any proposed or final regulation that designates critical habitat, those activities involving a Federal action that may adversely modify such habitat or that may be affected by such designation. As noted in the *Special Management Considerations or Protection* section above, we received several comments on the ANPR (68 FR 55926; September 29, 2003) regarding

activities potentially affected by a critical habitat designation.

A wide variety of activities may affect critical habitat and, when carried out, funded, or authorized by a Federal agency, require that an ESA section 7 consultation be conducted. Such activities include, but are not limited to, those described in the Species Descriptions and Area Assessments section. Generally these include water and land management actions of Federal agencies (*e.g.*, USFS, BLM, Corps, U.S. Bureau of Reclamation (BOR), the FHA, Natural Resource Conservation Service (NRCS), National Park Service (NPS), BIA, and the Federal Energy Regulatory Commission (FERC)) and related or similar actions of other federally regulated projects and lands, including livestock grazing allotments by the USFS and BLM; hydropower sites licensed by the FERC; dams built or operated by the Corps or BOR; timber sales and other vegetation management activities conducted by the USFS, BLM, and BIA; irrigation diversions authorized by the USFS and BLM; road building and maintenance activities authorized by the FHA, USFS, BLM, NPS, and BIA; and mining and road building/maintenance activities authorized by the State of California. Other actions of concern include dredge and fill, mining, diking, and bank stabilization activities authorized or conducted by the Corps, habitat modifications authorized by the FEMA, and approval of water quality standards and pesticide labeling and use restrictions administered by the EPA.

The Federal agencies that will most likely be affected by this critical habitat designation include the USFS, BLM, BOR, Corps, FHA, NRCS, NPS, BIA, FEMA, EPA, and the FERC. This designation will provide these agencies, private entities, and the public with clear notification of critical habitat designated for listed salmonids and the boundaries of the habitat. This designation will also assist these agencies and others in evaluating the potential effects of their activities on listed salmon and their critical habitat and in determining if section 7 consultation with NMFS is needed.

As noted above, numerous private entities also may be affected by this critical habitat designation because of the direct and indirect linkages to an array of Federal actions, including Federal projects, permits, and funding. For example, private entities may harvest timber or graze livestock on Federal land or have special use permits to convey water or build access roads across Federal land; they may require Federal permits to armor stream banks, construct irrigation withdrawal facilities, or build or repair docks; they may obtain water from federally funded and operated irrigation projects; or they may apply pesticides that are only available with Federal agency approval. These activities will need to be analyzed with respect to their potential to destroy or adversely modify critical habitat. In some cases, proposed activities may require modifications that may result in decreases in activities such as timber harvest and livestock and crop production. The transportation and utilities sectors may need to modify the placement of culverts, bridges and utility conveyances (*e.g.*, water, sewer and power lines) to avoid barriers to fish migration. Developments occurring in or near salmon streams (*e.g.*, marinas, residential, or industrial facilities) that require Federal authorization or funding may need to be altered or built in a manner that ensures that critical habitat is not destroyed or adversely modified as a result of the construction, or subsequent operation, of the facility. These are just a few examples of potential impacts, but it is clear that the effects will encompass numerous sectors of private and public activities. If you have questions regarding whether specific activities will constitute destruction or adverse modification of critical habitat, contact NMFS (see **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT**).

Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governments and agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments particularly are sought concerning:

(1) Maps and specific information describing the amount, distribution, and use type (*e.g.*, spawning, rearing, or migration) of salmon habitat in each ESU, as well as any additional information on occupied and unoccupied habitat areas;

(2) The reasons why any habitat should or should not be determined to be critical habitat as provided by sections 3(5)(A) and 4(b)(2) of the ESA;

(3) Information regarding the benefits of excluding lands covered by HCPs (ESA section 10(a)(1)(B) permits), including the regulatory burden designation may impose on landowners and the likelihood that exclusion of areas covered by existing plans will serve as an incentive for other landowners to develop plans covering their lands;

(4) Information regarding the benefits of excluding Federal and other lands covered by habitat conservation strategies and plans (*e.g.*, Northwest Forest Plan, PACFISH, etc.), including the regulatory burden designation may impose on land managers and the likelihood that exclusion of areas covered by existing plans will serve as an incentive for land user to implement the conservation measures covering the lands subject to those plans;

(5) Information regarding the benefits of designating particular areas as critical habitat;

(6) Current or planned activities in the areas proposed for designation and their possible impacts on proposed critical habitat;

(7) Any foreseeable economic or other potential impacts resulting from the proposed designations, in particular, any impacts on small entities;

(8) Whether our approach to critical habitat designation could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concern and comments; and

(9) Whether specific unoccupied areas (*e.g.*, dewatered stream reaches, areas behind dikes or dams, above dams, etc) not presently proposed for designation may be essential to provide additional spawning and rearing areas for an ESU. In particular we are seeking information regarding unoccupied areas that may be essential for the conservation of the SC and CV *O. mykiss* ESUs, and the CV spring-run chinook ESU (see ESU Descriptions for specific unoccupied areas that may be essential for conservation and for which comments are being solicited).

If you wish to comment on this proposal, you may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES** section). The proposed rule, maps, fact sheets, and other materials relating to this proposal can be found on our Web site at *http://swr.nmfs.noaa.gov.* We will consider all comments and information received during the comment period on this proposed rule as we prepare our final rulemaking. Accordingly, the final decision may differ from this proposal.

Public Hearings

Joint Commerce-Interior ESA implementing regulations state that the Secretary shall promptly hold at least one public hearing if any person requests one within 45 days of publication of a proposed regulation to

list a species or to designate critical habitat (see 50 CFR 424.16(c)(3)). Requests for public hearing must be made in writing (see **ADDRESSES**) by January 24, 2005. Details regarding the specific hearing locations and times will be posted on our Web site at *http://swr.nmfs.noaa.gov*. These hearings will provide the opportunity for interested individuals and parties to give comments, exchange information and opinions, and engage in a constructive dialogue concerning this proposed rule. We encourage the public's involvement in such ESA matters.

Peer Review

In accordance with an ESA policy published on July 1, 1994 (59 FR 34270), we will solicit the expert opinions of at least three appropriate independent specialists regarding this proposed rule. Given the varied considerations involved in making the proposed designations, we intend to solicit reviews from specialist(s) with biological expertise as well as specialist(s) with economic expertise in the geographic range of these ESUs. The purpose of such review is to ensure that the critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send these reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite them to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

In response to the ANPR (68 FR 55926; September 29, 2003) we received the names of two potential independent reviewers and will identify other candidates prior to or soon after publishing this proposed rule. We will announce the availability of comments received from these reviewers and the public and make them available via the internet as soon as practicable during or after the comment period but in advance of a final rule.

Required Determinations

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical jargon that interferes with its clarity? (3) Does the format of the proposed rule (grouping and order of the sections, use of headings, paragraphing, *etc.*) aid or reduce its clarity? (4) What else could we do to make this proposed rule easier to understand? You may send comments on how we could make this proposed rule easier to understand to one of the addresses identified in the **ADDRESSES** section or via e-mail to: *critical.habitat.swr@noaa.gov.*

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule and has been reviewed by the OMB. As noted above, we have prepared several reports to support the exclusion process under section 4(b)(2) of the ESA. The economic costs of the proposed critical habitat designations are described in our draft economic report (NMFS, 2004c). The benefits of the proposed designations are described in the Critical Habitat Analytical Review Team preliminary findings report (NMFS, 2004b). This document uses a biologically-based ranking system for gauging the benefits of applying section 7 of the ESA to particular watersheds. Because data are not available to express these benefits in monetary terms, we have adopted a cost-effectiveness framework, as outlined in our draft 4(b)(2) report (NMFS, 2004d). This approach is in accord with OMB's guidance on regulatory analysis (OMB Circular A–4, Regulatory Analysis, September 17, 2003). By taking this approach, we seek to designate sufficient critical habitat to meet the biological goal of the ESA while imposing the least burden on society, as called for by E.O. 12866.

In assessing the overall cost of critical habitat designation for the seven Pacific salmon and *O. mykiss* ESUs, the annual total impact figures given in the draft economic analysis (NMFS, 2004c) cannot be added together to obtain an aggregate annual impact. Because some watersheds are included in more than one ESU, a simple summation would entail duplication, resulting in an overestimate. Accounting for this duplication, the aggregate annual economic impact of the seven proposed critical habitat designations is $83,511,186 (in contrast to a $115,680,394 aggregate annual economic impact from designating *all* areas considered in the 4(b)(2) process for these ESUs). These amounts include impacts that are co-extensive with the implementation of the jeopardy standard of section 7 (NMFS, 2004c).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), 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 (*i.e.*, small businesses, small organizations, and small government jurisdictions). We have prepared a draft regulatory flexibility analysis and this document (NMFS, 2004e) is available upon request (*see* **ADDRESSES**). This analysis estimates that the number of regulated small entities potentially affected by this proposed rulemaking ranges from 379 to 3,151, depending on the ESU. If the proposed areas are designated as critical habitat, the estimated co-extensive costs of section 7 consultation incurred by small entities are estimated to range from $1.6 million to $18.2 million depending on the ESU. As described in the analysis, we considered various alternatives for designating critical habitat for these seven ESUs. We considered and rejected the alternative of not designating critical habitat for any of the ESUs because such an approach did not meet the legal requirements of the ESA. We also examined and rejected an alternative in which all the potential critical habitat of the seven Pacific salmon and *O. mykiss* ESUs is proposed for designation (*i.e.*, no areas are excluded) because many of the areas considered to have a low conservation value also had relatively high economic impacts that might be mitigated by excluding those areas from designation. A third alternative we examined and rejected would exclude all habitat areas with a low or medium conservation value. While this alternative furthers the goal of reducing economic impacts, it is not sensitive to the fact that for most ESUs, eliminating all habitat areas with low and medium conservation value is likely to significantly impede conservation. Moreover, for some habitat areas the incremental economic benefit from excluding that area is relatively small. Therefore, after considering these alternatives in the context of the section 4(b)(2) process of weighing benefits of exclusion against benefits of designation, we determined that the current proposal for designating critical habitat (*i.e.*, designating some but not all areas with low or medium conservation value) provides an appropriate balance of conservation and economic

mitigation and that excluding the areas identified in this proposed rulemaking would not result in extinction of the ESUs. It is estimated that small entities could save from $650,000 to $4.3 million in compliance costs, depending on the ESU, if the areas proposed for exclusion in this proposed rule are excluded from the designation.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule may be a significant regulatory action under Executive Order 12866. We have prepared a draft analysis of the energy effects of critical habitat designation and this document (NMFS, 2004e; see Appendix G) is available upon request (see **ADDRESSES**).

Approximately 90 hydropower projects exist within the area covered by the seven ESUs addressed in this rulemaking. The projects range from very small ones with installed capacities considerably less than 5 MW to much larger projects ranging up to 196 MW installed capacity. Within California, the majority of hydropower project are private or State-owned and licensed by FERC. A smaller percentage of all projects are owned and operated by the Corps or BOR. Consultations on hydropower projects represent a relatively small percentage of the total section 7 consultations concerning listed salmon, but cost of project modification may be higher that for other activities. According to the economic analysis performed for the proposed designation (NMFS, 2004e), costs to hydropower projects associated with salmon section 7 actions are anticipated to be approximately 23 percent of the annual costs of overall section 7 statewide. The primary modifications resulting from section 7 include construction or improvements to fish passage facilities and programs, research and monitoring of water quality and fish passage efficiency, and other offsite mitigation efforts.

Two threshold tests were considered to determine whether critical habitat designation would have a ''significant adverse effect on the supply, distribution, or use of energy'': Reductions in electricity production in excess of 1 billion kilowatt-hours per year or in excess of 500 megawattts of installed capacity; and increases in the cost of energy production in excess of one percent. For both thresholds of the energy impacts analysis, the assessment concludes that the total impacts of salmon conservation/mitigation measures for hydropower projects may exceed the thresholds for determining that an adverse energy effect is significant. However, the assessment also concludes based on the agency's section 7 consultation history, that the total impacts of such conservation or mitigation overestimate the incremental impacts of critical habitat designation alone because there is strong evidence that consultation based on the jeopardy standard alone is capable of imposing significant impacts on such projects. Based on the energy impacts analysis, NMFS believes that the designation of critical habitat will not have impacts that exceed the thresholds identified above.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act, we make the following findings:

(a) This proposed rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC 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 ESA, 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 who receive Federal funding, assistance, permits or 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 to State governments.

(b) Due to current public knowledge of salmon protection and the prohibition against take of these species both within and outside of the designated areas, we do not anticipate that this proposed rule will significantly or uniquely affect small governments. As such, a Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630, the proposed rule does not have significant takings implications. A takings implication assessment is not required. The designation of critical habitat affects only Federal agency actions. The proposed rule will not increase or decrease the current restrictions on private property concerning take of salmon. As noted above, due to widespread public knowledge of salmon protection and the prohibition against take of the species both within and outside of the designated areas, we do not anticipate that property values will be affected by the proposed critical habitat designations. While real estate market values may temporarily decline following designation, due to the perception that critical habitat designation may impose additional regulatory burdens on land use, we expect any such impacts to be short term (NMFS, 2004c). Additionally, critical habitat designation does not preclude development of HCPs and issuance of incidental take permits. Owners of areas that are included in the

designated critical habitat will continue to have the opportunity to use their property in ways consistent with the survival of listed salmon.

Federalism

In accordance with Executive Order 13132, this proposed rule does not have significant federalism effects. A federalism assessment is not required. In keeping with Department of Commerce policies, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate state resource agencies in California. The proposed designation may have some benefit to the states and local resource agencies in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Commerce has determined that this proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are proposing to designate critical habitat in accordance with the provisions of the ESA. This proposed rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the seven salmon ESUs.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This proposed rule does not contain new or revised information collection for which OMB approval is required under the Paperwork Reduction Act. 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

We have determined that we need not prepare environmental analyses as provided for under the National Environmental Policy Act of 1969 for critical habitat designations made pursuant to the ESA. See *Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S.Ct. 698 (1996).

Government-to-Government Relationship With Tribes

The longstanding and distinctive relationship between the Federal and tribal Governments is defined by treaties, statutes, executive orders, judicial decisions, and agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. Pursuant to these authorities lands have been retained by Indian Tribes or have been set aside for tribal use. These lands are managed by Indian Tribes in accordance with tribal goals and objectives within the framework of applicable treaties and laws.

Administration policy contained in the Secretarial Order: ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (June 5, 1997) (''Secretarial Order''); the President's Memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (50 FR 2291); Executive Order 13175; and Department of Commerce-American Indian and Alaska Native Policy (March 30, 1995) reflects and defines this unique relationship.

These policies also recognize the unique status of Indian lands. The Presidential Memorandum of April 29, 1994, provides that, to the maximum extent possible, tribes should be the governmental entities to manage their lands and tribal trust resources. The Secretarial Order provides that, ''Indian lands are not Federal public lands or part of the public domain, and are not subject to Federal public lands laws.''

In implementing these policies the Secretarial Order specifically seeks to harmonize this unique working relationship with the Federal Government's duties pursuant to the ESA. The order clarifies our responsibilities when carrying out authorities under the ESA and requires that we consult with and seek participation of, the affected Indian Tribes to the maximum extent practicable in the designation of critical habitat. Accordingly, we recognize that we must carry out our responsibilities under the ESA in a manner that harmonizes these duties with the Federal trust responsibility to the tribes and tribal sovereignty while striving to ensure that Indian Tribes do not bear a disproportionate burden for the conservation of species. Any decision to designate Indian land as critical habitat must be informed by the Federal laws and policies establishing our responsibility concerning Indian lands, treaties and trust resources, and by Department of Commerce policy establishing our responsibility for dealing with tribes when we implement the ESA.

Pursuant to the Secretarial Order we consulted with the affected Indian Tribes when considering the designation of critical habitat in an area that may impact tribal trust resources, tribally owned fee lands or the exercise of tribal rights. Additionally, one California Indian tribe and the BIA provided written comments that are a part of the administrative record for this proposed rulemaking.

We understand from the tribes and the BIA that there is general agreement that Indian lands should not be designated critical habitat. The Secretarial Order defines Indian lands as ''any lands title to which is either: (1) Held in trust by the United States for the benefit of any Indian tribe or (2) held by an Indian Tribe or individual subject to restrictions by the United States against alienation.'' In clarifying this definition with the tribes, we agree that (1) fee lands within the reservation boundaries and owned by the Tribe or individual Indian, and (2) fee lands outside the reservation boundaries and owned by the Tribe would be considered Indian lands for the purposes of this proposed rule. (Fee lands outside the reservation owned by individual Indians are not included within the definition of Indian lands for the purposes of this rule.)

In evaluating Indian lands for designation as critical habitat we look to section 4(b)(2) of the ESA. Section 4(b)(2) requires us to base critical habitat designations on the best scientific and commercial data available, 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 areas from a critical habitat designation when the benefits of exclusion outweigh the benefits of designation, provided the exclusion will not result in the extinction of the species. We find that a relevant impact for consideration is the degree to which the Federal designation of Indian lands would impact the longstanding unique

relationship between the tribes and the Federal Government and the corresponding effect on Pacific salmon protection and management (See Other Relevant Impacts and Critical Habitat Designation sections). This is consistent with recent case law addressing the designation of critical habitat on tribal lands. ''It is certainly reasonable to consider a positive working relationship relevant, particularly when the relationship results in the implementation of beneficial natural resource programs, including species preservation.'' *Center for Biological Diversity et al.* v. *Norton,* 240 F. Supp. 2d 1090, 1105); *Douglas County* v. *Babbitt,* 48 F3d 1495, 1507 (1995) (defining ''relevant'' as impacts consistent with the purposes of the ESA).

NMFS and many tribal governments in California currently have cooperative working relationships that have enabled us to implement natural resource programs of mutual interest for the benefit of threatened and endangered salmonids. Some tribes have existing natural resource programs that assist us on a regular basis in providing information relevant to salmonid protection throughout the region. Our consultation with the tribes and the BIA indicates that they view the designation of Indian lands as an unwanted intrusion into tribal self-governance, compromising the government-to-government relationship that is essential to achieving our mutual goal of conserving threatened and endangered salmonids.

At this time, for the general reasons described above, we anticipate that the ESA 4(b)(2) analysis will lead us to exclude all Indian lands with occupied habitat in our final designation for these seven ESUs of salmon and *O. mykiss.* Consistent with other proposed exclusions, any exclusion in the final rule will be made only after consideration of all comments received.

References Cited

A complete list of all references cited in this rulemaking can be found on our Web site at *http://swr.nmfs.noaa.gov* and is available upon request from the NMFS office in Long Beach, California (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 226

Endangered and threatened species.

Dated: November 29, 2004.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, we propose to amend part 226, title 50 of the Code of Regulations as set forth below:

PART 226—[AMENDED]

1. The authority citation of part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

2. Add § 226.211 to read as follows:

§ 226.211 Critical habitat for seven Evolutionarily Significant Units (ESUs) of salmon (Oncorhynchus spp.) in California.

Critical habitat is designated in the following counties for the following ESUs as described in paragraph (a) of this section, and as further described in paragraphs (b) through (e) of this section. The textual descriptions of critical habitat for each ESU are included in paragraphs (f) through (l) of this section, and these descriptions are the definitive source for determining the critical habitat boundaries. General location maps are provided at the end of each ESU description (paragraphs (f) through (l) of this section) and are provided for general guidance purposes only, and not as a definitive source for determining critical habitat boundaries.

(a) Critical habitat is designated for the following ESUs in the following counties:

ESU	State—Counties
(1) California Coastal Chinook	*CA*—Humboldt, Trinity, Mendocino, Sonoma, Lake, Napa, Glenn, Colusa, and Tehama.
(2) Northern California *O. mykiss*	*CA*—Humboldt, Trinity, Mendocino, Sonoma, Lake, Glenn, Colusa, and Tehama.
(3) Central California Coast *O. mykiss*	*CA*—Lake, Mendocino, Sonoma, Napa, Marin, San Francisco, San Mateo, Santa Clara, Santa Cruz, Alameda, Contra Costa, and San Joaquin.
(4) South-Central Coast *O. mykiss*	*CA*—Monterey, San Benito, Santa Clara, Santa Cruz, San Luis Obispo.
(5) Southern California *O. mykiss*	*CA*—San Luis Obispo, Santa Barbara, Ventura, Los Angeles, Orange and San Diego.
(6) Central Valley spring-run Chinook	*CA*—Tehama, Butte, Glenn, Shasta, Yolo, Sacramento, Solano, Colusa, Yuba, Sutter, Trinity, Alameda, San Joaquin, and Contra Costa.
(7) Central Valley *O. mykiss*	*CA*—Tehama, Butte, Glenn, Shasta, Yolo, Sacramento, Solona, Yuba, Sutter, Placer, Calaveras, San Joaquin, Stanislaus, Tuolumne, Merced, Alameda, Contra Costa.

(b) *Critical habitat boundaries.* Critical habitat includes the stream channels within the proposed stream reaches, and includes a lateral extent as defined by the ordinary high-water line (33 CFR 329.11). In areas for which the ordinary high-water line has not been defined pursuant to 33 CFR 329.11, the lateral extent will be defined by the bankfull elevation. Bankfull elevation is the level at which water begins to leave the channel and move into the floodplain and is reached at a discharge which generally has a recurrence interval of 1 to 2 years on the annual flood series. Critical habitat in estuaries (e.g. San Francisco-San Pablo-Suisun Bay, Humboldt Bay, and Morro Bay) is defined by the perimeter of the water body as displayed on standard 1:24,000 scale topographic maps or the elevation of extreme high water, whichever is greater.

(c) *Primary constituent elements.* Within these areas, the primary constituent elements essential for the conservation of these ESUs are those sites and habitat components that support one or more life stages, including:

(1) Freshwater spawning sites with water quantity and quality conditions and substrate supporting spawning, incubation and larval development;

(2) Freshwater rearing sites with:

(i) Water quantity and floodplain connectivity to form and maintain physical habitat conditions and support juvenile growth and mobility;

(ii) Water quality and forage supporting juvenile development; and

(iii) Natural cover such as shade, submerged and overhanging large wood, log jams and beaver dams, aquatic

vegetation, large rocks and boulders, side channels, and undercut banks.

(3) Freshwater migration corridors free of obstruction and excessive predation with water quantity and quality conditions and natural cover such as submerged and overhanging large wood, aquatic vegetation, large rocks and boulders, side channels, and undercut banks supporting juvenile and adult mobility and survival.

(4) Estuarine areas free of obstruction and excessive predation with:

(i) Water quality, water quantity, and salinity conditions supporting juvenile and adult physiological transitions between fresh- and saltwater;

(ii) Natural cover such as submerged and overhanging large wood, aquatic vegetation, large rocks and boulders, side channels; and

(iii) Juvenile and adult forage, including aquatic invertebrates and fishes, supporting growth and maturation.

(d) *Exclusion of Indian lands.* Critical habitat does not include occupied habitat areas on Indian lands. The Indian lands specifically excluded from critical habitat are those defined in the Secretarial Order, including:

(1) Lands held in trust by the United States for the benefit of any Indian tribe;

(2) Land held in trust by the United States for any Indian Tribe or individual subject to restrictions by the United States against alienation;

(3) Fee lands, either within or outside the reservation boundaries, owned by the tribal government; and

(4) Fee lands within the reservation boundaries owned by individual Indians.

(e) *Land owned or controlled by the Department of Defense.* Additionally, critical habitat does not include the following areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a):

(1) Camp Pendleton Marine Corps Base;

(2) Vandenberg Air Force Base;

(3) Camp San Luis Obispo;

(4) Camp Roberts; and

(5) Mare Island Army Reserve Center.

(f) California Coastal Chinook Salmon (Oncorhynchus tshawytscha). Critical habitat is proposed to include the areas defined in the following units:

(1) Redwood Creek Hydrologic Unit 1107—*(i) Orick Hydrologic Sub-area 110710.* Outlet(s) = Redwood Creek (Lat −41.2997, Long −124.0917) upstream to endpoint(s) in: Boyes Creek (41.3639, −123.9845); Bridge Creek (41.137, −124.0012); Brown Creek (41.3986, −124.0012); Emerald (Harry Weir) (41.2142, −123.9812); Godwood Creek (41.3889, −124.0312); Larry Dam Creek (41.3359, −124.003); Little Lost Man Creek (41.2944, −124.0014); Lost Man Creek (41.3133, −123.9854); May Creek (41.3547, −123.999); McArthur Creek (41.2705, −124.041); North Fork Lost Man Creek (41.3374, −123.9935); Prairie Creek (41.4239, −124.0367); Redwood Creek (41.1367, −123.9309); Redwood Creek (41.2997, −124.0499); Tom McDonald (41.1628, −124.0419).

(ii) Beaver Hydrologic Sub-area 110720. Outlet(s) = Redwood Creek (Lat 41.1367, Long −123.9309) upstream to endpoint(s): Lacks Creek (41.0334, −123.8124); Minor Creek (40.9706, −123.7899).

(iii) Lake Prairie Hydrologic Sub-area 110730. Outlet(s) = Redwood Creek (Lat 40.9070, Long −123.8170) upstream to endpoint(s) in: Redwood Creek (40.7432, −123.7206).

(2) Trinidad Hydrologic Unit 1108—*(i) Big Lagoon Hydrologic Sub-area 110810.* Outlet(s) = Maple Creek (Lat 41.1555, Long −124.1380) upstream to endpoint(s) in: North Fork Maple Creek (41.1294, −124.0771); Maple Creek (41.1223, −124.0995).

(ii) Little River Hydrologic Sub-area 110820. Outlet(s) = Little River (41.0277, −124.1112) upstream to endpoint(s) in: South Fork Little River (40.9961, −124.0435); Little River (41.0463, −123.9818); Railroad Creek (41.0474, −124.0453); Lower South Fork Little River (41.003, −124.0081); Upper South Fork Little River (41.0163, −123.9939).

(3) Mad River Hydrologic Unit 1109—*(i) Blue Lake Hydrologic Sub-area 110910.* Outlet(s) = Mad River (Lat 40.9139, Long −124.0642) upstream to endpoint(s) in: Lindsay Creek (40.983, −124.0326); Mill Creek (40.9008, −124.0086); North Fork Mad River (40.8687, −123.9649); Squaw Creek (40.9426, −124.0202); Warren Creek (40.8901, −124.0402).

(ii) North Fork Mad River 110920. Outlet(s) = North Fork Mad River (Lat 40.8687, Long −123.9649) upstream to endpoint(s) in: Sullivan Gulch (40.8557, −123.9487); North Fork Mad River (40.8837, −123.9436).

(iii) Butler Valley 110930. Outlet(s) = Mad River (Lat 40.8449, Long −123.9807) upstream to endpoint(s) in: Black Creek (40.7547, −123.9016); Black Dog Creek (40.8334, −123.9805); Canon Creek (40.8362, −123.9028); Mad River (40.7007, −123.8642); Maple Creek (40.7928, −123.8742).

(4) Eureka Plain Hydrologic Unit 1110—*(i) Eureka Plain Hydrologic Sub-area 111000.* Outlet(s) = Mad River (Lat 40.9560, Long −124.1278); Jacoby Creek (40.8435, −124.0815); Freshwater Creek (40.8088, −124.1442); Elk River (40.7568, −124.1948); Salmon Creek (40.6868, −124.2194) upstream to endpoint(s) in: Bridge Creek (40.6958, −124.0795); Dunlap Gulch (40.7101, −124.1155); Elk River (40.7025, −124.1522); Freshwater Creek (40.7389, −123.9944); Gannon Slough (40.8628, −124.0818); Jacoby Creek (40.7944, −124.0093); Little Freshwater Creek (40.7485, −124.0652); North Branch of the North Fork Elk River (40.6878, −124.0131); North Fork Elk River (40.6756, −124.0153); Ryan Creek (40.7835, −124.1198); Salmon Creek (40.6438, −124.1319); South Branch of the North Fork Elk River (40.6691, −124.0244); South Fork Elk River (40.6626, −124.061); South Fork Freshwater Creek (40.7097, −124.0277).

(5) Eel River Hydrologic Unit 1111—*(i) Ferndale Hydrologic Sub-area 111111.* Outlet(s) = Eel River (Lat 40.6282, Long −124.2838) upstream to endpoint(s) in: Atwell Creek (40.472, −124.1449); Howe Creek (40.4748, −124.1827); Price Creek (40.5028, −124.2035); Strongs Creek (40.5986, −124.1222); Van Duzen River (40.5337, −124.1262).

(ii) Scotia Hydrologic Sub-area 111112. Outlet(s) = Eel River (Lat 40.4918, Long −124.0998) upstream to endpoint(s) in: Bear Creek (40.391, −124.0156); Chadd Creek (40.3921, −123.9542); Jordan Creek (40.4324, −124.0428); Monument Creek (40.4676, −124.1133).

(iii) Larabee Creek Hydrologic Sub-area 111113. Outlet(s) = Larabee Creek (40.4090, Long −123.9334) upstream to endpoint(s) in: Carson Creek (40.4189, −123.8881); Larabee Creek (40.3950, −123.8138).

(iv) Hydesville Hydrologic Sub-area 111121. Outlet(s) = Van Duzen River (Lat 40.5337, Long −124.1262) upstream to endpoint(s) in: Cummings Creek (40.5258, −123.9896); Hely Creek (40.5042, −123.9703); Yager Creek (40.5383, −124.1121); Unnamed (40.5383, −124.1121).

(v) Yager Creek Hydrologic Sub-area 111123. Outlet(s) = Yager Creek (Lat 40.5583, Long −124.0577) upstream to endpoint(s) in: Corner Creek (40.6189, −123.9994); Fish Creek (40.6392, −124.0032); Lawrence Creek (40.6394, −123.9935); Middle Fork Yager Creek (40.5799, −123.9015); North Fork Yager Creek (40.6044, −123.9084); Owl Creek (40.5557, −123.9362); Shaw Creek (40.6245, −123.9518); Yager Creek (40.5673, −123.9403).

(vi) Weott Hydrologic Sub-area 111131. Outlet(s) = South Fork Eel River (Lat 40.3500, Long −213.9305)

upstream to endpoint(s) in: Bridge Creek (40.2929, −123.8569); Bull Creek (40.3148,−124.0343); Canoe Creek (40.2909, −123.922); Cow Creek (40.3583, −123.9626); Cuneo Creek (40.3377, −124.0385); Elk Creek (40.2837, −123.8365); Fish Creek (40.2316, −123.7915); Harper Creek (40.354, −123.9895); Mill Creek (40.3509, −124.0236); Salmon Creek (40.2214, −123.9059); South Fork Salmon River (40.1769, −123.8929); Squaw Creek (40.3401, −123.9997); Tostin Creek (40.1722, −123.8796).

(vii) Benbow Hydrologic Sub-area 111132. Outlet(s) = South Fork Eel River (Lat 40.1932, Long −123.7692) upstream to endpoint(s) in: Anderson Creek (39.9337, −123.8933); Bear Pen Creek (39.9125, −123.8108); Bear Wallow Creek (39.7296, −123.7172); Bond Creek (39.7856, −123.6937); Butler Creek (39.7439, −123.692); China Creek (40.1035, −123.9493); Connick Creek (40.0911, −123.8187); Cox Creek (40.0288, −123.8542); Cummings Creek (39.8431, −123.5752); Dean Creek (40.1383, −123.7625); Dinner Creek (40.0915, −123.937); East Branch South Fork Eel River (39.9433, −123.6278); Elk Creek (39.7986, −123.5981); Fish Creek (40.0565, −123.7768); Foster Creek (39.8455, −123.6185); Grapewine Creek (39.7991, −123.5186); Hartsook Creek (40.012, −123.7888); Hollow Tree Creek (39.7316, −123.6918); Huckleberry Creek (39.7315, −123.7253); Indian Creek (39.9464, −123.8993); Jones Creek (39.9977, −123.8378); Leggett Creek (40.1374, −123.8312); Little Sproul Creel (40.0897, −123.8585); Low Gap Creek (39993, −123.767); McCoy Creek (399598, −123.7542); Michael's Creek (397642, −123.7175); Miller Creek (40.1215, −123.916); Moody Creek (399531, −123.8819); Mud Creek (398232, −123.6107); Piercy Creek (399706, −123.8189); Pollock Creek (40.0822, −123.9184); Rattlesnake Creek (397974, −123.5426); Redwood Creek (397721, −123.7651); Redwood Creek (40.0974, −123.9104); Seely Creek (40.1494, −123.8825); Somerville Creek (40.0896, −123.8913); South Fork Redwood Creek (397663, −123.7579); Spoul Creek (40.0125, −123.8585); Standley Creek (399479, −123.8083); Tom Long Creek (40.0315, −123.6891); Twin Rocks Creek (398269, −123.5543); Warden Creek (40.0625, −123.8546); West Fork Sproul Creek (40.0386, −123.9015); Wildcat Creek (399049, −123.7739); Wilson Creek (39841, −123.6452); Unnamed Tributary (40.1136, −123.9359); Unnamed Tributary (40.0538, −123.8293).

(viii) Laytonville Hydrologic Sub-area 111133. Outlet(s) = South Fork Eel River (Lat 39.7665, Long −123.6484)) upstream to endpoint(s) in: Bear Creek (39.6413, −123.5797); Cahto Creek (39.6624, −123.5453); Dutch Charlie Creek (39.6892, −123.6818); Grub Creek (39.7777, −123.5809); Jack of Hearts Creek (39.7244, −123.6802); Kenny Creek (39.6733, −123.6082); Mud Creek (39.6561, −123.592); Redwood Creek (39.6738, −123.6631); Rock Creek (39.6931, −123.6204); South Fork Eel River (39.6271, −123.5389); Streeter Creek (39.7328, −123.5542); Ten Mile Creek (39.6651, −123.451).

(ix) Sequoia Hydrologic Sub-area 111141. Outlet(s) = South Fork Eel River (Lat 40.3558, Long −123.9194) upstream to endpoint(s) in: Brock Creek (40.2411, −123.7248); Dobbyn Creek (40.2216, −123.6029); Hoover Creek (40.2312, −123.5792); Line Gulch (40.1655, −123.4831); North Fork Dobbyn Creek (40.2669, −123.5467); South Fork Dobbyn Creek (40.1723, −123.5112); South Fork Eel River (40.35, −123.9305); Unnamed Tributary (40.3137, −123.8333); Unnamed Tributary (40.2715, −123.549).

(x) Spy Rock Hydrologic Sub-area 111142. Outlet(s) = Eel River (Lat 40.1736, Long −123.6043) upstream to endpoint(s) in: Bell Springs Creek (39.9399, −123.5144); Burger Creek (39.6943, −123.413); Chamise Creek (40.0563, −123.5479); Jewett Creek (40.1195, −123.6027); Kekawaka Creek (40.0686, −123.4087); North Fork Eel River (39.9567, −123.4375); Woodman Creek (39.7639, −123.4338).

(xi) North Fork Eel River Hydrologic Sub-area 111150. Outlet(s) = North Fork Eel River (Lat 39.9567, Long −123.4375) upstream to endpoint(s) in: North Fork Eel River (39.9370, −123.3758).

(xii) Outlet Creek Hydrologic Sub-area 111161. Outlet(s) = Outlet Creek (Lat 39.6263, Long −123.3453) upstream to endpoint(s) in: Baechtel Creek (39.3688, −123.4028); Berry Creek (39.4272, −123.2951); Bloody Run (39.5864, −123.3545); Broaddus Creek (39.3907, −123.4163); Davis Creek (39.3701, −123.3007); Dutch Henry Creek (39.5788, −123.4543); Haehl Creek (39.3795, −123.3393); Long Valley Creek (39.6091, −123.4577); Outlet Creek (39.4526, −123.3338); Ryan Creek (39.4803, −123.3642); Upp Creek (39.4276, −123.3578); Upp Creek (39.4276, −123.3578); Willits Creek (39.4315, −123.3794).

(xiii) Tomki Creek Hydrologic Sub-area 111162. Outlet(s) = Eel River (Lat 39.7138, Long −123.3531) upstream to endpoint(s) in: Cave Creek (39.3925, −123.2318); Long Branch Creek (39.4074, −123.1897); Middle Fork Eel River (39.7136, −123.353); Outlet Creek (39.6263, −123.3453); Rocktree Creek (39.4533, −123.3079); Salmon Creek (39.4461, −123.2104); Scott Creek (39.456, −123.2297); String Creek (39.4855, −123.2891); Tomki Creek (39.549, −123.3613); Wheelbarrow Creek (39.5029, −123.3287).

(xiv) Lake Pillsbury Hydrologic Sub-area 111163. Outlet(s) = Eel River (Lat 39.3860, Long −123.1163) upstream to endpoint(s) in: Eel River (39.4078, −122.958).

(xv) Round Valley Hydrologic Sub-area 111172. Outlet(s) = Mill Creek (Lat 39.7398, Long −123.1431); Williams (39.8147, −123.1335) upstream to endpoint(s) in: Mill Creek (39.8456, −123.2822); Murphy Creek (39.8804, −123.1636); Poor Mans Creek (39.8179, −123.1833); Short Creek (39.8645, −123.2242); Turner Creek (39.7238, −123.2191); Williams Creek (39.8596, −123.1341).

(6) Cape Mendocino Hydrologic Unit 1112—*(i) Capetown Hydrologic Sub-area 111220.* Outlet(s) = Bear River (Lat 40.4744, Long −124.3881) upstream to endpoint(s) in: Bear River (40.3591, −124.0536); South Fork Bear River (40.4271, −124.2873).

(ii) Mattole River Hydrologic Sub-area 111230. Outlet(s) = Mattole River (Lat 40.2942, Long −124.3536) upstream to endpoint(s) in: Bear Creek (40.1262, −124.0631); Blue Slide Creek (40.1286, −123.9579); Bridge Creek (40.0503, −123.9885); Conklin Creek (40.3169, −124.229); Dry Creek (40.2389, −124.0621); East Fork Honeydew Creek (40.1633, −124.0916); East Fork of the North Fork Mattole River (40.3489, −124.2244); Eubanks Creek (40.0893, −123.9743); Gilham Creek (40.2162, −124.0309); Grindstone Creek (40.1875, −124.0041); Honeydew Creek (40.1942, −124.1363); Mattole Canyon (40.1833, −123.9666); Mattole River (39.9735, −123.9548); McGinnis Creek (40.3013, −124.2146); McKee Creek (40.0674, −123.9608); Mill Creek (40.0169, −123.9656); North Fork Mattole River (40.3729, −124.2461); North Fork Bear Creek (40.1422, −124.0945); Oil Creek (40.3008, −124.1253); Rattlesnake Creek (40.2919, −124.1051); South Fork Bear Creek (40.0334, −124.0232); Squaw Creek (40.219, −124.1921); Thompson Creek (39.9969, −123.9638); Unnamed (40.1522, −124.0989); Upper North Fork Mattole River (40.2907, −124.1115); Westlund Creek (40.2333, −124.0336); Woods creek (40.2235, −124.1574); Yew Creek (40.0019, −123.9743).

(7) Mendocino Coast Hydrologic Unit 1113—*(i) Wages Creek Hydrologic Sub-area 111312.* Outlet(s) = Wages Creek (Lat 39.6513, Long −123.7851)

upstream to endpoint(s) in: Wages Creek (39.6393, −123.7146).

(ii) Ten Mile River Hydrologic Sub-area 111313. Outlet(s) = Ten Mile River (Lat 39.5529, Long −123.7658) upstream to endpoint(s) in: Middle Fork Ten Mile River (39.5397, −123.5523); Little North Fork Ten Mile River (39.6188, −123.7258); Ten Mile River (39.5721, −123.7098); South Fork Ten Mile River (39.4927, −123.6067); North Fork Ten Mile River (39.5804, −123.5735).

(iii) Noyo River Hydrologic Sub-area 111320. Outlet(s) = Noyo River (Lat 39.4274, Long −123.8096) upstream to endpoint(s) in: North Fork Noyo River (39.4541, −123.5331); Noyo River (39.431, −123.494); South Fork Noyo River (39.3549, −123.6136).

(iv) Big River Hydrologic Sub-area 111330. Outlet(s) = Big River (Lat 39.3030, Long −123.7957) upstream to endpoint(s) in: Big River (39.3095, −123.4454).

(v) Albion River Hydrologic Sub-area 111340. Outlet(s) = Albion River (Lat 39.2253, Long −123.7679) upstream to endpoint(s) in: Albion River (39.2644, −123.6072); North Fork Albion River (39.2827, −123.607).

(vi) Navarro River Hydrologic Sub-area 111350. Outlet(s) = Navarro River (Lat 39.1921, Long −123.7611) upstream to endpoint(s) in: Navarro River (39.0534); Rancheria Creek (38.9689, −123.4169).

(vii) Garcia River Hydrologic Sub-area 111370. Outlet(s) = Garcia River (Lat 38.9455, Long −123.7257) upstream to endpoint(s) in: Garcia River (38.9160, −123.4900).

(8) Russian River Hydrologic Unit 1114—*(i) Guerneville Hydrologic Sub-area 111411.* Outlet(s) = Russian River (Lat 38.4507, Long −123.1289) upstream to endpoint(s) in: Austin Creek (38.5099, −123.0681); Mark West Creek (38.4961, −122.8489).

(ii) Austin Creek Hydrologic Sub-area 111412. Outlet(s) = Austin Creek (Lat 38.5099, Long −123.0681) upstream to endpoint(s) in: Austin Creek (38.5326, −123.0844).

(iii) Mark West Hydrologic Sub-area 111423. Outlet(s) = Mark West Creek (Lat 38.4961, Long −122.8489) upstream to endpoint(s) in: Mark West Creek (38.4526, −122.8347).

(iv) Warm Springs Hydrologic Sub-area 111424. Outlet(s) = Dry Creek (Lat 38.5861, Long −122.8573) upstream to endpoint(s) in: Dry Creek (38.7179, −123.0075).

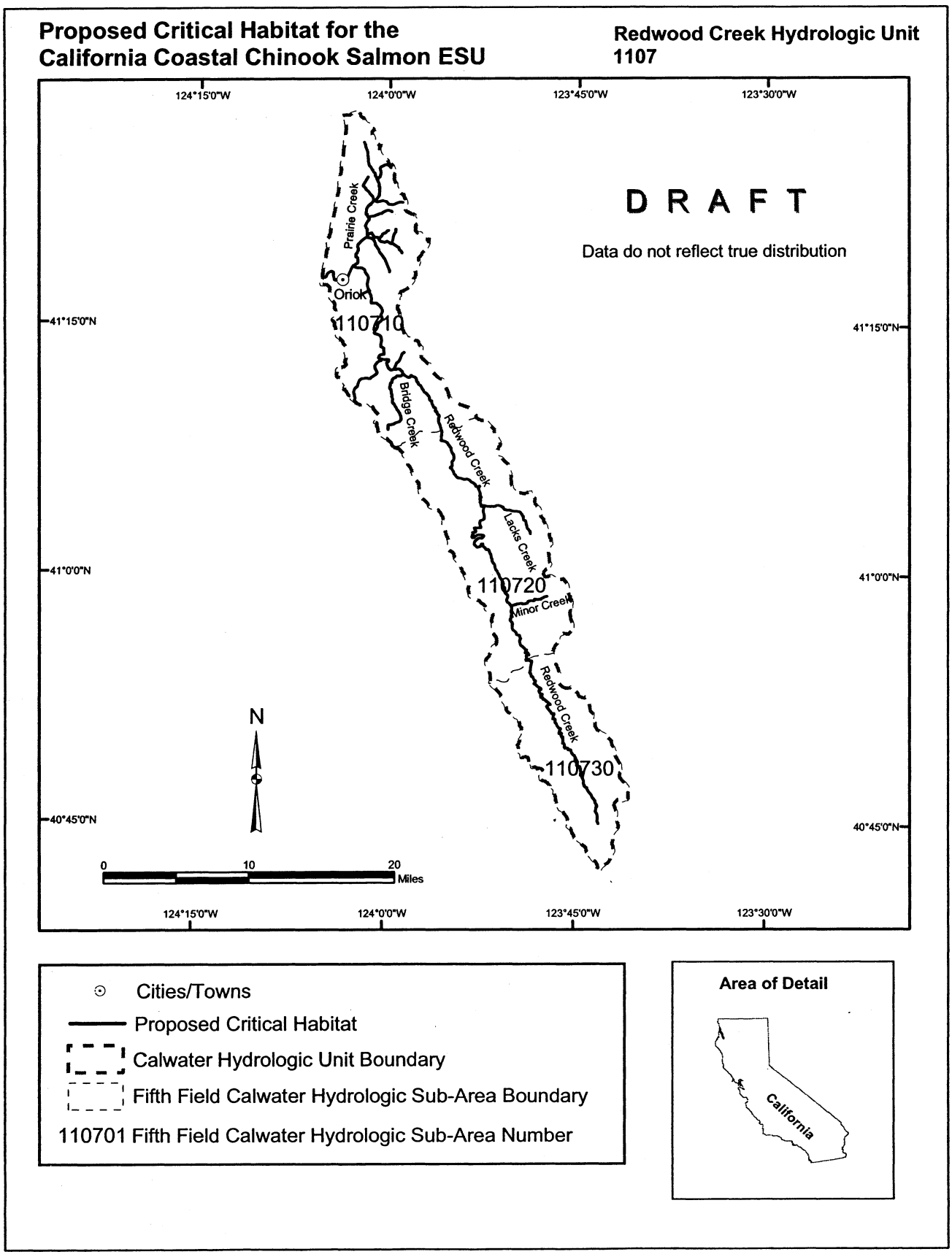
(v) Geyserville Hydrologic Sub-area 111425. Outlet(s) = Russian River (Lat 38.6132, Long −122.8321) upstream.

(vi) Ukiah Hydrologic Sub-area 111431. Outlet(s) = Russian River (Lat 38.8828, Long −123.0557) upstream to endpoint(s) in: Feliz Creek (38.9941, −123.1779).

(vii) Forsythe Creek Hydrologic Sub-area 111433. Outlet(s) = Russian River (Lat 39.2257, Long −123.2012) upstream to endpoint(s) in: Forsythe Creek (39.2780, −123.2608); Russian River (39.3599, −123.2326).

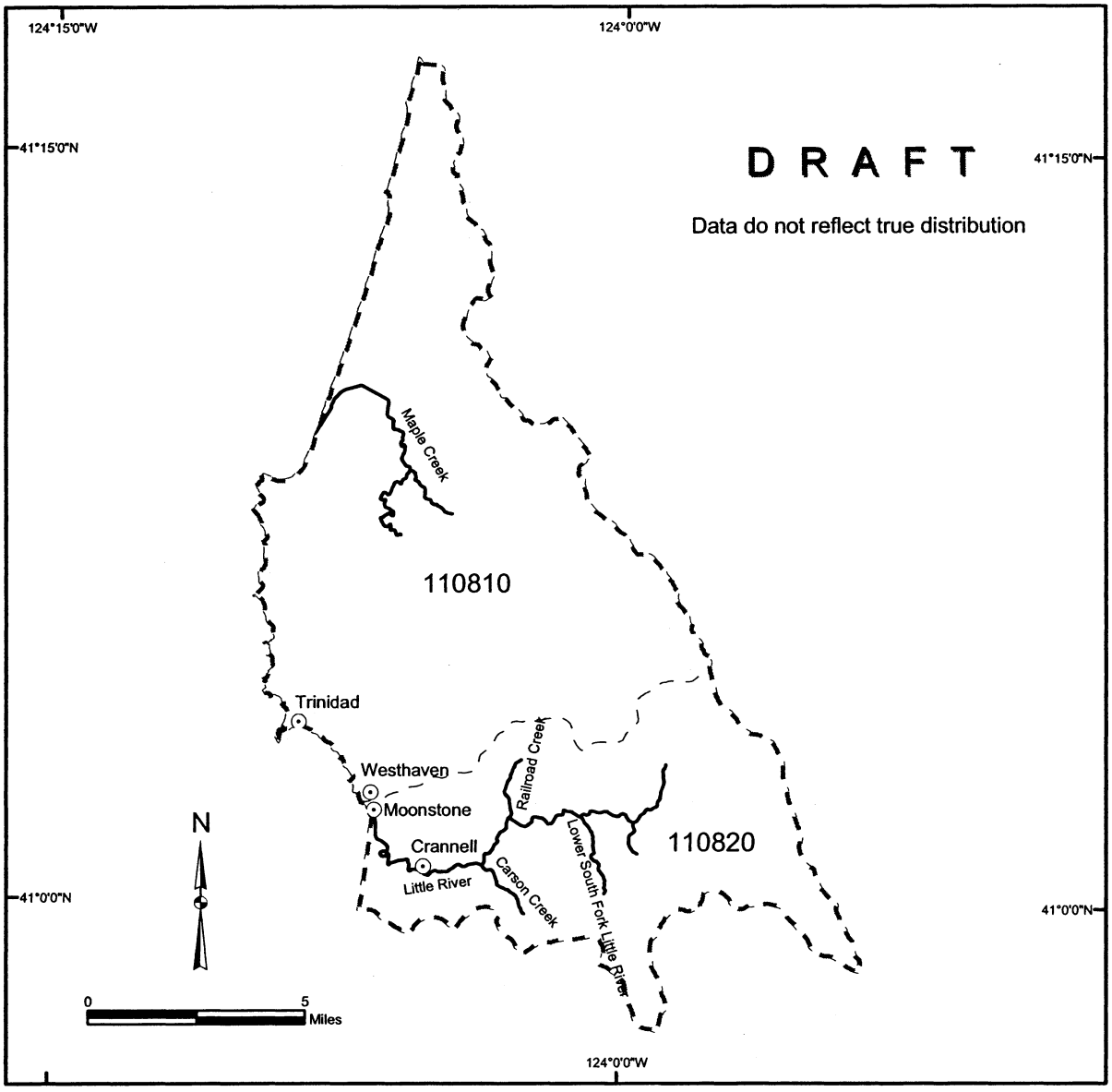
(9) Maps of proposed critical habitat for the California Coast chinook salmon ESU follow:

BILLING CODE 3510–22–P


Proposed Critical Habitat for the California Coastal Chinook Salmon ESU
Redwood Creek Hydrologic Unit 1107
124°15'0"W
124°0'0"W
123°45'0"W
123°30'0"W
41°15'0"N
41°0'0"N
40°45'0"N
DRAFT
Data do not reflect true distribution
Prairie Creek
Orick
110710
Bridge Creek
Redwood Creek
Lacks Creek
110720
Minor Creek
Redwood Creek
110730
N
0
10
20
Miles
Cities/Towns
Proposed Critical Habitat
Calwater Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California

Proposed Critical Habitat for the California Coastal Chinook Salmon ESU

Trinidad Hydrologic Unit 1108



⊙ Cities/Towns

Proposed Critical Habitat

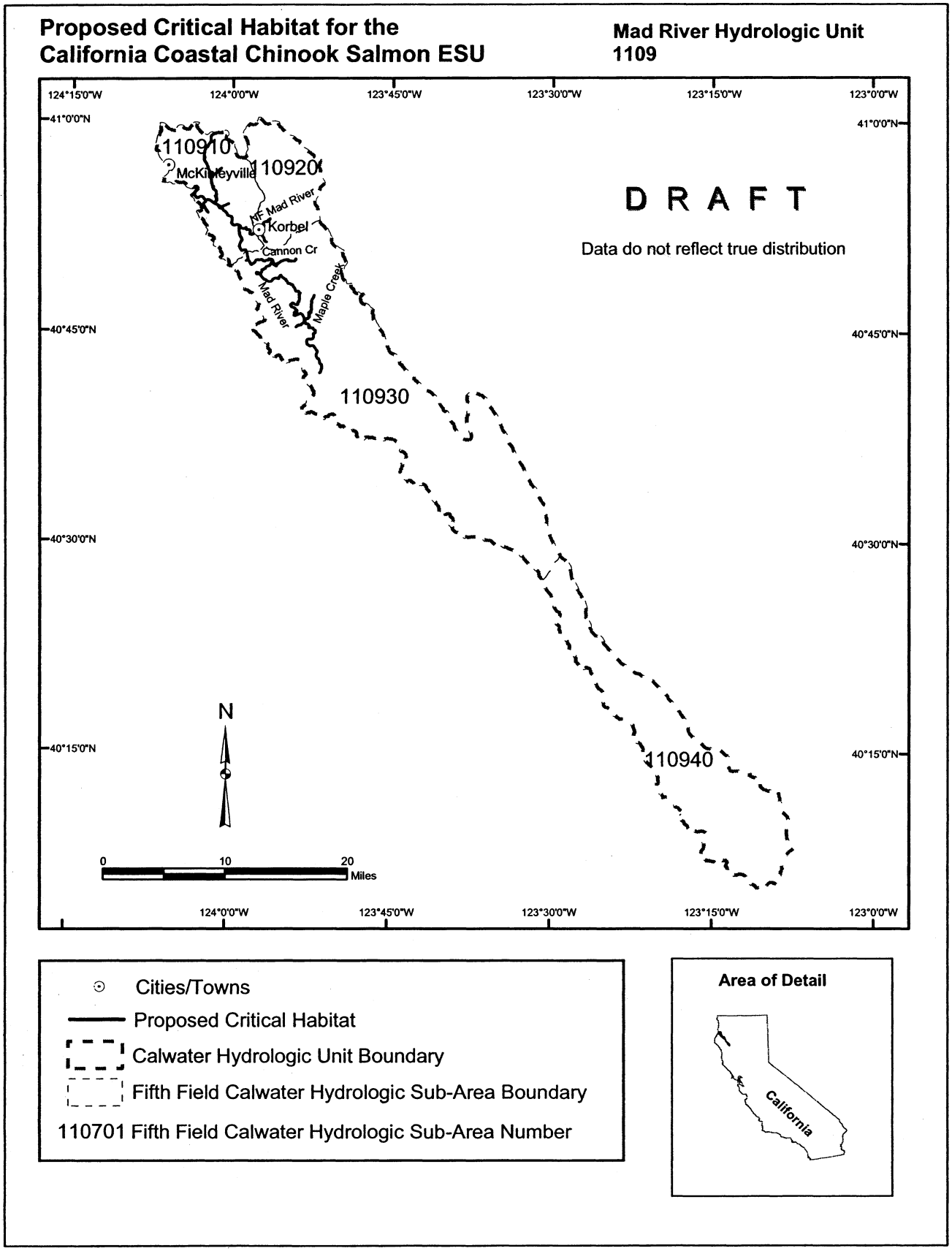
Calwater Hydrologic Unit Boundary

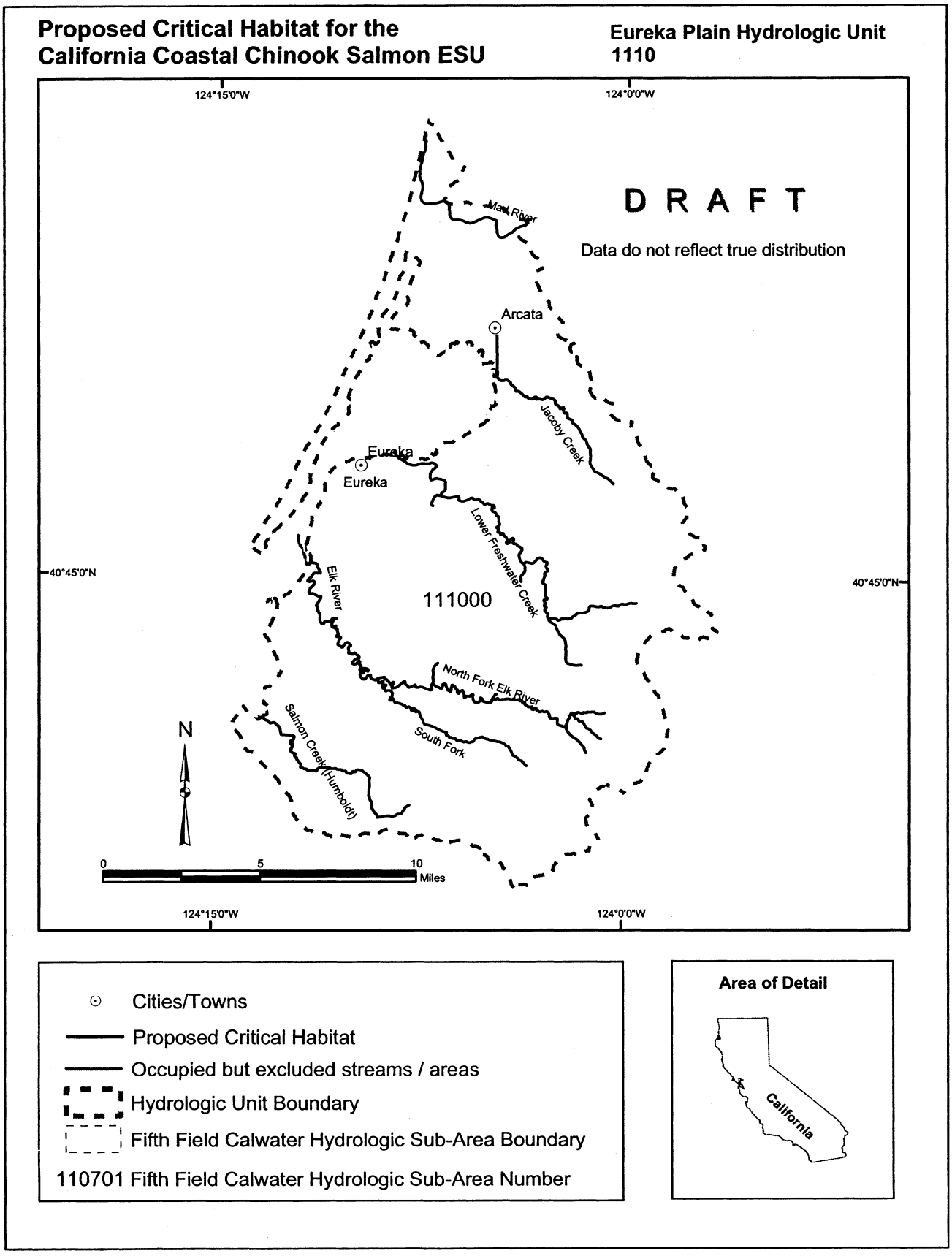
Fifth Field Calwater Hydrologic Sub-Area Boundary

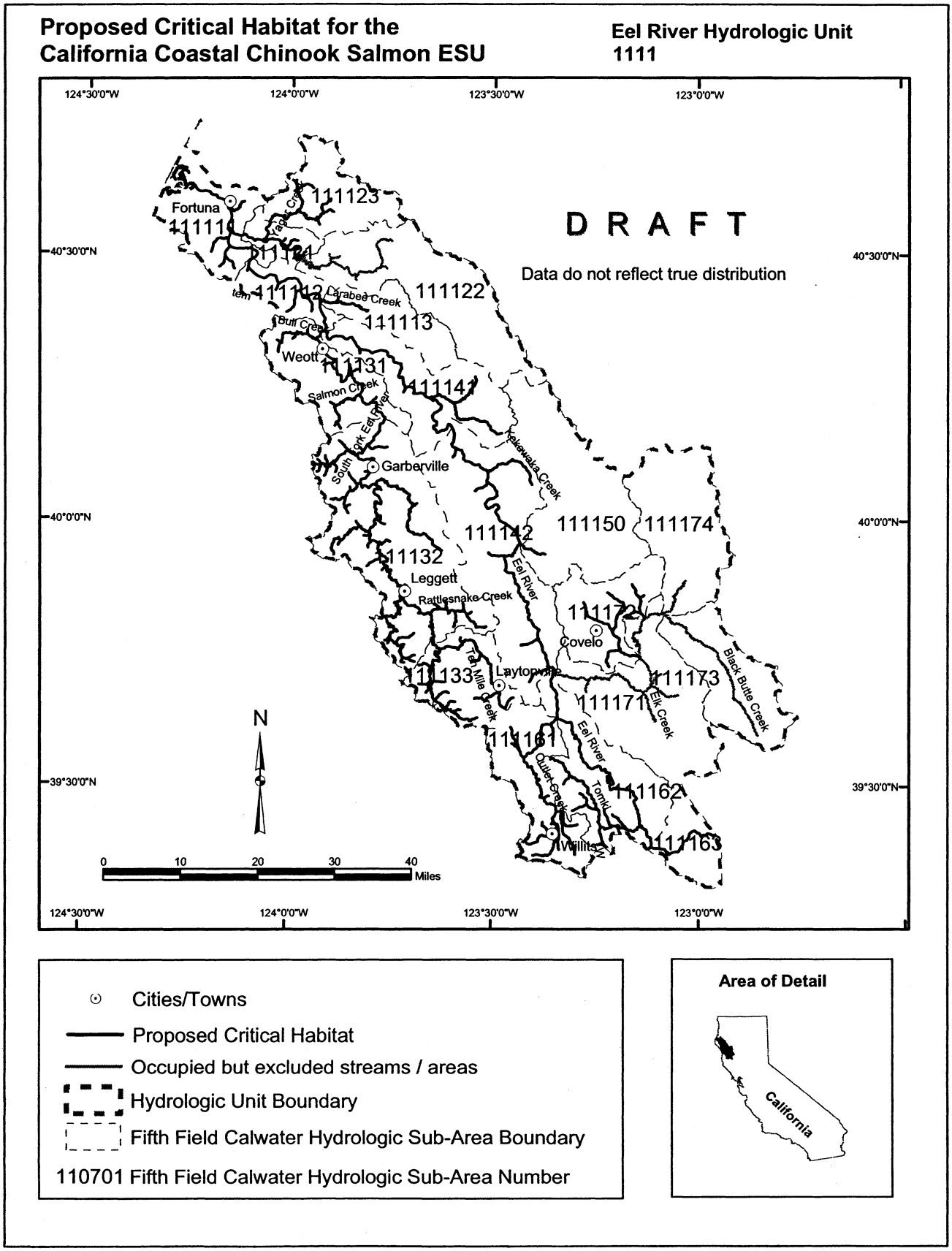
110701 Fifth Field Calwater Hydrologic Sub-Area Number

Area of Detail

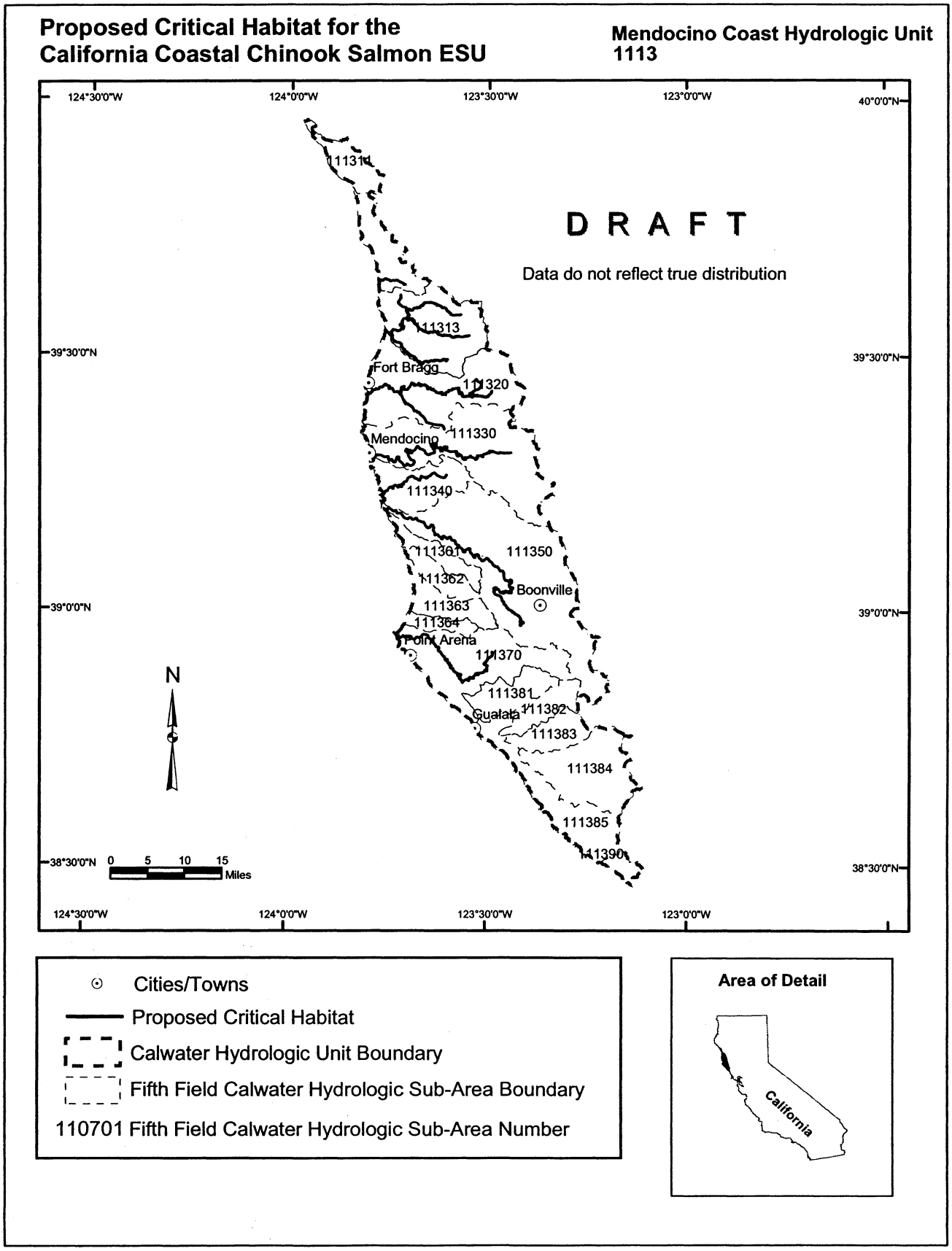


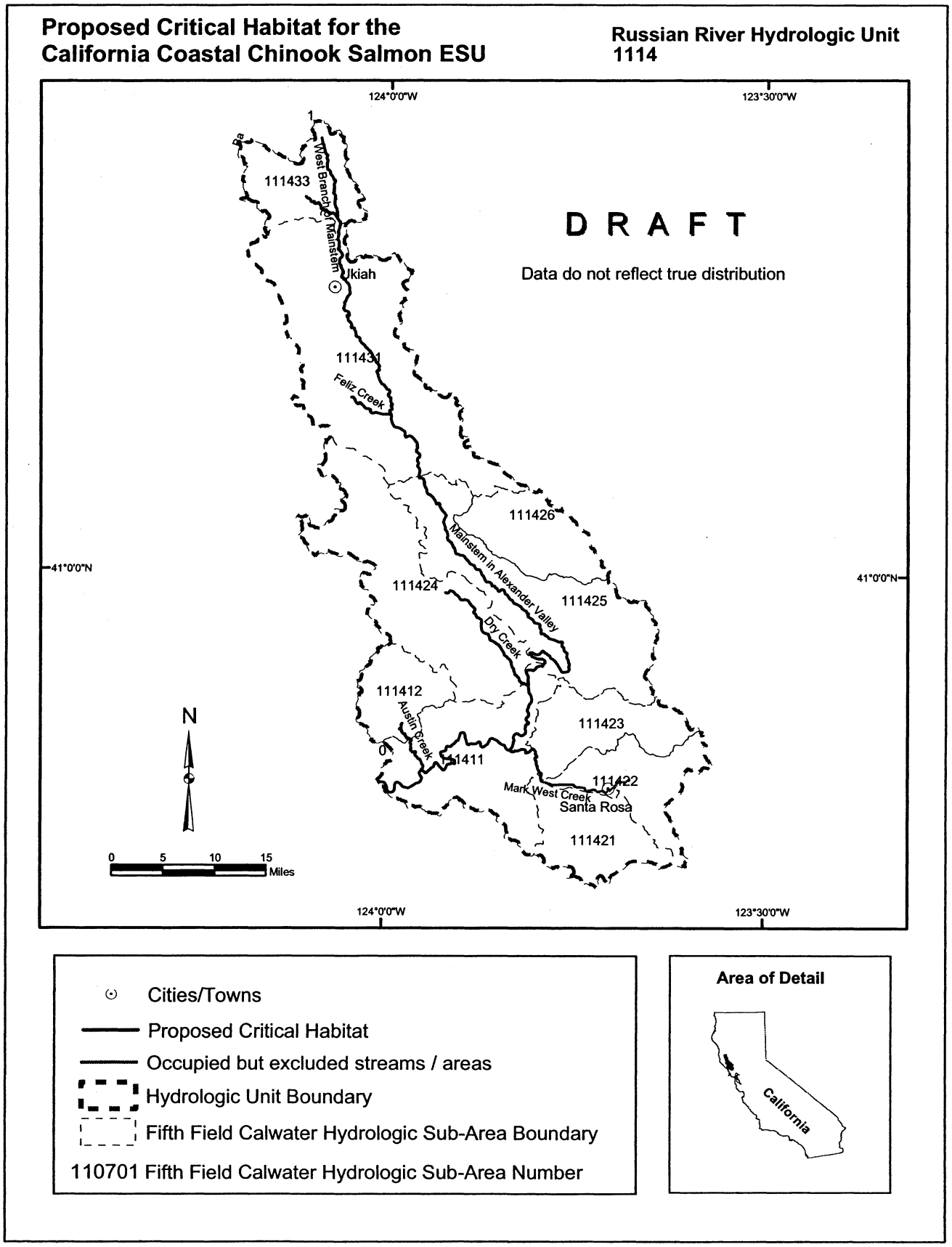

Proposed Critical Habitat for the California Coastal Chinook Salmon ESU
Mad River Hydrologic Unit 1109
124°15'0"W
124°0'0"W
123°45'0"W
123°30'0"W
123°15'0"W
123°0'0"W
41°0'0"N
40°45'0"N
40°30'0"N
40°15'0"N
110910
110920
110930
110940
McKinleyville
NF Mad River
Korbel
Cannon Cr
Mad River
Maple Creek
DRAFT
Data do not reflect true distribution
N
0
10
20
Miles
Cities/Towns
Proposed Critical Habitat
Calwater Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the California Coastal Chinook Salmon ESU
Eureka Plain Hydrologic Unit 1110
124°15'0"W
124°0'0"W
DRAFT
Data do not reflect true distribution
Mad River
Arcata
Jacoby Creek
Eureka
Eureka
Lower Freshwater Creek
40°45'0"N
Elk River
111000
North Fork Elk River
South Fork
Salmon Creek (Humboldt)
N
0
5
10
Miles
Cities/Towns
Proposed Critical Habitat
Occupied but excluded streams / areas
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the California Coastal Chinook Salmon ESU
Eel River Hydrologic Unit 1111
DRAFT
Data do not reflect true distribution
124°30'0"W
124°0'0"W
123°30'0"W
123°0'0"W
40°30'0"N
40°0'0"N
39°30'0"N
Fortuna
Garberville
Weott
Leggett
Laytonville
Covelo
Willits
111123
111111
111121
111122
111112
111113
111131
111141
111142
111150
111174
111132
111172
111133
111173
111171
111161
111162
111163
Eel River
Salmon Creek
South Fork Eel River
Rattlesnake Creek
Tan Mile Creek
Elk Creek
Black Butte Creek
Outlet Creek
Tomki
Larabee Creek
Buff Creek
Yakewalla Creek
N
0 10 20 30 40
Miles
Cities/Towns
Proposed Critical Habitat
Occupied but excluded streams / areas
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the California Coastal Chinook Salmon ESU
Cape Mendocino Hydrologic Unit 1112
124°30'0"W
124°0'0"W
40°30'0"N
40°0'0"N
111210
111220
111230
DRAFT
Data do not reflect true distribution
Bear River mainstem
North Fork
Petrolia
Mattole River
Honeydew
Squaw Creek
South Fork Bear Creek
Whitethorn
N
0 5 10 15 Miles
Cities/Towns
Proposed Critical Habitat
Calwater Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the California Coastal Chinook Salmon ESU
Mendocino Coast Hydrologic Unit 1113
124°30'0"W
124°0'0"W
123°30'0"W
123°0'0"W
40°0'0"N
39°30'0"N
39°0'0"N
38°30'0"N
DRAFT
Data do not reflect true distribution
111310
11313
Fort Bragg
111320
Mendocino
111330
111340
111361
111350
111362
Boonville
111363
111364
Point Arena
111370
111381
Gualala
111382
111383
111384
111385
111390
N
0 5 10 15
Miles
Cities/Towns
Proposed Critical Habitat
Calwater Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California



BILLING CODE 3510–22–C

(g) *Northern California O. mykiss (Oncorhynchus mykiss).* Critical habitat is proposed to include the areas defined in the following units:

(1) Redwood Creek Hydrologic Unit 1107—*(i) Orick Hydrologic Sub-area 110710.* Outlet(s) = Boat Creek (Lat 41.4059, Long —124.0675); Home Creek (41.4027, −124.0683); Redwood Creek (41.2923, −124.0917); Squashan Creek (41.389, −124.0703) upstream to endpoint(s) in: Boat Creek (41.4110, −124.0583); Bond Creek (41.2326, −124.0262); Boyes Creek (41.3701, −124.9891); Bridge Creek (41.1694, −123.9964); Brown Creek (41.3986, −124.0012); Cloquet Creek (41.2456, −124.0116); Cole Creek (41.2187, −124.0087); Copper Creek (41.1516, −123.9258); Dolason Creek (41.1969, −123.9667); Elam Creek (41.2613, −124.0321); Emerald Creek (41.2164, −123.9808); Forty Four Creek (41.2187, −124.0195); Gans South Creek (41.2617, −124.0157); Godwood Creek (41.3787, −124.0354); Hayes Creek (41.2889, −124.0295); Home Creek (41.3951, −124.0386); Larry Dam Creek (41.3441, −123.9966); Little Lost Man Creek (41.3078, −124.0084); Lost Man Creek (41.3187, −123.9892); May Creek (41.3521, −124.0164); McArthur Creek (41.2702, −124.0427); Miller Creek (41.2290, −124.0116); North Fork Lost Man Creek (41.3405, −123.9859); Oscar Larson Creek (41.2559, −123.9943); Prairie Creek (41.4440, −124.0411); Redwood Creek (41.1367, −123.9309); Skunk Cabbage Creek (41.3211, −124.0802); Slide Creek (41.1736, −123.9450); Squashan Creek (41.3739, −124.0440); Streelow Creek (41.3622, −124.0472); Tom McDonald Creek (41.1933, −124.0164); Unnamed Tributary (41.3619, −123.9967); Unnamed Tributary (41.3424, −124.0572).

(ii) Beaver Hydrologic Sub-area 110720. Outlet(s) = Redwood Creek (Lat 41.1367, Long —123.9309) upstream to endpoint(s) in: Beaver Creek (41.0208, −123.8608); Captain Creek (40.9199, −123.7944); Cashmere Creek (41.0132, −123.8862); Coyote Creek (41.1249, −123.8796); Devils Creek (41.1224, −123.9384); Garcia Creek (41.0180, −123.8923); Garrett Creek (41.0904, −123.8712); Karen Court Creek (41.0368, −123.8953); Lacks Creek (41.0306, −123.8096); Loin Creek (40.9465, −123.8454); Lupton Creek (40.9058, −123.8286); Mill Creek (41.0045, −123.8525); Minor Creek (40.9706, −123.7899); Molasses Creek (40.9986, −123.8490); Moon Creek (40.9807, −123.8368); Panther Creek (41.0732, −123.9275); Pilchuck Creek (41.9986, −123.8710); Roaring Gulch (41.0319, −123.8674); Santa Fe Creek (40.9368, −123.8397); Sweathouse Creek (40.9332, −123.8131); Toss-Up Creek (40.9845, −123.8656); Wiregrass Creek (40.9652, −123.8553).

(iii) Lake Prairie Hydrologic Sub-area 110730. Outlet(s) = Redwood Creek (Lat 40.9070, Long —123.8170) upstream to endpoint(s) in: Bradford Creek (40.7812, −123.7215); Cut-Off Meander (40.8507, −123.7729); Emmy Lou Creek (40.8655, −123.7771); Gunrack Creek (40.8391, −123.7650); High Prairie Creek (40.8191, −123.7723); Jena Creek (40.8742, −123.8065); Lake Prairie Creek (40.7984, −123.7558); Lupton Creek (40.9069, −123.8172); Minon Creek (40.8140, −123.7372); Noisy Creek (40.8613, −123.8044); Pardee Creek (40.7779, −123.7416); Redwood Creek (40.7432, −123.7206); Simion Creek (40.8241, −123.7560); Six Rivers Creek (40.8352, −123.7842); Smokehouse Creek (40.7405, −123.7278); Snowcamp Creek (40.7415, −123.7296); Squirrel Trail Creek (40.8692, −123.7844); Twin Lakes Creek (40.7369, −123.7214); Panther Creek (40.8019, −123.7094); Windy Creek (40.8866, −123.7956).

(2) Trinidad Hydrologic Unit 1108—*(i) Big Lagoon Hydrologic Sub-area 110810.* Outlet(s) = Maple Creek (Lat 41.1555, Long —124.1380); McDonald Creek (41.2521, −124.0919) upstream to endpoint(s) in: Beach Creek (41.0716, −124.0239); Clear Creek (41.1031, −124.0030); Diamond Creek (41.1571, −124.0926); Maple Creek (41.0836, −123.9790); McDonald Creek (41.1850, −124.0773); M-Line Creek (41.0752, −124.0787); North Fork McDonald Creek (41.2107, −124.0664); North Fork of Maple Creek (41.1254, −124.0539); Pitcher Creek (41.1521, −124.0897); South Fork Maple Creek (41.1003, −124.1119); Tom Creek (41.1773, −124.0966); Unnamed Tributary (41.1004, −124.0155); Unnamed Tributary (41.0780, −124.0676); Unnamed Tributary (41.1168, −124.0886); Unnamed Tributary (41.0851, −124.0966); Unnamed Tributary (41.1132, −124.0827); Unnamed Tributary (41.0749, −124.0889); Unnamed Tributary (41.1052, −124.0675); Unnamed Tributary (41.0714, −124.0611); Unnamed Tributary (41.0948, −124.0016).

(ii) Little River Hydrologic Sub-area 110820. Outlet(s) = Little River (Lat 41.0277, Long —124.1112) upstream to endpoint(s) in: South Fork Little River (40.9899, −124.0394); Freeman Creek (41.0283, −124.0585); Little River (41.0530, −123.9689); Lower South Fork Little River (40.9893, −124.0007); Railroad Creek (41.0468, −124.0466); Strawberry Creek (40.9963, −124.1155); Unnamed Tributary (41.0356, −123.9958); Unnamed Tributary (41.0407, −124.0598); Unnamed Tributary (41.0068, −123.9830); Unnamed Tributary (41.0365, −124.0361); Unnamed Tributary (41.0444, −124.0194); Unnamed Tributary (41.0431, −124.0125); Upper South Fork Little River (41.0131, −123.9852).

(3) Mad River Hydrologic Unit 1109—*(i) Blue Lake Hydrologic Sub-area 110910.* Outlet(s) = Mad River (Lat 40.9139, Long —124.0642); Strawberry Creek (40.9964, −124.1155); Widow White Creek (40.9635, −124.1253) upstream to endpoint(s) in: Boundary Creek (40.8395, −123.9920); Grassy Creek (40.9314, −124.0188); Hall Creek (40.9162, −124.0141); Kelly Creek (40.8656, −124.0260); Leggit Creek (40.8808, −124.0269); Lindsay Creek (40.9838, −124.0283); Mather Creek (40.9796, −124.0526); Mill Creek (40.9296, −124.1037); Mill Creek (40.8521, −123.9617); North Fork Mad River (40.8687, −123.9649); Norton Creek (40.9572, −124.1003); Palmer Creek (40.8633, −124.0193); Puter Creek (40.8474, −123.9966); Quarry Creek (40.8526, −124.0098); Squaw Creek (40.9426, −124.0202); Strawberry Creek (40.9761, −124.0630); Unnamed Tributary (40.9624, −124.0179); Unnamed Tibitary (40.9713, −124.0477); Unnamed Tributary (40.9549, -124.0554); Unnamed Tributary (40.9672, −124.0218); Warren Creek (40.8860, −124.0351); Widow White Creek (40.9522, −124.0784).

(ii) North Fork Mad River Hydrologic Sub-area 110920. Outlet(s) = North Fork Mad River (Lat 40.8687, Long −123.9649) upstream to endpoint(s) in: Bald Mountain Creek (40.8922, −123.9097); Denman Creek (40.9293, −123.9429); East Fork North Fork (40.9702, −123.9449); Gosinta Creek (40.9169, −123.9420); Hutchery Creek (40.8712, −123.9450); Jackson Creek (40.9388, −123.9462); Krueger Creek (40.9505, −123.9611); Long Prairie Creek (40.9235, −123.8945); Mule Creek (40.9416, −123.9309); North Fork Mad River (40.9918, −123.9610); Pine Creek (40.9299, −123.9114); Pollock Creek (40.9081, −123.9071); Sullivan Gulch (40.8512, −123.9401); Tyson Creek (40.9559, −123.9738); Unnamed Tributary (40.9879, −123.9511); Unnamed Tributary (40.9906, −123.9540); Unnamed Tributary (40.9294, −123.8842); Unnamed Tributary (40.9866, −123.9788); Unnamed Tributary (40.9927, −123.9736).

(iii) Butler Valley Hydrologic Sub-area 110930. Outlet(s) = Mad River (Lat 40.8449, Long −123.9807) upstream to endpoint(s) in: Bear Creek (40.5468, −123.6728); Black Creek (40.7521,

−123.9080); Black Dog Creek (40.8334, −123.9805); Blue Slide Creek (40.7333, −123.9225); Boulder Creek (40.7634, −123.8667); Bug Creek (40.6587, −123.7356); Cannon Creek (40.8535, −123.8850); Coyote Creek (40.6147, −123.6488); Devil Creek (40.8032, −123.9175); Dry Creek (40.8218, −123.9751); East Creek (40.5403, −123.5579); Maple Creek (40.7933, −123.8353); Pilot Creek (40.5950, −123.5888); Simpson Creek (40.8138, −123.9156); Unnamed Tributary (40.7306, −123.9019); Unnamed Tributary (40.7739, −123.9255); Unnamed Tributary (40.7744, −123.9137); Unnamed Tributary (40.8029, −123.8716); Unnamed Tributary (40.8038, −123.8691); Unnamed Tributary (40.8363, −123.8973).

(4) Eureka Plain Hydrologic Unit 1110—*(i) Eureka Plain Hydrologic Sub-area 111000.* Outlet(s) = Elk River (Lat 40.7568, Long −124.1948); Freshwater Creek (40.8088, −124.1442); Jacoby Creek (40.8436, −124.0834); Mad River (40.9560, −124.1278); Rocky Gulch (40.8309, −124.0813); Salmon Creek (40.6868, −124.2194); Washington Gulch (40.8317, −124.0805) upstream to endpoint(s) in: Bridge Creek (40.6958, −124.0805); Browns Gulch (40.7038, −124.1074); Clapp Gulch (40.6967, −124.1684); Cloney Gulch (40.7826, −124.0347); Doe Creek (40.6964, −124.0201); Dunlap Gulch (40.7076, −124.1182); Falls Gulch (40.7655, −124.0261); Fay Slough (40.8033, −124.0574); Freshwater Creek (40.7385, −124.0035); Golf Course Creek (40.8406, −124.0402); Graham Gulch (40.7540, −124.0228); Guptil Gulch (40.7530, −124.1202); Henderson Gulch (40.7357, −124.1394); Jacoby Creek (40.7951, −124.0087); Lake Creek (40.6848, −124.0831); Line Creek (40.6578, −124.0460); Little Freshwater Creek (40.7371, −124.0649); Little North Fork Elk River (40.6972, −124.0100); Little South Fork Elk River (40.6555, −124.0877); Martin Slough (40.7679, −124.1578); McCready Gulch (40.7824, −124.0441); McWinney Creek (40.6968, −124.0616); Morrison Gulch (40.8105, −124.0437); North Branch of the North Fork Elk River (40.6879, −124.0130); North Fork Elk River (40.6794−123.9834); Railroad Gulch (40.6955, −124.1545); Rocky Gulch (40.8079, −124.0528); Ryan Creek (40.7352, −124.0996); Salmon Creek (40.6438, −124.1318); South Branch of the North Fork Elk River (40.6700, −124.0251); South Fork Freshwater Creek (40.7110, −124.0367); South Fork Elk River (40.6437, −124.0388); Swain Slough (40.7524, −124.1825); Tom Gulch (40.6794, −124.1452); Unnamed Tributary (40.7850, −124.0561); Unnamed Tributary (40.7496, −124.1651); Unnamed Tributary (40.7785,—124.1081); Unnamed Tributary (40.7667, −124.1054); Unnamed Tributary (40.7559, −124.0870); Unnamed Tributary (40.7952, −124.0568); Unnamed Tributary (40.7408, −124.1118); Unnamed Tributary (40.7186, −124.1385); Unnamed Tributary (40.7224, −124.1038); Unnamed Tributary (40.8194, −124.0305); Unnamed Tributary (40.8106, −124.0083); Unnamed Tributary (40.7585, −124.1456); Unnamed Tributary (40.7457, −124.1138); Unnamed Tributary (40.8085, −124.0713); Unnamed Tributary (40.6634, −124.1193); Unnamed Tributary (40.7576, −124.1576); Washington Gulch (40.8116, −124.0491).

(5) Eel River Hydrologic Unit 1111—*(i) Ferndale Hydrologic Sub-area 111111.* Outlet(s) = Eel River (Lat 40.6275, Long −124.2520) upstream to endpoint(s) in: Atwell Creek (40.4824, −124.1498); Dean Creek (40.4847, −124.1217); Horse Creek (40.5198, −124.1702); House Creek (40.4654, −124.1916); Howe Creek (40.4956, −124.1690); Nanning Creek (40.4914, −124.0652); North Fork Strongs Creek (40.6077, −124.1047); Price Creek (40.5101, −124.2731); Rohner Creek (40.6151, −124.1408); Strongs Creek (40.5999, −124.0985); Sweet Creek (40.4900, −124.2007); Van Duzen River (40.5337, −124.1262).

(ii) Scotia Hydrologic Sub-area 111112. Outlet(s) = Eel River (Lat 40.4918, Long −124.0988) upstream to endpoint(s) in: Bear Creek (40.3942, −124.0262); Bridge Creek (40.4278, −123.9317); Chadd Creek (40.3919, −123.9540); Darnell Creek (40.4533, −123.9808); Dinner Creek (40.4406, −124.0855); Greenlaw Creek (40.4315, −124.0231); Jordan Creek (40.4171, −124.0517); Kiler Creek (40.4465, −124.0952); Larabee Creek (40.4089, −123.9331); Monument Creek (40.4371, −124.1165); Shively Creek (40.4454, −123.9539); South Fork Bear Creek (40.3856, −124.0182); South Fork Eel River (40.3558, −123.9194); Stitz Creek (40.4649, −124.0531); Twin Creek (40.4419, −124.0714); Unnamed Tributary (40.3933, −123.9984); Weber Creek (40.3767, −123.9094).

(iii) Larabee Creek Hydrologic Sub-area 111113. Outlet(s) = Larabee Creek (Lat 40.4089, Long -123.9331) upstream to endpoint(s) in: Arnold Creek (40.4006, -123.8583); Balcom Creek (40.4030, -123.8986); Bosworth Creek (40.3584, -123.7089); Boulder Flat Creek (40.3530, -123.6381); Burr Creek (40.4250, -123.7767); Carson Creek (40.4181, -123.8879); Chris Creek (40.4146, -123.9235); Cooper Creek (40.3123, -123.6463); Dauphiny Creek (40.4049, -123.8893); Frost Creek (40.3765, -123.7357); Hayfield Creek (40.3350, -123.6535); Knack Creek (40.3788, -123.7385); Larabee Creek (40.2807, -123.6445); Martin Creek (40.3730, -123.7060); Maxwell Creek (40.3959, -123.8049); McMahon Creek (40.3269, -123.6363); Mill Creek (40.3849, -123.7440); Mountain Creek (40.2955, -123.6378); Scott Creek (40.4020, -123.8738); Smith Creek (40.4194, -123.8568); Thurman Creek (40.3506, -123.6669); Unnamed Tributary (40.3842, -123.8062); Unnamed Tributary (40.3982, -123.7862); Unnamed Tributary (40.3806, -123.7564); Unnamed Tributary (40.3661, -123.7398); Unnamed Tributary (40.3524, -123.7330).

(iv) Hydesville Hydrologic Sub-area 111121. Outlet(s) = Van Duzen River (Lat 40.5337, Long -124.1262) upstream to endpoint(s) in: Cuddeback Creek (40.5421, -124.0263); Cummings Creek (40.5282, -123.9770); Fiedler Creek (40.5351, -124.0106); Hely Creek (40.5165, -123.9531); Yager Creek (40.5583, -124.0577); Unnamed Tributary (40.5718, -124.0946); Unnamed Tributary (40.4915, -124.0000).

(v) Bridgeville Hydrologic Sub-area 111122. Outlet(s) = Van Duzen River (Lat 40.4942, Long -123.9720) upstream to endpoint(s) in: Bear Creek (40.3455, -123.5763); Blanket Creek (40.3635, -123.5710); Browns Creek (40.4958, -123.8103); Butte Creek (40.4119, -123.7047); Dairy Creek (40.4174, -123.5981); Fish Creek (40.4525, -123.8434); Grizzly Creek (40.5193, -123.8470); Little Larabee Creek (40.4708, -123.7395); Little Van Duzen River (40.3021, -123.5540); North Fork Van Duzen (40.4881, -123.6411); Panther Creek (40.3921, -123.5866); Root Creek (40.4490, -123.9018); Stevens Creek (40.5062, -123.9073); Thompson Creek (40.4222, -123.6084); Van Duzen River (40.4820, -123.6629); Unnamed Tributary (40.4932, -123.9120); Unnamed Tributary (40.4724, -123.8836); Unnamed Tributary (40.4850, -123.8468); Unnamed Tributary (40.3994, -123.6821); Unnamed Tributary (40.3074, -123.5834).

(vi) Yager Creek Hydrologic Sub-area 111123. Outlet(s) = Yager Creek (Lat 40.5583, Long -124.0577) upstream to endpoint(s) in: Bell Creek (40.6809, -123.9685); Blanten Creek (40.5839, -124.0165); Booths Run (40.6584,

-123.9428); Corner Creek (40.6179, -124.0010); Fish Creek (40.6390, -124.0024); Yager Creek (40.5673, -123.9403); Lawrence Creek (40.6986, -123.9314); Middle Fork Yager Creek (40.5782, -123.9243); North Fork Yager Creek (40.6056, -123.9080); Shaw Creek (40.6231, -123.9509); South Fork Yager Creek (40.5451, -123.9409); Unnamed Tributary (40.5892, -123.9663); Unnamed Tributary (40.5891, -124.0608).

(vii) Weott Hydrologic Sub-area 111131. Outlet(s) = South Fork Eel River (Lat 40.3500, Long —123.9305) upstream to endpoint(s) in: Albee Creek (40.3592, -124.0088); Bridge Creek (40.2960, -123.8561); Bull Creek (40.3587, -123.9624); Burns Creek (40.3194, -124.0420); Butte Creek (40.1982, -123.8387); Canoe Creek (40.2669, -123.9556); Coon Creek (40.2702, -123.9013); Cow Creek (40.2664, -123.9838); Cuneo Creek (40.3401, -124.0494); Decker Creek (40.3312, -123.9501); Elk Creek (40.2609, -123.7957); Fish Creek (40.2459, -123.7729); Harper Creek (40.3591, -123.9930); Mill Creek (40.3568, -124.0333); Mowry Creek (40.2937, -123.8895); North Fork Cuneo Creek (40.3443, -124.0488); Ohman Creek (40.1924, -123.7648); Panther Creek (40.2775, -124.0289); Preacher Gulch (40.2944, -124.0047); Salmon Creek (40.2145, -123.8926); Slide Creek (40.3011, -124.0390); South Fork Salmon Creek (40.1769, -123.8929); Squaw Creek (40.3167, -123.9988); Unnamed Tributary (40.3065, -124.0074); Unnamed Tributary (40.2831, -124.0359).

(viii) Benbow Hydrologic Sub-area 111132. Outlet(s) = South Fork Eel River (Lat 40.1932, Long -123.7692) upstream to endpoint(s) in: Anderson Creek (39.9325, -123.8928); Bear Creek (39.7885, -123.7620); Bear Pen Creek (39.9201, -123.7986); Bear Wallow Creek (39.7270, -123.7140); Big Dan Creek (39.8430, -123.6992); Bond Creek (39.7778, -123.7060); Bridges Creek (39.9087, -123.7142); Buck Mountain Creek (40.0944, -123.7423); Butler Creek (39.7423, -123.6987); Cedar Creek (39.8834, -123.6216); China Creek (40.1035, -123.9493); Connick Creek (40.0912, -123.8154); Couborn Creek (39.9820, -123.8973); Cox Creek (40.0310, -123.8398); Cruso Cabin Creek (39.9281, -123.5842); Dean Creek (40.1342, -123.7363); Durphy Creek (40.0205, -123.8271); East Branch South Fork Eel River (39.9359, -123.6204); Elkhorn Creek (39.9272, -123.6279); Fish Creek (40.0390, -123.7630); Hartsook Creek (40.0081, -123.8113); Hollow Tree Creek (39.7250, -123.6924); Huckleberry Creek (39.7292, -123.7275); Indian Creek (39.9470, -123.9008); Islam John Creek (39.8062, -123.7363); Jones Creek (39.9958, -123.8374); Leggett Creek (40.1470, -123.8375); Little Sproul Creek (40.0890, -123.8577); Lost Man Creek (39.7983, -123.7287); Low Gap Creek (39.8029, -123.6803); Low Gap Creek (39.9933, -123.7601); McCoy Creek (39.9572, -123.7369); Michael's Creek (39.7665, -123.7035); Middle Creek (39.8052, -123.7691); Milk Ranch Creek (40.0102, -123.7514); Mill Creek (39.8673, -123.7605); Miller Creek (40.1319, -123.9302); Mitchell Creek (39.7350, -123.6862); Moody Creek (39.9471, -123.8827); Mule Creek (39.8169, -123.7745); North Fork Cedar Creek (39.8864, -123.6363); North Fork McCoy Creek (39.9723, -123.7496); North Fork Standley Creek (39.9442, -123.8330); Ohman Creek (40.1929, -123.7687); Piercy Creek (39.9597, -123.8442); Pollock Creek (40.0802, -123.9341); Rattlesnake Creek (39.7912, -123.5428); Red Mountain Creek (39.9363, -123.7203); Redwood Creek (39.7723, -123.7648); Redwood Creek (40.0974, -123.9104); Rock Creek (39.8962, -123.7065); Sebbas Creek (39.9934, -123.8903); Somerville Creek (40.1006, -123.8884); South Fork Mule Creek (39.8174, -123.7788); South Fork Redwood Creek (39.7662, -123.7579); Sproul Creek (40.0226, -123.8649); Squaw Creek (40.0760, -123.7257); Standly Creek (39.9327, -123.8309); Tom Long Creek (40.0175, -123.6551); Waldron Creek (39.7469, -123.7465); Walter's Creek (39.7921, -123.7250); Warden Creek (40.0629, -123.8551); West Fork Sproul Creek (40.0587, -123.9170); Wildcat Creek (39.8956, -123.7820); Wilson Creek (39.8362, -123.6345); Unnamed tributary (39.9927, -123.8807).

(ix) Laytonville Hydrologic Sub-area 111133. Outlet(s) = South Fork Eel River (Lat 39.7665, Long -123.6484) upstream to endpoint(s) in: Bear Creek (39.6446, -123.5766); Big Rick Creek (39.7117, -123.5512); Cahto Creek (39.6527, -123.5579); Dark Canyon Creek (39.7333, -123.6614); Dutch Charlie Creek (39.6843, -123.7023); Elder Creek (39.7234, -123.6192); Fox Creek (39.7441, -123.6142); Grub Creek (39.7777, -123.5809); Jack of Hearts Creek (39.7136, -123.6896); Kenny Creek (39.6838, -123.5929); Little Case Creek (39.6892, -123.5441); Mill Creek (39.6839, -123.5118); Mud Creek (39.6713, -123.5741); Mud Springs Creek (39.6929, -123.5629); Redwood Creek (39.6545, -123.6753); Rock Creek (39.6922, -123.6090); Section Four Creek (39.6137, -123.5297); South Fork Eel River (39.6242, -123.5468); Streeter Creek (39.7340, -123.5606); Ten Mile Creek (39.6652, -123.4486); Unnamed Tributary (39.7004, -123.5678).

(x) Sequoia Hydrologic Sub-area 111141. Outlet(s) = Eel River (Lat 40.3557, Long −123.9191) upstream to endpoint(s) in: Beatty Creek (40.3198, −123.7500); Brock Creek (40.2410, −123.7246); Cameron Creek (40.3313, −123.7707); Kapple Creek (40.3531, −123.8585); Dobbyn Creek (40.2216, −123.6029); Mud Creek (40.2078, −123.5143); North Fork Dobbyn Creek (40.2669, −123.5467); Sonoma Creek (40.2974, −123.7953); South Fork Dobbyn Creek (40.1723, −123.5112); Line Gulch Creek (40.1640, −123.4783); South Fork Eel River (40.3500, −123.9305); South Fork Thompson Creek (40.3447, −123.8334); Thompson Creek (40.3552, −123.8417); Unnamed Tributary (40.2745, −123.5487).

(xi) Spy Rock Hydrologic Sub-area 111142. Outlet(s) = Eel River (Lat 40.1736, Long −123.6043) upstream to endpoint(s) in: Bear Pen Canyon (39.6943, −123.4359); Bell Springs Creek (39.9457, −123.5313); Blue Rock Creek (39.8937, −123.5018); Burger Creek (39.6693, −123.4034); Chamise Creek (40.0035, −123.5945); Gill Creek (39.7879, −123.3465); Iron Creek (39.7993, −123.4747); Jewett Creek (40.1122, −123.6171); Kekawaka Creek (40.0686, −123.4087); Rock Creek (39.9347, −123.5187); Shell Rock Creek (39.8414, −123.4614); Unnamed Tributary (39.7579, −123.4709); White Rock Creek (39.7646, −123.4684); Woodman Creek (39.7612, −123.4364).

(xii) Outlet Creek Hydrologic Sub-area 111161. Outlet(s) = Outlet Creek (Lat 39.4248, Long −123.3453) upstream to endpoint(s) in: Baechtel Creek (39.3623, −123.4143); Berry Creek (39.4271, −123.2777); Bloody Run Creek (39.5864, −123.3545); Broaddus Creek (39.3869, −123.4282); Cherry Creek (39.6043, −123.4073); Conklin Creek (39.3756, −123.2570); Davis Creek (39.3354, −123.2945); Haehl Creek (39.3735, −123.3172); Long Valley Creek (39.6246, −123.4651); Mill Creek (39.4196, −123.3919); Outlet Creek (39.4526, −123.3338); Ryan Creek (39.4804, −123.3644); Unnamed Tributary (39.4956, −123.3591); Unnamed Tributary (39.4322, −123.3848); Unnamed Tributary (39.5793, −123.4546); Unnamed Tributary (39.3703, −123.3419); Upp Creek (39.4479, −123.3825); Willts Creek (39.4445, −123.3898).

(xiii) Tomki Creek Hydrologic Sub-area 111162. Outlet(s) = Eel River (Lat 39.7138, Long −123.3532) upstream to endpoint(s) in: Cave Creek (39.3842, −123.2148); Dean Creek (39.6924, −123.3727); Garcia Creek (39.5153, −123.1512); Little Cave Creek (39.3915,

−123.2462); Little Creek (39.4146, −123.2595); Long Branch Creek (39.4074, −123.1897); Outlet Creek (39.6263, −123.3453); Rocktree Creek (39.4534, −123.3053); Salmon Creek (39.4367, −123.1939); Scott Creek (39.4492, −123.2286); String Creek (39.4658, −123.3206); Tarter Creek (39.4715, −123.2976); Thomas Creek (39.4768, −123.1230); Tomki Creek (39.5483, −123.3687); Unnamed Tributary (39.5064, −123.3574); Whitney Creek (39.4399, −123.1084); Wheelbarrow Creek (39.4851, −123.3391).

(xiv) Eden Valley Hydrologic Sub-area 111171. Outlet(s) = Middle Fork Eel River (Lat 39.7136, Long −123.3530) upstream to endpoint(s) in: Black Butte River (39.8238, −123.0877); Crocker Creek (39.5559, −123.0409); Eden Creek (39.5992, −123.1746); Elk Creek (39.5371, −123.0101); Hayshed Creek (39.7082, −123.0967); Mill Creek (39.7398, −123.1431); Salt Creek (39.6765, −123.2740); Sportsmans Creek (39.5373, −123.0247); Sulper Springs (39.5536, −123.0365); Thatcher Creek (39.6686, −123.0639); Williams Creek (39.8147, −123.1335).

(xv) Round Valley Hydrologic Sub-area 111172. Outlet(s) = Mill Creek (Lat 39.7398, Long −123.1431); Williams Creek (39.8147, −123.1335) upstream to endpoint(s) in: Cold Creek (39.8714, −123.2991); Grist Creek (39.7640, −123.2883); Mill Creek (39.8481, −123.2896); Murphy Creek (39.8885, −123.1612); Short Creek (39.8703, −123.2352); Town Creek (39.7991, −123.2889); Turner Creek (39.7218, −123.2175); Williams Creek (39.8903, −123.1212); Unnamed Tributary (39.7428, −123.2757); Unnamed Tributary (39.7493, −123.2584).

(xvi) Black Butte River Hydrologic Sub-area 111173. Outlet(s) = Black Butte River (Lat 39.8234, Long −123.0862) upstream to endpoint(s) in: Black Butte River (39.5946, −122.8579); Buckhorn Creek (39.6563, −122.9225); Cold Creek (39.6960, −122.9063); Estell Creek (39.5966, −122.8224); Spanish Creek (39.6287, −122.8331).

(xvii) Wilderness Hydrologic Sub-area 111174. Outlet(s) = Middle Fork Eel River (Lat 39.8240, Long −123.0877) upstream to endpoint(s) in: Beaver Creek (39.9352, −122.9943); Fossil Creek (39.9447, −123.0403); Middle Fork Eel River (40.0780, −123.0442); North Fork Middle Fork Eel River (40.0727, −123.1364); Palm of Gileade Creek (40.0229, −123.0647); Pothole Creek (39.9347, −123.0440).

(6) Cape Mendocino Hydrologic Unit 1112—*(i) Oil Creek Hydrologic Sub-area 111210.* Outlet(s) = Guthrie Creek (Lat 40.5407, Long −124.3626); Oil Creek (40.5195, −124.3767) upstream to endpoint(s) in: Guthrie Creek (40.5320, −124.3128); Oil Creek (40.5061, −124.2875); Unnamed Tributary (40.4946, −124.3091); Unnamed Tributary (40.4982, −124.3549); Unnamed Tributary (40.5141, −124.3573); Unnamed Tributary (40.4992, −124.3070).

(ii) Capetown Hydrologic Sub-area 111220. Outlet(s) = Bear River (Lat 40.4744, Long −124.3881); Davis Creek (40.3850, −124.3691); Singley Creek (40.4311, −124.4034) upstream to endpoint(s) in: Antone Creek (40.4281, −124.2114); Bear River (40.3591, −124.0536); Beer Bottle Gulch (40.3949, −124.1410); Bonanza Gulch (40.4777, −124.2966); Brushy Creek (40.4102, −124.1050); Davis Creek (40.3945, −124.2912); Harmonica Creek (40.3775, −124.0735); Hollister Creek (40.4109, −124.2891); Nelson Creek (40.3536, −124.1154); Peaked Creek (40.4123, −124.1897); Pullen Creek (40.4057, −124.0814); Singley Creek (40.4177, −124.3305); South Fork Bear River (40.4047, −124.2631); Unnamed Tributary (40.4271, −124.3107); Unnamed Tributary (40.4814, −124.2741); Unnamed Tributary (40.3633, −124.0651); Unnamed Tributary (40.3785, −124.0599); Unnamed Tributary (40.4179, −124.2391); Unnamed Tributary (40.4040, −124.0923); Unnamed Tributary (40.3996, −124.3175); Unnamed Tributary (40.4045, −124.0745); Unnamed Tributary (40.4668, −124.2364); Unnamed Tributary (40.4389, −124.2350); Unnamed Tributary (40.4516, −124.2238); Unnamed Tributary (40.4136, −124.1594); Unnamed Tributary (40.4350, −124.1504); Unnamed Tributary (40.4394, −124.3745); West Side Creek (40.4751, −124.2432).

(iii) Mattole River Hydrologic Sub-area 111230. Outlet(s) = Big Creek (Lat 40.1567, Long −124.2114); Big Flat Creek (40.1275, −124.1764); Buck Creek (40.1086, −124.1218); Cooskie Creek (40.2192, −124.3105); Fourmile Creek (40.256, −124.3578); Gitchell Creek (40.0938, −124.1023); Horse Mountain Creek (40.0685, −124.0822); Kinsey Creek (40.1717, −124.2310); Mattole River (40.2942, −124.3536); McNutt Gulch (40.3541, −124.3619); Oat Creek (40.1785, −124.2445); Randall Creek (40.2004, −124.2831); Shipman Creek (40.1175, −124.1449); Spanish Creek (40.1835, −124.2569); Telegraph Creek (40.0473, −124.0798); Whale Gulch (39.9623, −123.9785) upstream to endpoint(s) in: Anderson Creek (40.0329, −123.9674); Baker Creek (40.0143, −123.9048); Bear Creek (40.1262, −124.0631); Bear Creek (40.2819, −124.3336); Bear Trap Creek (40.2157, −124.1422); Big Creek (40.1742, −124.1924); Big Finley Creek (40.0910, −124.0179); Big Flat Creek (40.1444, −124.1636); Blue Slide Creek (40.1562, −123.9283); Box Canyon Creek (40.1078, −123.9854); Bridge Creek (40.0447, −124.0118); Buck Creek (40.1166, −124.1142); Conklin Creek (40.3197, −124.2055); Cooskie Creek (40.2286, −124.2986); Devils Creek (40.3432, −124.1365); Dry Creek (40.2646, −124.0660); East Branch North Fork Mattole River (40.3333, −124.1490); East Fork Honeydew Creek (40.1625, −124.0929); Eubank Creek (40.0997, −123.9661); Fire Creek (40.1533, −123.9509); Fourmile Creek (40.2604, −124.3079); Fourmile Creek (40.1767, −124.0759); French Creek (40.1384, −124.0072); Gibson Creek (40.0304, −123.9279); Gilham Creek (40.2078, −124.0085); Gitchell Creek (40.1086, −124.0947); Green Ridge Creek (40.3254, −124.1258); Grindstone Creek (40.2019, −123.9890); Harris Creek (40.0381, −123.9304); Harrow Creek (40.1612, −124.0292); Helen Barnum Creek (40.0036, −123.9101); Honeydew Creek (40.1747, −124.1410); Horse Mountain Creek (40.0769, −124.0729); Indian Creek (40.2772, −124.2759); Jewett Creek (40.1465, −124.0414); Kinsey Creek (40.1765, −124.2220); Lost Man Creek (39.9754, −123.9179); Mattole Canyon (40.2021, −123.9570); Mattole River (39.9714, −123.9623); McGinnis Creek (40.3186, −124.1801); McKee Creek (40.0864, −123.9480); McNutt Gulch (40.3458, −124.3418); Middle Creek (40.2591, −124.0366); Mill Creek (40.0158, −123.9693); Mill Creek (40.3305, −124.2598); Mill Creek (40.2839, −124.2946); Nooning Creek (40.0616, −124.0050); North Fork Mattole River (40.3866, −124.1867); North Fork Bear Creek (40.1494, −124.1060); North Fork Fourmile Creek (40.2019, −124.0722); Oat Creek (40.1884, −124.2296); Oil Creek (40.3214, −124.1601); Painter Creek (40.0844, −123.9639); Prichett Creek (40.2892, −124.1704); Randall Creek (40.2092, −124.2668); Rattlesnake Creek (40.3250, −124.0981); Shipman Creek (40.1250, −124.1384); Sholes Creek (40.1603, −124.0619); South Branch West Fork Bridge Creek (40.0326, −123.9853); South Fork Bear Creek (40.0176, −124.0016); Spanish Creek (40.1965, −124.2429); Squaw Creek (40.1934, −124.2002); Stanley Creek (40.0273, −123.9166); Sulphur Creek (40.3647, −124.1586); Telegraph Creek (40.0439, −124.0640); Thompson Creek (39.9913, −123.9707); Unnamed Tributary

(40.3475, −124.1606); Unnamed Tributary (40.3522, −124.1533); Unnamed Tributary (40.0891, −123.9839); Unnamed Tributary (40.2223, −124.0172); Unnamed Tributary (40.1733, −123.9515); Unnamed Tributary (40.2899, −124.0955); Unnamed Tributary (40.2853, −124.3227); Unnamed Tributary (39.9969, −123.9071); Upper East Fork Honeydew Creek (40.1759, −124.1182); Upper North Fork Mattole River (40.2907, −124.1115); Vanauken Creek (40.0674, −123.9422); West Fork Bridge Creek (40.0343, −123.9990); West Fork Honeydew Creek (40.1870, −124.1614); Westlund Creek (40.2440, −124.0036); Whale Gulch (39.9747, −123.9812); Woods Creek (40.2119, −124.1611); Yew Creek (40.0018, −123.9762).

(7) Mendocino Coast Hydrologic Unit 1113—*(i) Usal Creek Hydrologic Sub-area 111311.* Outlet(s) = Jackass Creek (Lat 39.8806, Long −123.9155); Usal Creek (39.8316, −123.8507) upstream to endpoint(s) in: Bear Creek (39.8898, −123.8344); Jackass Creek (39.8901, −123.8928); Little Bear Creek (39.8782, −123.8250); Waterfall Gulch (39.8725, −123.8784); North Fork Jackass Creek (39.9095, −123.9101); North Fork Julias Creek (39.8634, −123.7967); Soldier Creek (39.8679, −123.8162); South Fork Usal Creek (39.8356, −123.7865); Julias Creek (39.8574, −123.7912); Unnamed Tributary (39.9279, −123.8666); Unnamed Tributary (39.8890, −123.8480); Usal Creek (39.9160, −123.8787).

(ii) Wages Creek Hydrologic Sub-area 111312. Outlet(s) = Cottaneva Creek (Lat 39.7360, Long −123.8293); Hardy Creek (39.7107, −123.8082); Howard Creek (39.6778, −123.7915); Juan Creek (39.7028, −123.8042); DeHaven Creek (39.6592, −123.7863); Wages Creek (39.6513, −123.7851) upstream to endpoint(s) in: Cottaneva Creek (39.7825, −123.8210); Dunn Creek (39.8103, −123.8320); Hardy Creek (39.7221, −123.7822); Howard Creek (39.6808, −123.7463); Juan Creek (39.7107, −123.7472); Kimball Gulch (39.7559, −123.7828); Little Juan Creek (39.7003, −123.7609); DeHaven Creek (39.6572, −123.7350); Middle Fork Cottaneva Creek (39.7738, −123.8058); North Fork Cottaneva Creek (39.8011, −123.8047); North Fork Dehaven Creek (39.6660, −123.7382); North Fork Wages Creek (39.6457, −123.7066); Rider Gulch (39.6348, −123.7621); Rockport Creek (39.7346, −123.8021); Slaughterhouse Gulch (39.7594, −123.7914); South Fork Cottaneva Creek (39.7447, −123.7773); South Fork Wages Creek (39.6297, −123.6862); Upper Wages Creek (39.6396, −123.6773).

(iii) Ten Mile River Hydrologic Sub-area 111313. Outlet(s) = Abalobadiah Creek (Lat 39.5654, Long −123.7672); Chadbourne Gulch (39.6133, −123.7822); Ten Mile River (39.5529, −123.7658); Seaside Creek (39.5592, −123.7655) upstream to endpoint(s) in: Abalobadiah Creek (39.5878, −123.7503); Bald Hill Creek (39.6278, −123.6461); Barlow Gulch (39.6044, −123.7501); Bear Pen Creek (39.5824, −123.6402); Booth Gulch (39.5598, −123.5908); Buckhorn Creek (39.6093, −123.6980); Campbell Creek (39.5053, −123.6610); Cavanough Gulch (39.6164, −123.6853); Chadbourne Gulch (39.6190, −123.7682); Clark Fork (39.5409, −123.5403); Curchman Creek (39.4789, −123.6398); Gulch 11 (39.4686, −123.5764); Gulch 19 (39.5993, −123.5730); Little Bear Haven Creek (39.5654, −123.6050); Little North Fork (39.6264, −123.7350); Mill Creek (39.5392, −123.7068); North Fork Ten Mile River (39.5870, −123.5480); O'Conner Gulch (39.6205, −123.6655); Patsy Creek (39.5714, −123.5669); Redwood Creek (39.5142, −123.5620); Seaside Creek (39.5612, −123.7501); Smith Creek (39.5251, −123.6499); South Fork Bear Haven Creek (39.5688, −123.6527); South Fork Ten Mile River (39.5083, −123.5395); Ten Mile River (39.5721, −123.7098); Unnamed Tributary (39.5234, −123.5893); Unnamed Tributary (39.5191, −123.6263); Unnamed Tributary (39.5558, −123.5450); Unnamed Tributary (39.5898, −123.7657); Unnamed Tributary (39.5813, −123.7526); Unnamed Tributary (39.6032, −123.5893).

(iv) Noyo River Hydrologic Sub-area 111320. Outlet(s) = Digger Creek (Lat 39.4088, Long −123.8164); Hare Creek (39.4171, −123.8128); Jug Handle Creek (39.3767, −123.8176); Mill Creek (39.4894, −123.7967); Mitchell Creek (39.3923, −123.8165); Noyo River (39.4274, −123.8096); Pudding Creek (39.4588, −123.8089); Virgin Creek (39.4714, −123.8045) upstream to endpoint(s) in: Bear Gulch (39.3881, −123.6614); Brandon Gulch (39.4191, −123.6645); Bunker Gulch (39.3969, −123.7153); Burbeck Creek (39.4354, −123.4235); Covington Gulch (39.4099, −123.7546); Digger Creek (39.4058, −123.8092); Duffy Gulch (39.4469, −123.6023); Gulch Creek (39.4441, −123.4684); Gulch Seven (39.4523, −123.5183); Hare Creek (39.3781, −123.6922); Hayworth Creek (39.4857, −123.4769); Hayshed Creek (39.4200, −123.7391); Jug Handle Creek (39.3647, −123.7523); Kass Creek (39.4273, −123.6797); Little North Fork (39.4532, −123.6636); Little Valley Creek (39.5026, −123.7277); Marble Gulch (39.4423, −123.5479); McMullen Creek (39.4383, −123.4488); Middle Fork North Fork (39.4924, −123.5231); Mill Creek (39.4843, −123.7575); Mitchell Creek (39.3813, −123.7734); North Fork Hayworth Creek (39.4891, −123.5026); North Fork Noyo (39.4974, −123.5405); North Fork Noyo (39.4765, −123.5535); North Fork South Fork Noyo River (39.3971, −123.6108); Noyo River (39.4242, −123.4356); Olds Creek (39.3964, −123.4448); Parlin Creek (39.3700, −123.6111); Pudding Creek (39.4591, −123.6516); Redwood Creek (39.4660, −123.4571); South Fork Hare Creek (39.3785, −123.7384); South Fork Noyo River (39.3620, −123.6188); Unnamed Tributary (39.4113, −123.5621); Unnamed Tributary (39.3918, −123.6425);Unnamed Tributary (39.4168, −123.4578); Unnamed Tributary (39.4653, −123.7549); Unnamed Tributary (39.4640, −123.7473); Unnamed Tributary (39.4931, −123.7371); Unnamed Tributary (39.4922, −123.7381); Unnamed Tributary (39.4939, −123.7184); Unnamed Tributary (39.4158, −123.6428); Unnamed Tributary (39.4002, −123.7347); Unnamed Tributary (39.3831, −123.6177); Unnamed Tributary (39.4926, −123.4764); Virgin Creek (39.4621, −123.7855);

(v) Big River Hydrologic Sub-area 111330. Outlet(s) = Big River (Lat 39.3030, Long −123.7957); Casper Creek (39.3617, −123.8169); Doyle Creek (39.3603, −123.8187); Jack Peters Creek (39.3193, −123.8006); Russian Gulch (39.3288, −123.8050) upstream to endpoint(s) in: Berry Gulch (39.3585, −123.6930); Big River (39.3166, −123.3733); Casper Creek (39.3462, −123.7556); Chamberlain Creek (39.4007, −123.5317); Daugherty Creek (39.1700, −123.3699); Doyle Creek (39.3517, −123.8007); East Branch Little North Fork Big River (39.3372, −123.6410); East Branch North Fork Big River (39.3354, −123.4652); Gates Creek (39.2083, −123.3944); Jack Peters Gulch (39.3225, −123.7850); James Creek (39.3922, −123.4747); Johnson Creek (39.1963, −123.3927); Johnson Creek (39.2556, −123.4485); Laguna Creek (39.2914, −123.6301); Little North Fork Big River (39.3497, −123.6242); Marten Creek (39.3290, −123.4279); Mettick Creek (39.2591, −123.5193); Middle Fork North Fork Casper Creek (39.3575, −123.7170); North Fork Big River (39.3762, −123.4591); North Fork Casper Creek (39.3610, −123.7356); North Fork James Creek (39.3980, −123.4939); North Fork Ramone Creek

(39.2760, −123.4846); Pig Pen Gulch (39.3226, −123.4609); Pruitt Creek (39.2592, −123.3812); Ramone Creek (39.2714, −123.4415); Rice Creek (39.2809, −123.3963); Russell Brook (39.2863, −123.4461); Russian Gulch (39.3237, −123.7650); Snuffins Creek (39.1836, −123.3854); Soda Creek (39.2230, −123.4239); South Fork Big River (39.2317, −123.3687); South Fork Casper Creek (39.3493, −123.7216); Two Log Creek (39.3484, −123.5781); Unnamed Tributary (39.3897, −123.5556); Unnamed Tributary (39.3637, −123.5464); Unnamed Tributary (39.3776, −123.5274); Unnamed Tributary (39.4029, −123.5771); Unnamed Tributary (39.3209, −123.5964); Valentine Creek (39.2694, −123.3957); Water Gulch (39.3608, −123.5916).

(vi) Albion River Hydrologic Sub-area 111340. Outlet(s) = Albion River (Lat 39.2253, Long −123.7679); Big Salmon Creek (39.2150, −123.7660); Buckhorn Creek (39.2593, −123.7839); Dark Gulch (39.2397, −123.7740); Little Salmon Creek (39.2150, −123.7660); Little River (39.2734, −123.7914) upstream to endpoint(s) in: Albion River (39.2613, −123.5766); Big Salmon Creek (39.2045, −123.6425); Buckhorn Creek (39.2513, −123.7595); Dark Gulch (39.2379, −123.7592); Duck Pond Gulch (39.2456, −123.6960); East Railroad Gulch (39.2604, −123.6381); Hazel Gulch (39.2141, −123.6418); Kaison Gulch (39.2733, −123.6803); Little North Fork South Fork Albion River (39.2350, −123.6431); Little River (39.2683, −123.7190); Little Salmon Creek (39.2168, −123.7515); Marsh Creek (39.2325, −123.5596); Nordon Gulch (39.2489, −123.6503); North Fork Albion River (39.2854, −123.5752); Pleasant Valley Gulch (39.2379, −123.6965); Railroad Gulch (39.2182, −123.6932); Soda Springs Creek (39.2943, −123.5944); South Fork Albion River (39.2474, −123.6107); Tom Bell Creek (39.2805, −123.6519); Unnamed Tributary (39.2279, −123.6972); Unnamed Tributary (39.2194, −123.7100); Unnamed Tributary (39.2744, −123.5889); Unnamed Tributary (39.2318, −123.6800).

(vii) Navarro River Hydrologic Sub-area 111350. Outlet(s) = Navarro River (Lat 39.1921, Long −123.7611) upstream to endpoint(s) in: Alder Creek (38.9830, −123.3946); Anderson Creek (38.9644, −123.2907); Bailey Creek (39.1733, −123.4804); Barton Gulch (39.1804, −123.6783); Bear Creek (39.1425, −123.4326); Bear Wallow Creek (39.0053, −123.4075); Beasley Creek (38.9366, −123.3265); Bottom Creek (39.2117, −123.4607); Camp 16 Gulch (39.1937, −123.6095); Camp Creek (38.9310, −123.3527); Cold Spring Creek (39.0376, −123.5027); Con Creek (39.0374, −123.3816); Cook Creek (39.1879, −123.5109); Cune Creek (39.1622, −123.6014); Dago Creek (39.0731, −123.5068); Dead Horse Gulch (39.1576, −123.6124); Dutch Henry Creek (39.2112, −123.5794); Floodgate Creek (39.1291, −123.5365); Fluem Gulch (39.1615, −123.6695); Flynn Creek (39.2099, −123.6032); German Creek (38.9452, −123.4269); Gut Creek (39.0803, −123.3312); Ham Canyon (39.0164, −123.4265); Horse Creek (39.0144, −123.4960); Hungry Hollow Creek (39.1327, −123.4488); Indian Creek (39.0708, −123.3301); Jimmy Creek (39.0117, −123.2888); John Smith Creek (39.2275, −123.5366); Little North Fork Navarro River (39.1941, −123.4553); Low Gap Creek (39.1590, −123.3783); Navarro River (39.0537, −123.4409); Marsh Gulch (39.1692, −123.7049); McCarvey Creek (39.1589, −123.4048); Mill Creek (39.1270, −123.4315); Minnie Creek (38.9751, −123.4529); Murray Gulch (39.1755, −123.6966); Mustard Gulch (39.1673, −123.6393); North Branch (39.2069, −123.5361); North Fork Indian Creek (39.1213, −123.3345); North Fork Navarro River (39.1708, −123.5606); Parkinson Gulch (39.0768, −123.4070); Perry Gulch (39.1342, −123.5707); Rancheria Creek (38.8626, −123.2417); Ray Gulch (39.1792, −123.6494); Robinson Creek (38.9845, −123.3513); Rose Creek (39.1358, −123.3672); Shingle Mill Creek (39.1671, −123.4223); Soda Creek (39.0238, −123.3149); Soda Creek (39.1531, −123.3734); South Branch (39.1534, −123.4173); Spooner Creek (39.2221, −123.4811); Tramway Gulch (39.1481, −123.5958); Yale Creek (38.8882, −123.2785).

(viii) Greenwood Creek Hydrologic Sub-area 111361. Outlet(s) = Greenwood Creek (Lat 39.1262, Long −123.7181) upstream to endpoint(s) in: Greenwood Creek (39.1245, −123.6474).

(ix) Elk Creek Hydrologic Sub-area 111362. Outlet(s) = Elk Creek (Lat 39.1024, Long −123.7080) upstream to endpoint(s) in: Elk Creek (39.0657, −123.6245).

(x) Alder Creek Hydrologic Sub-area 111363. Outlet(s) = Alder Creek (Lat 39.0044, Long −123.6969); Mallo Pass Creek (39.0341, −123.6896) upstream to endpoint(s) in: Alder Creek (338.9961, −123.6471); Mallo Pass Creek (39.0287, −123.6373).

(xi) Brush Creek Hydrologic Sub-area 111364. Outlet(s) = Brush Creek (Lat 38.9760, Long −123.7120) upstream to endpoint(s) in: Brush Creek (38.9730, −123.5563); Mill Creek (38.9678, −123.6515); Unnamed Tributary (38.9724, −123.6571).

(xii) Garcia River Hydrologic Sub-area 111370. Outlet(s) = Garcia River (Lat 38.9550, Long −123.7338); Point Arena Creek (38.9141, −123.7103); Schooner Gulch (38.8667, −123.6550) upstream to endpoint(s) in: Blue Water Hole Creek (38.9378, −123.5023); Flemming Creek (38.8384, −123.5361); Garcia River (38.8965, −123.3681); Hathaway Creek (38.9351, −123.7098); Inman Creek (38.8804, −123.4370); Larmour Creek (38.9419, −123.4469); Mill Creek (38.9078, −123.3143); North Fork Garcia River (38.9233, −123.5339); North Fork Schooner Gulch (38.8758, −123.6281); Pardaloe Creek (38.8895, −123.3423); Point Arena Creek (38.9069, −123.6838); Redwood Creek (38.9241, −123.3343); Rolling Brook (38.8965, −123.5716); Schooner Gulch (38.8677, −123.6198); South Fork Garcia River (38.8450, −123.5420); Stansburry Creek (38.9422, −123.4720); Signal Creek (38.8639, −123.4414); Unnamed Tributary (38.8758, −123.5692); Unnamed Tributary (38.8818, −123.5723); Whitlow Creek (38.9141, −123.4624).

(xiii) North Fork Gualala River Hydrologic Sub-area 111381. Outlet(s) = North Fork Gualala River (Lat 38.7784, Long −123.4992) upstream to endpoint(s) in: Bear Creek (38.8347, −123.3842); Billings Creek (38.8652, −123.3496); Doty Creek (38.8495, −123.5131); Dry Creek (38.8416, −123.4455); McGann Gulch (38.8026, −123.4458); North Fork Gualala River (38.8479, −123.4113); Robinson Creek (38.8416, −123.3725); Robinson Creek (38.8386, −123.4991); Stewart Creek (38.8109, −123.4157); Unnamed Tributary (38.8295, −123.5570); Unnamed Tributary (38.8353, −123.3760); Unnamed Tributary (38.8487, −123.3820).

(xiv) Rockpile Creek Hydrologic Sub-area 111382. Outlet(s) = Rockpile Creek (Lat 38.7507, Long −123.4706) upstream to endpoint(s) in: Rockpile Creek (38.7966, −123.3872).

(xv) Buckeye Creek Hydrologic Sub-area 111383. Outlet(s) = Buckeye Creek (Lat 38.7405, Long −123.4573) upstream to endpoint(s) in: Buckeye Creek (38.7400, −123.2697); Flat Ridge Creek (38.7616, −123.2400); Franchini Creek (38.7500, −123.3708); North Fork Buckeye (38.7991, −123.3166).

(xvi) Wheatfield Fork Hydrologic Sub-area 111384. Outlet(s) = Wheatfield Fork Gualala River (Lat 38.7014, Long −123.4154) upstream to endpoint(s) in: Danfield Creek (38.6369, −123.1431); Haupt Creek (38.6220, −123.2551); House Creek (38.6545, −123.1184);

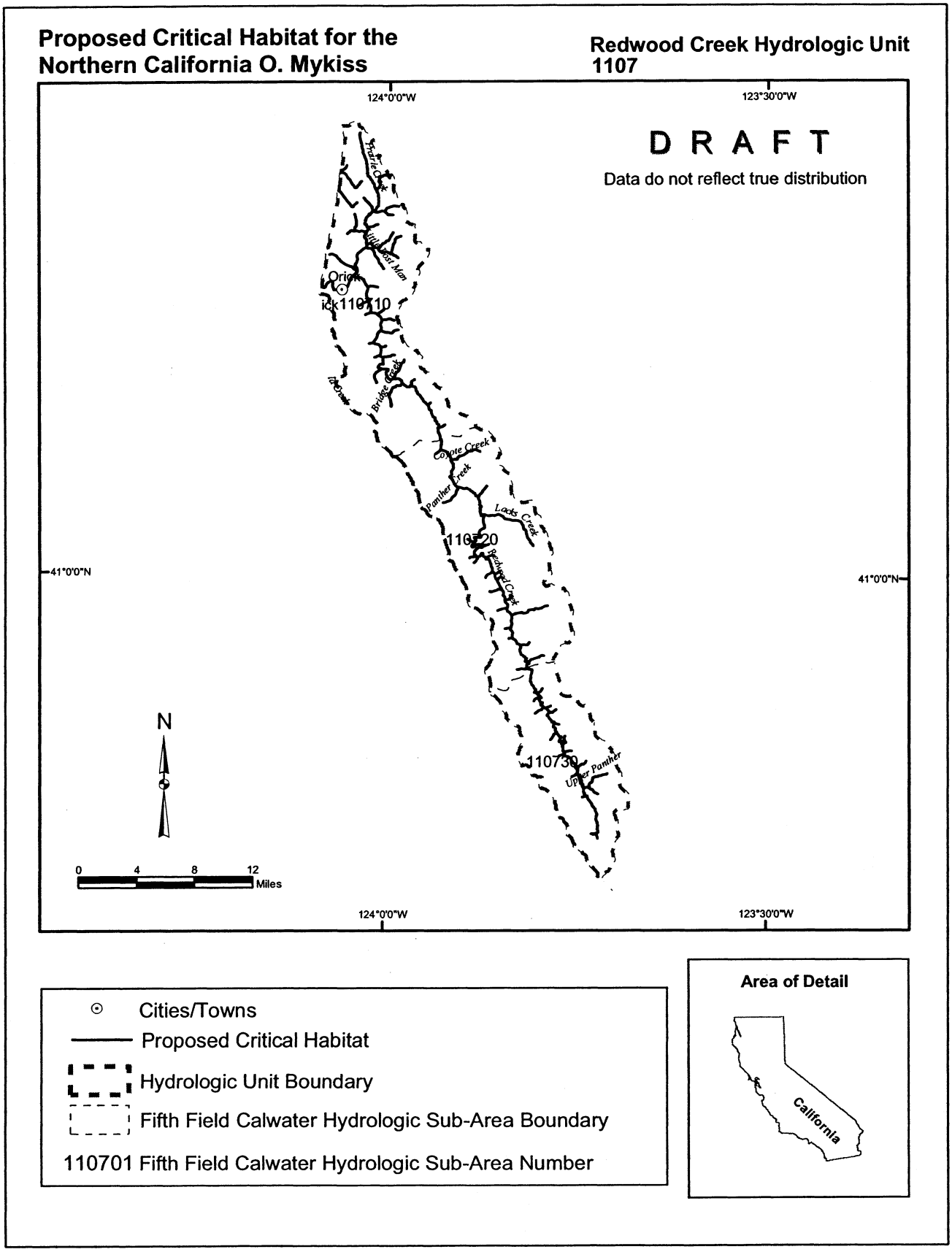
North Fork Fuller Creek (38.7252, −123.2968); Pepperwood Creek (38.6205, −123.1665); South Fork Fuller Creek (38.6973, −123.2860); Tombs Creek (38.6989, −123.1616); Unnamed Tributary (38.7175, −123.2744); Wheatfield Fork Gualala River (38.7497, −123.2215); Fuller Creek (38.7109, −123.3256).

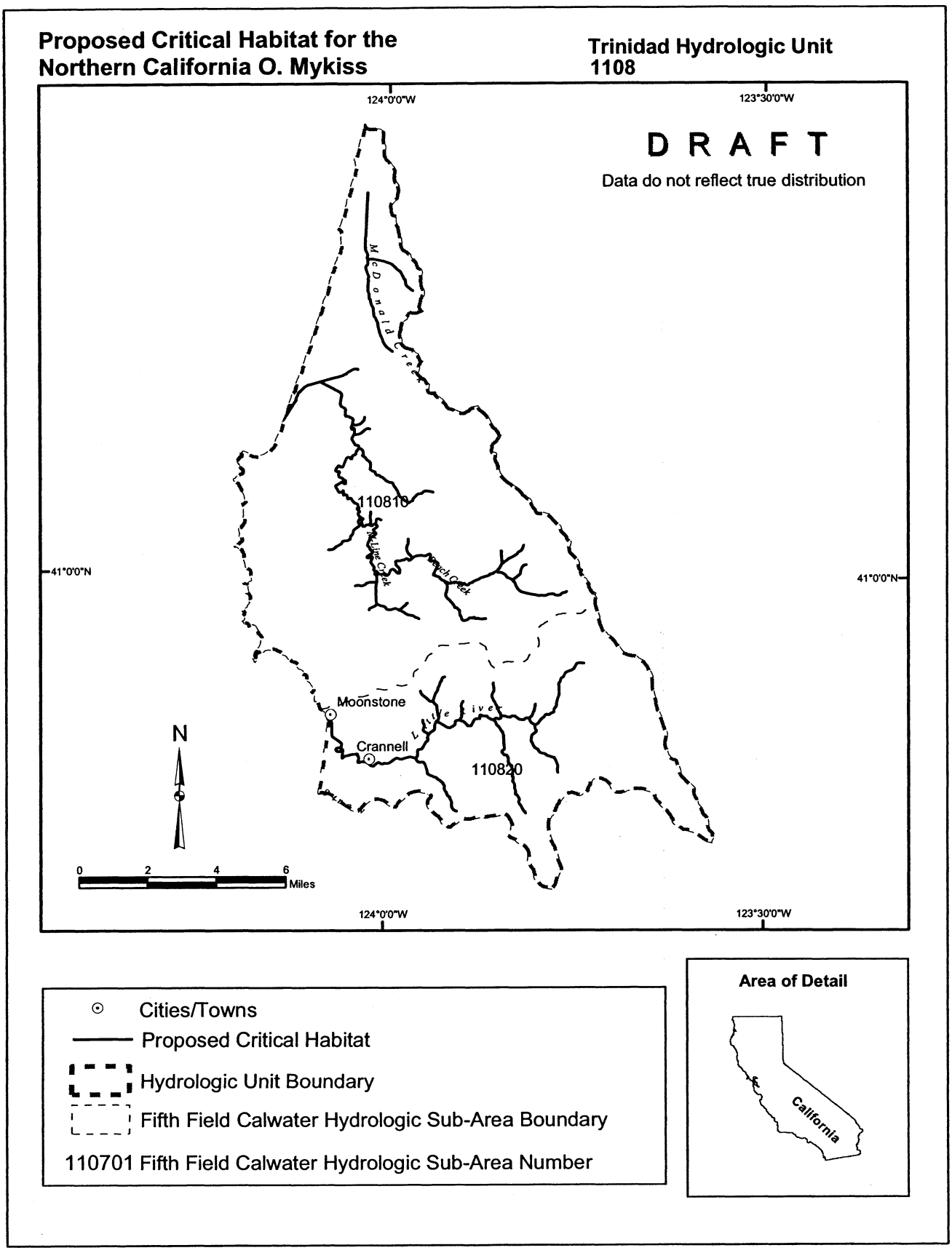
(xvii) Gualala Hydrologic Sub-area 111385. Outlet(s) = Fort Ross Creek (Lat 38.5119, Long −123.2436); Gualala River (38.7687, −123.5334); Kolmer Gulch (38.5238, −123.2646) upstream to endpoint(s) in: Big Pepperwood Creek (38.7951, −123.4638); Carson Creek (38.5653, −123.1906); Fort Ross Creek (38.5174, −123.2363); Groshong Gulch (38.7814, −123.4904); Gualala River (38.7780, −123.4991); Kolmer Gulch (38.5369, −123.2247); Little Pepperwood (38.7738, −123.4427); McKenzie Creek (38.5895, −123.1730); Palmer Canyon Creek (38.6002, −123.2167); Sproule Creek (38.6122, −123.2739); Unknown Tributary (38.5634, −123.2003); Turner Canyon (38.5294, −123.1672); South Fork Gualala River (38.5646, −123.1689); Marshall Creek (38.5647, −123.2058).

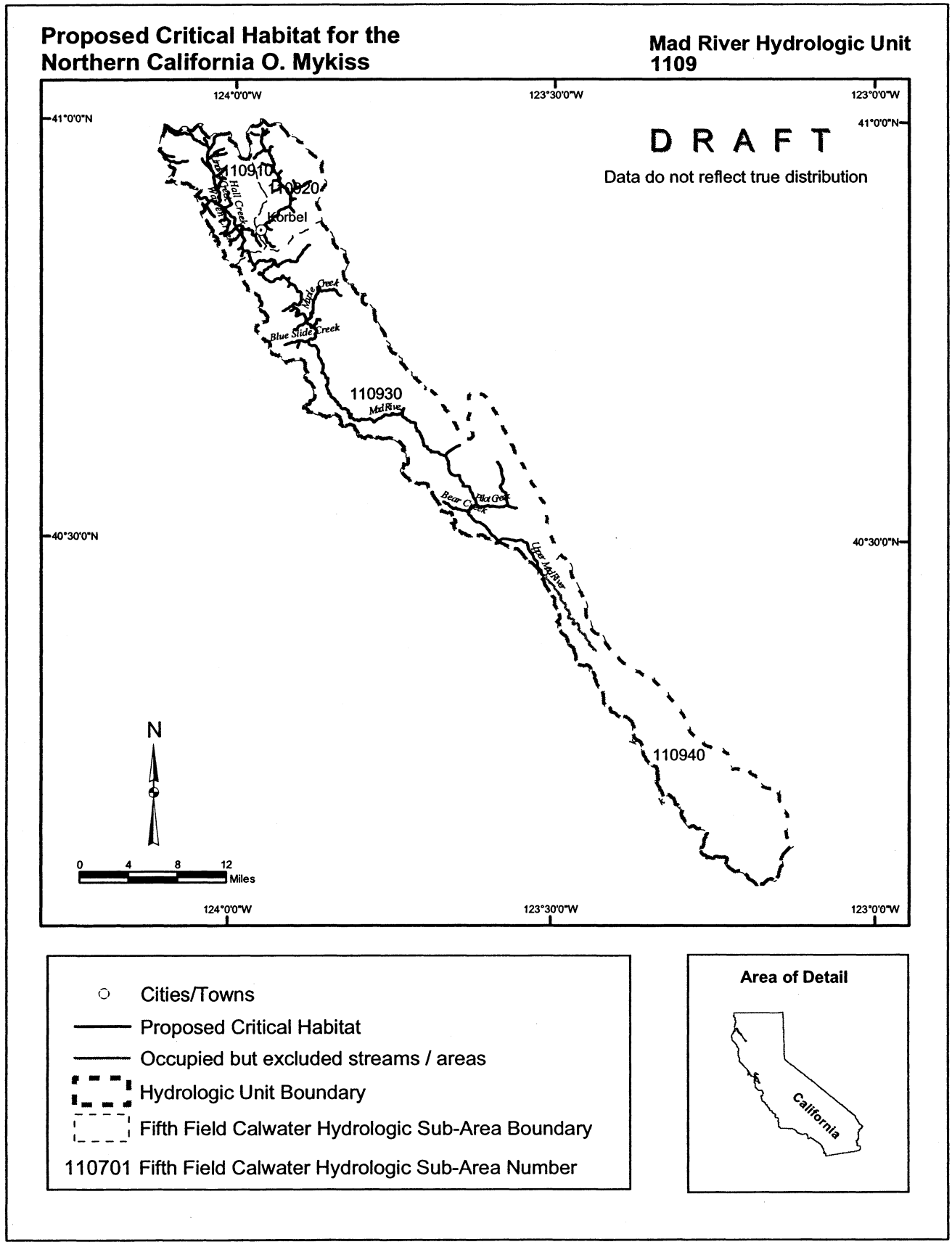
(xviii) Russian Gulch Hydrologic Sub-area 111390. Outlet(s) = Russian Gulch Creek (Lat 38.4669, Long −123.1569) upstream to endpoint(s) in: Russian Gulch Creek (38.4956, −123.1535); West Branch Russian Gulch Creek (38.4968, −123.1631).

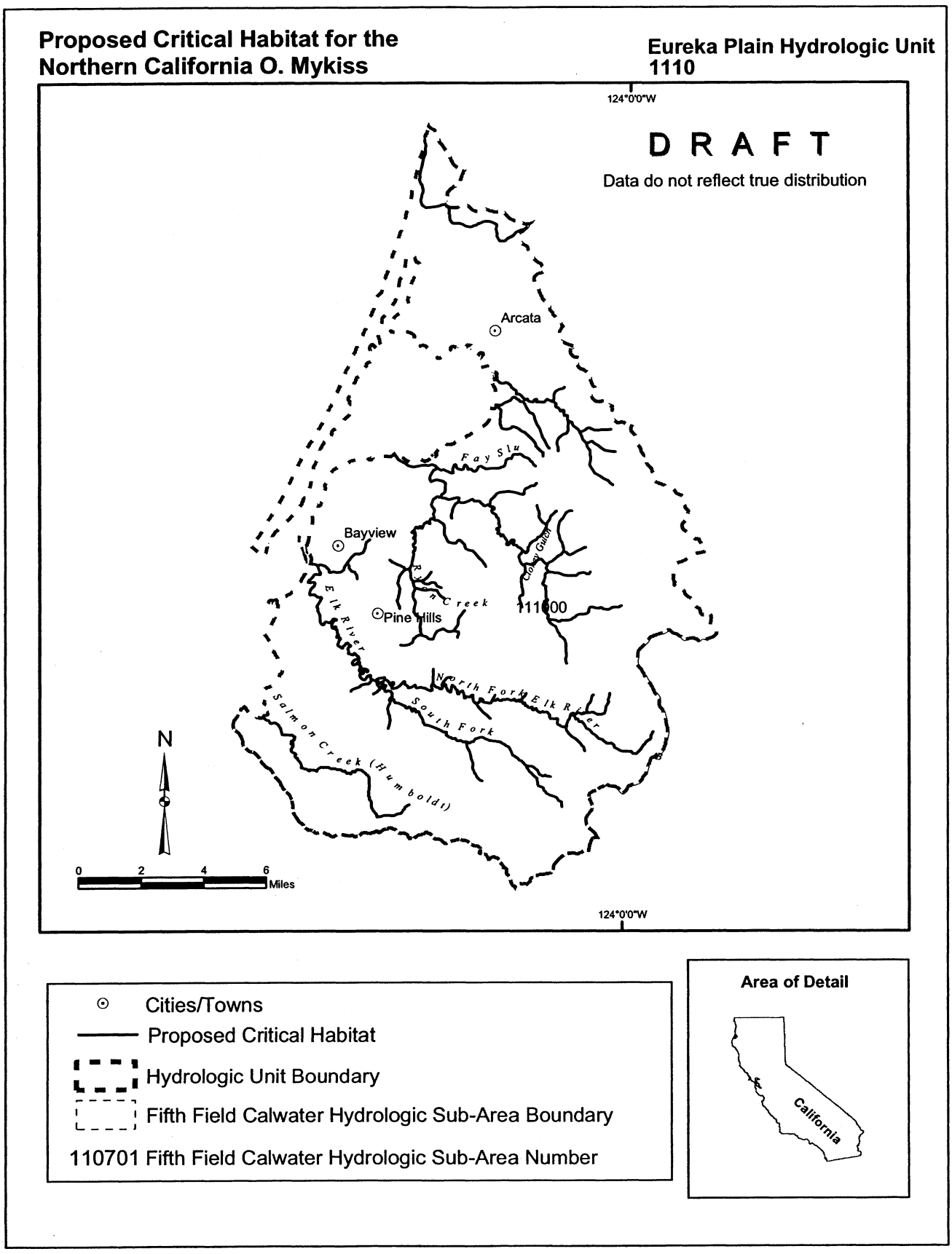
(8) Maps of proposed critical habitat for the Northern California *O. mykiss* ESU follow:

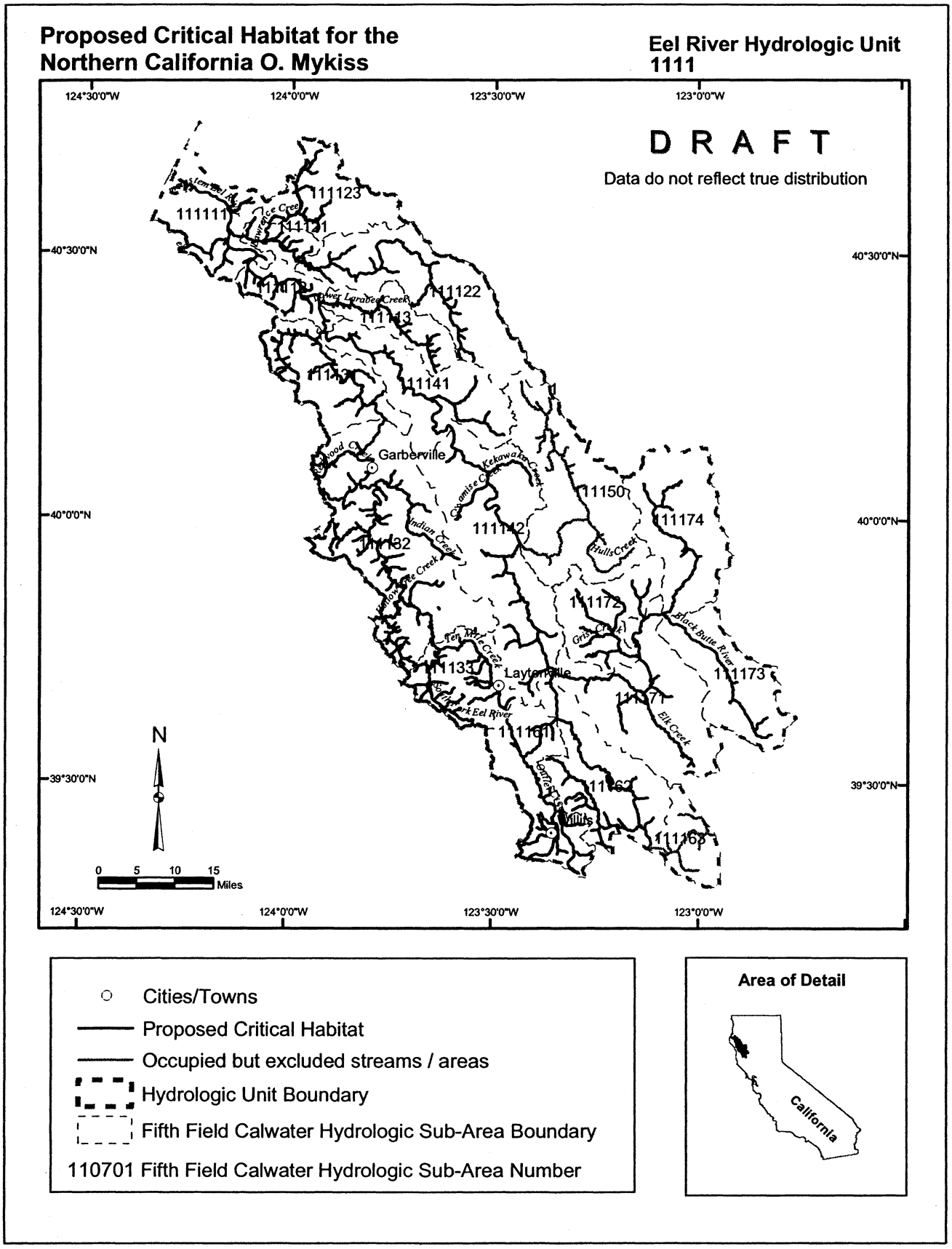
BILLING CODE 3510–22–P

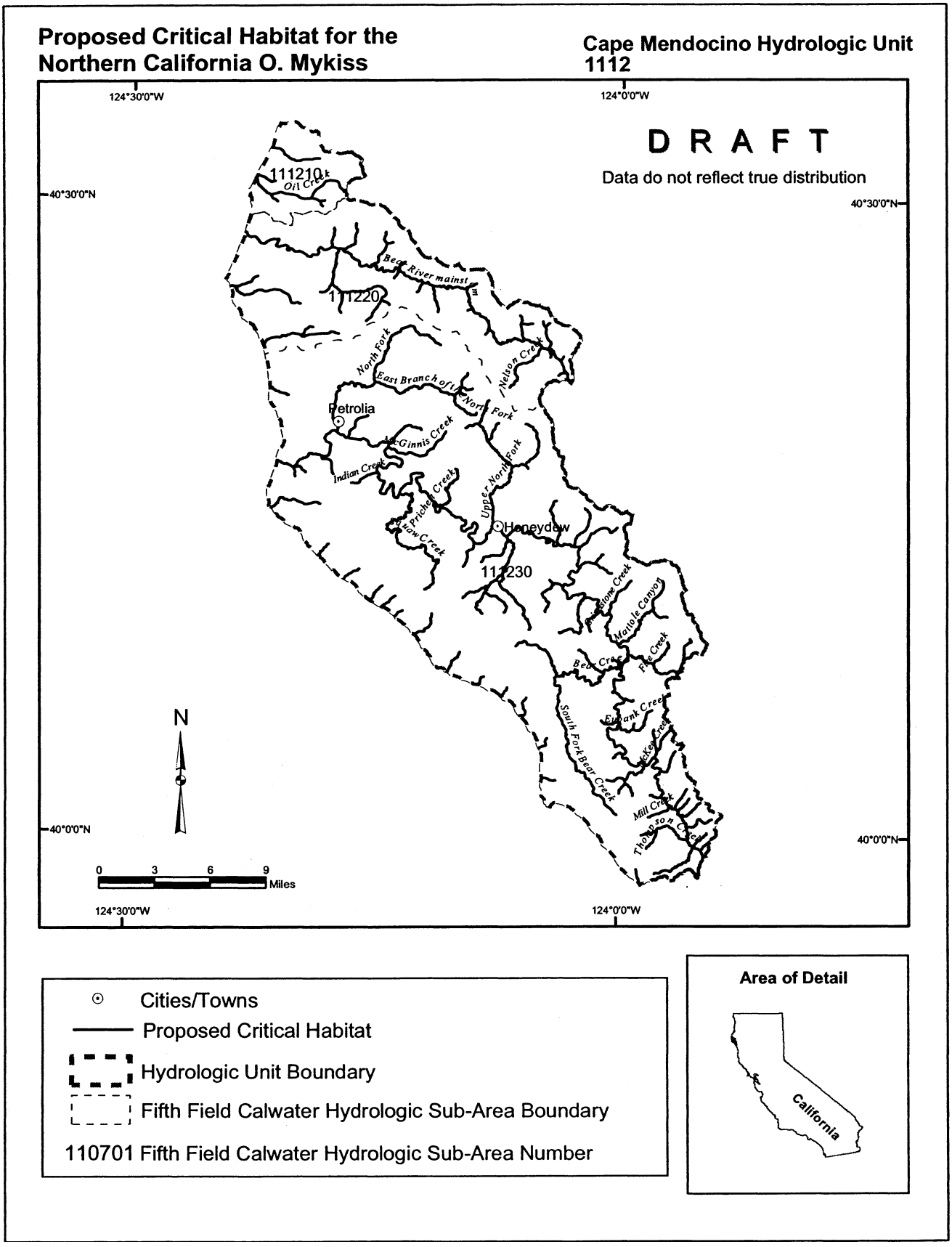

Proposed Critical Habitat for the Northern California O. Mykiss
Redwood Creek Hydrologic Unit 1107
124°0'0"W
123°30'0"W
DRAFT
Data do not reflect true distribution
Prairie Creek
Little East Man
Orick
110710
Bridge Creek
Coyote Creek
Panther Creek
Lacks Creek
110720
Redwood Creek
110730
Upper Panther
41°0'0"N
N
0 4 8 12
Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California

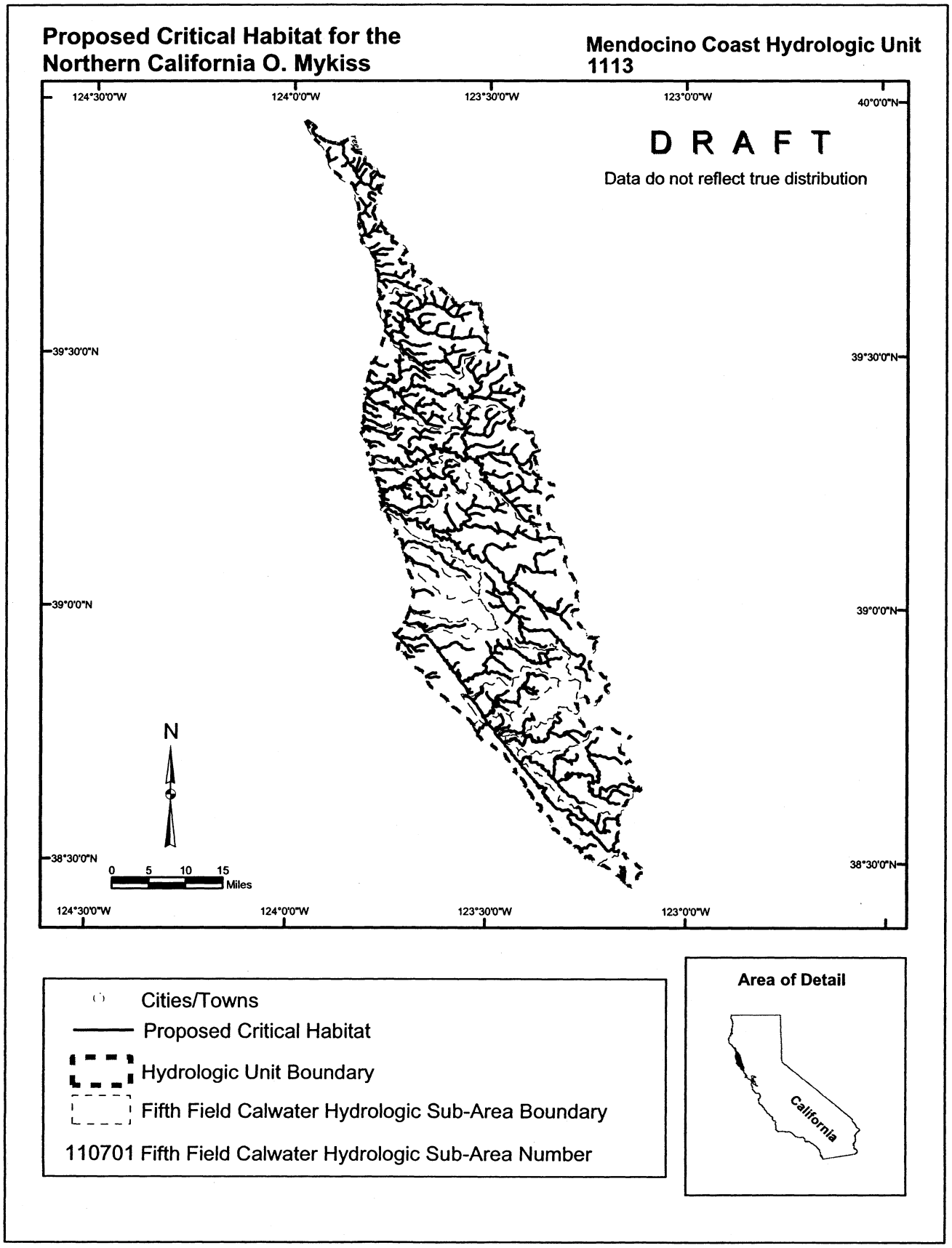

Proposed Critical Habitat for the Northern California O. Mykiss
Trinidad Hydrologic Unit 1108
124°0'0"W
123°30'0"W
DRAFT
Data do not reflect true distribution
McDonald Creek
110810
Mill Creek
Lindsay Creek
41°0'0"N
Moonstone
Crannell
Little River
110820
N
0 2 4 6 Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the Northern California O. Mykiss
Mad River Hydrologic Unit 1109
124°0'0"W
123°30'0"W
123°0'0"W
41°0'0"N
40°30'0"N
D R A F T
Data do not reflect true distribution
110910
110920
Korbel
Hall Creek
Maple Creek
Blue Slide Creek
110930
Mad River
Bear Creek
Little Mad River
110940
N
0 4 8 12
Miles
Cities/Towns
Proposed Critical Habitat
Occupied but excluded streams / areas
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the Northern California O. Mykiss
Eureka Plain Hydrologic Unit 1110
124°0'0"W
DRAFT
Data do not reflect true distribution
Arcata
Fay Slu
Bayview
Clam Gulch
Elk River
Pine Hills
111600
North Fork Elk River
South Fork
Salmon Creek (Humboldt)
N
0 2 4 6
Miles
124°0'0"W
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the Northern California O. Mykiss
Eel River Hydrologic Unit 1111
DRAFT
Data do not reflect true distribution
124°30'0"W
124°0'0"W
123°30'0"W
123°0'0"W
40°30'0"N
40°0'0"N
39°30'0"N
111123
111111
111121
111122
111113
111131
111141
Garberville
Kekawaka Creek
Bull Creek
Indian Creek
111142
111182
11150
111174
Hulls Creek
111172
Grizzly Creek
Black Butte River
111173
Ten Mile Creek
111133
Laytonville
South Fork Eel River
111171
Elk Creek
111161
Outlet Creek
Willits
111163
N
0 5 10 15
Miles
Cities/Towns
Proposed Critical Habitat
Occupied but excluded streams / areas
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the Northern California O. Mykiss
Cape Mendocino Hydrologic Unit 1112
124°30'0"W
124°0'0"W
DRAFT
Data do not reflect true distribution
40°30'0"N
40°0'0"N
111210
Oil Cr.
Beat River mainstem
111220
North Fork
East Branch of the North Fork
Nelson Creek
Petrolia
McGinnis Creek
Indian Creek
Upper North Fork
Pritchett Creek
Honeydew
111230
Matole Canyon
Bear Creek
Fire Creek
Eubank Creek
McKee Creek
South Fork Bear Creek
Mill Creek
Thompson Creek
N
0 3 6 9
Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California



BILLING CODE 3510–22–C

(h) *Central California Coast O. mykiss (Oncorhynchus mykiss).* Critical habitat is proposed to include the areas defined in the following units:

(1) Russian River Hydrologic Unit 1114—*(i) Guerneville Hydrologic Sub-area 111411.* Outlet(s) = Russian River (Lat 38.4507, Long −123.1289) upstream to endpoint(s) in: Atascadero Creek (38.3473, −122.8626); Austin Creek (38.5098, −123.0680); Baumert Springs (38.4195, −122.9658); Dutch Bill Creek (38.4132, −122.9508); Duvoul Creek (38.4527, −122.9525); Fife Creek (38.5584, −122.9922); Freezeout Creek (38.4405, −123.0360); Green Valley Creek, (38.4445, −122.9185); Grub Creek (38.4411, −122.9636); Hobson Creek (38.5334, −122.9401); Hulbert Creek (38.5548, −123.0362); Jenner Gulch (38.4869, −123.0996); Kidd Creek (38.5029, −123.0935); Lancel Creek (38.4247, −122.9322); Mark West Creek (38.4961, −122.8489); Mays Canyon (38.4800, −122.9715); North Fork Lancel Creek (38.4447, −122.9444); Pocket Canyon (38.4650, −122.9267); Porter Creek (38.5435, −122.9332); Purrington Creek (38.4083, −122.9307); Sheep House Creek (38.4820, −123.0921); Smith Creek (38.4622, −122.9585); Unnamed Tributary (38.4560, −123.0246); Unnamed Tributary (38.3976, −122.8994); Unnamed Tributary (38.3772, −122.8938); Willow Creek (38.4249, −123.0022).

(ii) Austin Creek Hydrologic Sub-area 111412. Outlet(s) = Austin Creek (Lat 38.5098, Long −123.0680) upstream to endpoint(s) in: Bear Pen Creek (38.5939, −123.1644); Big Oat Creek (38.5615, −123.1299); Blue Jay Creek (38.5618, −123.1399); Conshea Creek (38.5830, −123.0824); Devil Creek (38.6163, −123.0425); Black Rock Creek (38.5586, −123.0730); Thompson Creek (38.5747, −123.0300); Pole Mountain Creek (38.5122, −123.1168); Red Slide Creek (38.6039, −123.1141); Saint Elmo Creek (38.5130, −123.1125); Schoolhouse Creek (38.5595, −123.0175); Spring Creek (38.5041, −123.1364); Sulphur Creek (38.6187, −123.0553); Austin Creek (38.6262, −123.1347); East Austin Creek (38.6349, −123.1238); Gilliam Creek (38.5803, −123.0152); Gray Creek (38.6132, −123.0107); Ward Creek (38.5720, −123.1547).

(iii) Laguna Hydrologic Sub-area 111421. Outlet(s) = Laguna de Santa Rosa (Lat 38.4522, Long −122.8347) upstream to endpoint(s) in: Crane Creek (38.3521, −122.6022); Hinebaugh Creek (38.3509, −122.6913); Laguna de Santa Rosa (38.3431, −122.7229); Blucher Creek (38.3509, −122.8258); Copeland Creek (38.3371, −122.6038).

(iv) Mark West Hydrologic Sub-area 111423. Outlet(s) = Mark West Creek (Lat 38.4858, Long −122.8419) upstream to endpoint(s) in: Humbug Creek (38.5412, −122.6249); Laguna de Santa Rosa (38.4526, −122.8347); Mark West Creek (38.5187, −122.5995); Pool Creek (38.5486, −122.7641); Pruit Creek (38.5313, −122.7615); Windsor Creek (38.5484, −122.8101).

(v) Warm Springs Hydrologic Sub-area 111424. Outlet(s) = Dry Creek (Lat 38.5862, Long −122.8577) upstream to endpoint(s) in: Angel Creek (38.6101, −122.9833); Crane Creek (38.6434, −122.9451); Dry Creek (38.7181, −123.0091); Dutcher Creek (38.7223, −122.9770); Felta (38.5679, −122.9379); Foss Creek (38.6244, −122.8754); Grape Creek (38.6593, −122.9707); Mill Creek (38.5976, −122.9914); North Slough Creek (38.6392, −122.8888); Palmer Creek (38.5770, −122.9904); Redwood Log Creek (38.6705, −123.0725); Salt Creek (38.5543, −122.9133); Pena Creek (38.6384, −123.0743); Wallace Creek (38.6260, −122.9651); Wine Creek (38.6662, −122.9682); Woods Creek (38.6069, −123.0272).

(vi) Geyserville Hydrologic Sub-area 111425. Outlet(s) = Russian River (Lat 38.6132, Long −122.8321) upstream to endpoint(s) in: Ash Creek (38.8556, −123.0082); Bear Creek (38.7253, −122.7038); Bidwell Creek (38.6229, −122.6320); Big Sulphur Creek (38.8279, −122.9914); Bluegum Creek (38.6988, −122.7596); Briggs Creek (38.6845, −122.6811); Coon Creek (38.7105, −122.6957); Crocker Creek (38.7771, −122.9595); Edwards Creek (38.8592, −123.0758); Foss Creek (38.6373, −122.8753); Franz Creek (38.5726, −122.6343); Gill Creek (38.7552, −122.8840); Gird Creek (38.7055, −122.8311); Ingalls Creek (38.7344, −122.7192); Kellog Creek (38.6753, −122.6422); Little Briggs Creek (38.7082, −122.7014); Maacama Creek (38.6743, −122.7431); McDonnell Creek (38.7354, −122.7338); Mill Creek (38.7009, −122.6490); Miller Creek (38.7211, −122.8608); Oat Valley Creek (38.8461, −123.0712); Redwood Creek (38.6342, −122.6720); Foote Creek (38.6433, −122.6797); Sausal Creek (38.6924, −122.7930); South Fork Gill Creek (38.7420, −122.8760); Unnamed Tributary (38.7329, −122.8601); Yellowjacket Creek (38.6666, −122.6308).

(vii) Sulphur Creek Hydrologic Sub-area 111426. Outlet(s) = Big Sulphur Creek (Lat 38.8279, Long −122.9914) upstream to endpoint(s) in: Alder Creek (38.8503, −122.8953); Anna Belcher Creek (38.7537, −122.7586); Big Sulphur Creek (38.8243, −122.8774); Cobb Creek (38.7953, −122.7909); Frasier Creek (38.8439, −122.9341); Humming Bird Creek (38.8460, −122.8596); Lovers Gulch (38.7396, −122.8275); North Branch Little Sulphur Creek (38.7783, −122.8119); Squaw Creek (38.8199, −122.7945); Little Sulphur Creek (38.7469, −122.7425).

(viii) Ukiah Hydrologic Sub-area 111431. Outlet(s) = Russian River (Lat 38.8828, Long −123.0557) upstream to endpoint(s) in: Pieta Creek (38.8622, −122.9329).

(ix) Forsythe Creek Hydrologic Sub-area 111433. Outlet(s) = West Branch Russian River (Lat 39.2257, Long −123.2012) upstream to endpoint(s) in: Bakers Creek (39.2859, −123.2432); Eldridge Creek (39.2250, −123.3309); Forsythe Creek (39.2976, −123.2963); Jack Smith Creek (39.2754, −123.3421); Mariposa Creek (39.3472, −123.2625); Mill Creek (39.2969, −123.3360); Salt Hollow Creek (39.2585, −123.1881); Seward Creek (39.2606, −123.2646); West Branch Russian River (39.3642, −123.2334).

(2) Bodega Hydrologic Unit 1115—*(i) Salmon Creek Hydrologic Sub-area 111510.* Outlet(s) = Salmon Creek (Lat 38.3554, Long −123.0675) upstream to endpoint(s) in: Coleman Valley Creek (38.3956, −123.0097); Faye Creek (38.3749, −123.0000); Finley Creek (38.3707, −123.0258); Salmon Creek (38.3877, −122.9318); Tannery Creek (38.3660, −122.9808).

(ii) Estero Americano Hydrologic Sub-area 111530. Outlet(s) = Estero Americano (Lat 38.2939, Long −123.0011) upstream to endpoint(s) in: Estero Americano (38.3117, −122.9748); Ebabias Creek (38.3345, −122.9759).

(3) Marin Coastal Hydrologic Unit 2201—*(i) Walker Creek Hydrologic Sub-area 220112.* Outlet(s) = Walker Creek (Lat 38.2213, Long −122.9228); Millerton Gulch (38.1055, −122.8416) upstream to endpoint(s) in: Chileno Creek (38.2145, −122.8579); Frink Canyon (38.1761, −122.8405); Millerton Gulch (38.1376, −122.8052); Verde Canyon (38.1630, −122.8116); Unnamed Trib (38.1224, −122.8095); Walker Creek (38.1617, −122.7815).

(ii) Lagunitas Creek Hydrologic Sub-area 220113. Outlet(s) = Lagunitas Creek (Lat 38.0827, Long −122.8274) upstream to endpoint(s) in: Cheda Creek (38.0483, −122.7329); Devil's Gulch (38.0393, −122.7128); Giacomini Creek (38.0032, −122.7617); Horse Camp Gulch (38.0078, −122.7624); Lagunitas Creek (37.9974, −122.7045); Olema Creek (37.9719, −122.7125); Quarry Gulch (38.0345, −122.7639); San Geronimo Creek (38.0131, −122.6499); Unnamed Tributary (37.9893, −122.7328); Unnamed Tributary (37.9976, −122.7553).

(iii) Point Reyes Hydrologic Sub-area 220120. Outlet(s) = Creamery Bay Creek

(Lat 38.0809, Long −122.9561); East Schooner Creek (38.0913, −122.9293); Home Ranch (38.0705, −122.9119); Laguna Creek (38.0235, −122.8732); Muddy Hollow Creek (38.0329, −122.8842) upstream to endpoint(s) in: Creamery Bay Creek (38.0779, −122.9572); East Schooner Creek (38.0928, −122.9159); Home Ranch Creek (38.0784, −122.9038); Laguna Creek (38.0436, −122.8559); Muddy Hollow Creek (38.0549, −122.8666).

(iv) Bolinas Hydrologic Sub-area 220130. Outlet(s) = Easkoot Creek (Lat 37.9026, Long −122.6474); McKinnon Gulch (37.9126, −122.6639); Morse Gulch (37.9189, −122.6710); Pine Gulch Creek (37.9218, −122.6882); Redwood Creek (37.8595, −122.5787); Stinson Gulch (37.9068, −122.6517); Wilkins Creek (37.9343, −122.6967) upstream to endpoint(s) in: Easkoot Creek (37.8987, −122.6370); Kent Canyon (37.8866, −122.5800); McKinnon Gulch (37.9197, −122.6564); Morse Gulch (37.9240, −122.6618); Pine Gulch Creek (37.9557, −122.7197); Redwood Creek (37.9006, −122.5787); Stinson Gulch (37.9141, −122.6426); Wilkins Creek (37.9450, −122.6910).

(4) San Mateo Hydrologic Unit 2202—*(i) San Mateo Coastal Hydrologic Sub-area 220221.* Outlet(s) = Arroyo de en Medio (Lat 37.4929, Long −122.4606); Denniston Creek (37.5033, −122.4869); Frenchmans Creek (37.4804, −122.4518); San Pedro Creek (37.5964, −122.5057) upstream to endpoint(s) in: Arroyo De En Medio (37.5202, −122.4562); Denniston Creek (37.5184, −122.4896); Frenchmans Creek (37.5170, −122.4332); Middle Fork San Pedro Creek (37.5758, −122.4591); North Fork San Pedro Creek (37.5996, −122.4635); San Pedro Creek (37.5825, −122.4771).

(ii) Half Moon Bay Hydrologic Sub-area 220222. Outlet(s) = Arroyo Leon Creek (Lat 37.4758, Long −122.4493) upstream to endpoint(s) in: Apanolio Creek (37.5202, −122.4158); Arroyo Leon Creek (37.4560, −122.3442); Mills Creek (37.4629, −122.3721); Pilarcitos Creek (37.5259, −122.3980); Unnamed Tributary (37.4705, −122.3616).

(iii) Tunitas Creek Hydrologic Sub-area 220223. Outlet(s) = Lobitos Creek (Lat 37.3762, Long −122.4093); Tunitas Creek (37.3567, −122.3999) upstream to endpoint(s) in: East Fork Tunitas Creek (37.3981, −122.3404); Lobitos Creek (37.4246, −122.3586); Tunitas Creek (37.4086, −122.3502).

(iv) San Gregorio Creek Hydrologic Sub-area 220230. Outlet(s) = San Gregorio Creek (Lat 37.3215, Long −122.4030) upstream to endpoint(s) in: Alpine Creek (37.3062, −122.2003); Bogess Creek (37.3740, −122.3010); El Corte Madera Creek (37.3650, −122.3307); Harrington Creek (37.3811, −122.2936); La Honda Creek (37.3680, −122.2655); Langley Creek (37.3302, −122.2420); Mindego Creek (37.3204, −122.2239); San Gregorio Creek (37.3099, −122.2779); Woodruff Creek (37.3415, −122.2495).

(v) Pescadero Creek Hydrologic Sub-area 220240. Outlet(s) = Pescadero Creek (Lat 37.2669, Long −122.4122); Pomponio Creek (37.2979, −122.4061) upstream to endpoint(s) in: Bradley Creek (37.2819, −122.3802); Butano Creek (37.2419, −122.3165); Evans Creek (37.2659, −122.2163); Honsinger Creek (37.2828, −122.3316); Little Boulder Creek (37.2145, −122.1964); Little Butano Creek (37.2040, −122.3492); Oil Creek (37.2572, −122.1325); Pescadero Creek (37.2320, −122.1553); Lambert Creek (37.3014, −122.1789); Peters Creek (37.2883, −122.1694); Pomponio Creek (37.3030, −122.3805); Slate Creek (37.2530, −122.1935); Tarwater Creek (37.2731, −122.2387); Waterman Creek (37.2455, −122.1568).

(5) Bay Bridges Hydrologic Unit 2203—*San Rafael Hydrologic Sub-area 220320.* Outlet(s) = Corte Madera Creek (Lat 37.9425, Long −122.5059) upstream to endpoint(s) in: Cascade Creek (37.9867, −122.6287); Corte Madera Creek (37.9859, −122.5842); Larkspur Creek (37.9305, −122.5514); Ross Creek (37.9558, −122.5752); San Anselmo Creek (37.9825, −122.6420); Sleepy Hollow Creek (38.0074, −122.5794); Tamalpais Creek (37.9481, −122.5674).

(6) South Bay Hydrologic Unit 2204—*(i) Eastbay Cities Hydrologic Sub-area 220420.* Outlet(s) = Alameda Creek (Lat 37.5942, Long −122.1422) upstream.

(ii) Alameda Creek Hydrologic Sub-area 220430. Outlet(s) = Alameda Creek (Lat 37.5812, Long −121.9644) upstream to endpoint(s) in: Alameda Creek (37.4569, −121.6996); Arroyo Honda (37.3661, −121.6684); Arroyo Mocho (37.5572, −121.5807); Arroyo de Laguna (37.6771, −121.9124); Arroyo del Valle (37.6141, −121.7466); Arroyo las Positias (37.7029, −121.7594); Calveras Creek (37.4642, −121.7766); Colorado Creek (37.4301, −121.5092); Sinbad Creek (37.6509, −121.9353); Stoneybrook Creek (37.6377, −121.9608).

(7) Santa Clara Hydrologic Unit 2205—*(i) Freemont Bayside Hydrologic Sub-area 220520.* Outlet(s) = Alameda Creek (Lat 37.5777, Long −122.0251) upstream to endpoint(s) in: Alameda Creek (37.5812, −121.9644).

(ii) Coyote Creek Hydrologic Sub-area 220530. Outlet(s) = Coyote Creek (Lat 37.4629, Long −121.9894; 37.2275, −121.7514) upstream to endpoint(s) in: Arroyo Aguague (37.3907, −121.7836); Coyote Creek (37.2778, −121.8033); Coyote Creek (37.1677, −121.6301); Upper Penitencia Creek (37.3969, −121.7577).

(iii) Palo Alto Hydrologic Sub-area 220550. Outlet(s) = Guadalupe River (Lat 37.4614, Long −122.0240); San Francisquito Creek (37.4658, −122.1152); Stevens Creek (37.4456, −122.0641) upstream to endpoint(s) in: Bear Creek (37.4528, −122.3020); Guadalupe River (37.3499, −.121.9094); Los Trancos (37.3293, −122.1786); San Francisquito Creek (37.4098, −122.2389); Stevens Creek (37.2990, −122.0778).

(8) San Pablo Hydrologic Unit 2206—*(i) Petaluma River Hydrologic Sub-area 220630.* Outlet(s) = Petaluma River (Lat 38.1111, Long −122.4944) upstream to endpoint(s) in: Adobe Creek (38.2940, −122.5834); Lichau Creek (38.2848, −122.6654); Lynch Creek (38.2748, −122.6194); Petaluma River (38.3010, −122.7149); Schultz Slough (38.1892, −122.5953); San Antonio Creek (38.2049, −122.7408); Unnamed Tributary (38.3105, −122.6146); Willow Brook (38.3165, −122.6113).

(ii) Sonoma Creek Hydrologic Sub-area 220640. Outlet(s) = Sonoma Creek (Lat 38.1525, Long −122.4050) upstream to endpoint(s) in: Agua Caliente Creek (38.3368, −122.4518); Asbury Creek (38.3401, −122.5590); Bear Creek (38.4656, −122.5253); Calabazas Creek (38.4033, −122.4803); Carriger Creek (38.3031, −122.5336); Graham Creek (38.3474, −122.5607); Hooker Creek (38.3809, −122.4562); Mill Creek (38.3395, −122.5454); Nathanson Creek (38.3350, −122.4290); Rodgers Creek (38.2924, −122.5543); Schell Creek (38.2554, −122.4510); Sonoma Creek (38.4507, −122.4819); Stuart Creek (38.3936, −122.4708); Yulupa Creek (38.3986, −122.5934).

(iii) Napa River Hydrologic Sub-area 220650. Outlet(s) = Napa River (Lat 38.0786, Long −122.2468) upstream to endpoint(s) in: Bale Slough (38.4806, −122.4578); Bear Canyon Creek (38.4512, −122.4415); Bell Canyon Creek (38.5551, −122.4827); Brown's Valley Creek (38.3251, −122.3686); Carneros Creek (38.3108, −122.3914); Conn Creek (38.4843, −122.3824); Cyrus Creek (38.5776, −122.6032); Diamond Mountain Creek (38.5645, −122.5903); Dry Creek (38.4334, −122.4791); Dutch Henery Creek (38.6080, −122.5253); Garnett Creek (38.6236, −122.5860); Huichica Creek (38.2811, −122.3936); Jericho Canyon Creek (38.6219, −122.5933); Miliken Creek (38.3773, −122.2280); Mill Creek (38.5299, −122.5513); Murphy Creek

(38.3155, −122.2111); Napa Creek (38.3047, −122.3134); Napa River (38.6210, −122.6129); Pickle Canyon Creek (38.3672, −122.4071); Rector Creek (38.4410, −122.3451); Redwood Creek (38.3765, −122.4466); Ritchie Creek (38.5369, −122.5652); Sarco Creek (38.3567, −122.2071); Soda Creek (38.4156, −122.2953); Spencer Creek (38.2729, −122.1909); Sulphur Creek (38.4839, −122.5161); Suscol Creek (38.2522, −122.2157); Tulucay Creek (38.2929, −122.2389); Unnamed Tributary (38.4248, −122.4935); York Creek (38.5128, −122.5023).

(9) Suisun Hydrologic Unit 2207—*Suisun Creek Hydrologic Sub-area 220722.* Outlet(s) = Suisun Creek (Lat 38.2020, Long −122.1035) upstream to endpoint(s) in: Suisun Creek (38.3301, −122.1371); Wooden Valley Creek (38.3749, −122.1830).

(10) Big Basin Hydrologic Unit 3304—*(i) Davenport Hydrologic Sub-area 330411* Outlet(s) = Baldwin Creek (Lat 36.9669, −122.1232); Davenport Landing Creek (37.0231, −122.2153); Laguna Creek (36.9824, −122.1560); Liddell Creek (37.0001, −122.1816); Majors Creek (36.9762, −122.1423); Molino Creek (37.0368, −122.2292); San Vicente Creek (37.0093, −122.1940); Scott Creek (37.0404, −122.2307); Waddell Creek (37.0935, −122.2762); Wilder Creek (36.9535, −122.0775) upstream to endpoint(s) in: Baldwin Creek (37.0126, −122.1006); Bettencourt Creek (37.1081, −122.2386); Big Creek (37.0832, −122.2175); Davenport Landing Creek (37.0475, −122.1920); East Branch Waddell Creek (37.1482, −122.2531); East Fork Liddell Creek (37.0204, −122.1521); Henry Creek (37.1695, −122.2751); Laguna Creek (37.0185, −122.1287); Liddell Creek (37.0030, −122.1768); Little Creek (37.0688, −122.2097); Majors Creek (36.9815, −122.1374); Middle Fork East Fork Liddell Creek (37.0194, −122.1608); Mill Creek (37.1034, −122.2218); Molino Creek (37.0384, −122.2125); Peasley Gulch (36.9824, −122.0861); Queseria Creek (37.0521, −122.2042); San Vicente Creek (37.0417, −122.1741); Scott Creek (37.1338, −122.2306); Waddell Creek (37.1338, −122.2677); West Branch Waddell Creek (37.1697, −122.2642); West Fork Liddell Creek (37.0117, −122.1763); Unnamed Tributary (37.0103, −122.0701); Wilder Creek (37.0107, −122.0770).

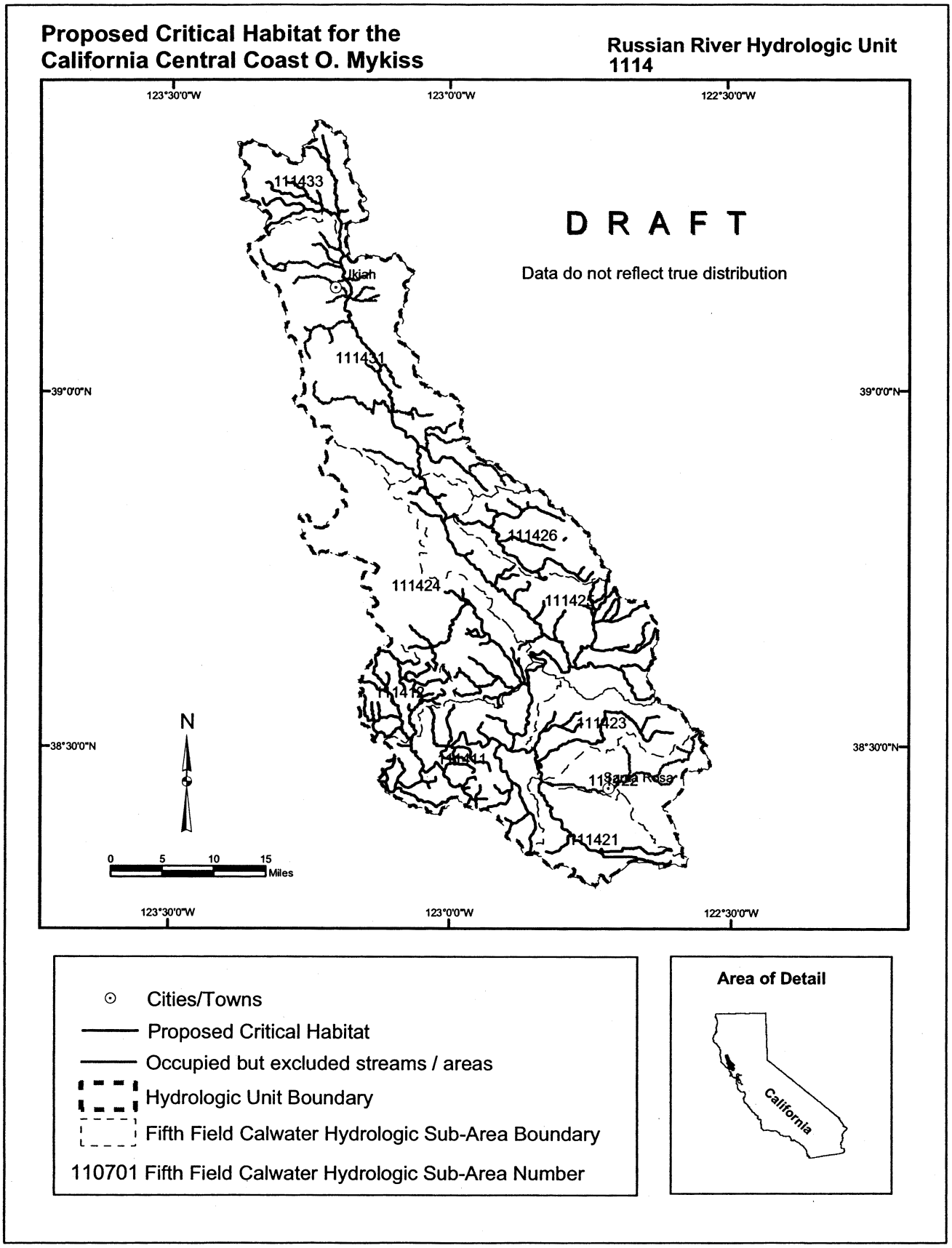
(ii) San Lorenzo Hydrologic Sub-area 330412. Outlet(s) = Arana Gulch Creek (Lat 36.9676, Long −122.0028); San Lorenzo River (36.9641, −122.0125) upstream to endpoint(s) in: Arana Gulch Creek (37.0270, −121.9739); Bean Creek (37.0956, −122.0022); Bear Creek (37.1711, −122.0750); Boulder Creek (37.1952, −122.1892); Bracken Brae Creek (37.1441, −122.1459); Branciforte Creek (37.0701, −121.9749); Crystal Creek (37.0333, −121.9825); Carbonera Creek (37.0286, −122.0202); Central Branch Arana Gulch Creek (37.0170, −121.9874); Deer Creek (37.2215, −122.0799); Fall Creek (37.0705, −122.1063); Gold Gulch Creek (37.0427, −122.1018); Granite Creek (37.0490, −121.9979); Hare Creek (37.1544, −122.1690); Jameson Creek (37.1485, −122.1904); Kings Creek (37.2262, −122.1059); Lompico Creek (37.1250, −122.0496); Mackenzie Creek (37.0866, −122.0176); Mountain Charlie Creek (37.1385, −121.9914); Newell Creek (37.1019, −122.0724); San Lorenzo River (37.2276, −122.1384); Two Bar Creek (37.1833, −122.0929); Unnamed Tributary (37.2106, −122.0952); Unnamed Tributary (37.2032, −122.0699); Zayante Creek (37.1062, −122.0224).

(iii) Aptos-Soquel Hydrologic Sub-area 330413. Outlet(s)=Aptos Creek (Lat 36.9692, Long −121.9065); Soquel Creek (36.9720, −121.9526) upstream to endpoint(s) in: Amaya Creek (37.0930, −121.9297); Aptos Creek (37.0545, −121.8568); Bates Creek (37.0099, −121.9353); Bridge Creek (37.0464, −121.8969); East Branch Soquel Creek (37.0690, −121.8297); Hester Creek (37.0967, −121.9458); Hinckley Creek (37.0671, −121.9069); Moores Gulch (37.0573, −121.9579); Soquel Creek (37.0443, −121.9404); Valencia Creek (37.0323, −121.8493); West Branch Soquel Creek (37.1095, −121.9606).

(iv) Ano Nuevo Hydrologic Sub-area 330420. Outlet(s)=Ano Nuevo Creek (Lat 37.1163, Long −22.3060); Gazos Creek (37.1646, −122.3625); Whitehouse Creek (37.1457, −122.3469) upstream to endpoint(s) in: Ano Nuevo Creek (37.1269, −122.3039); Bear Gulch (37.1965, −122.2773); Gazos Creek (37.2088, −122.2868); Old Womans Creek (37.1829, −122.3033); Whitehouse Creek (37.1775, −122.2900).

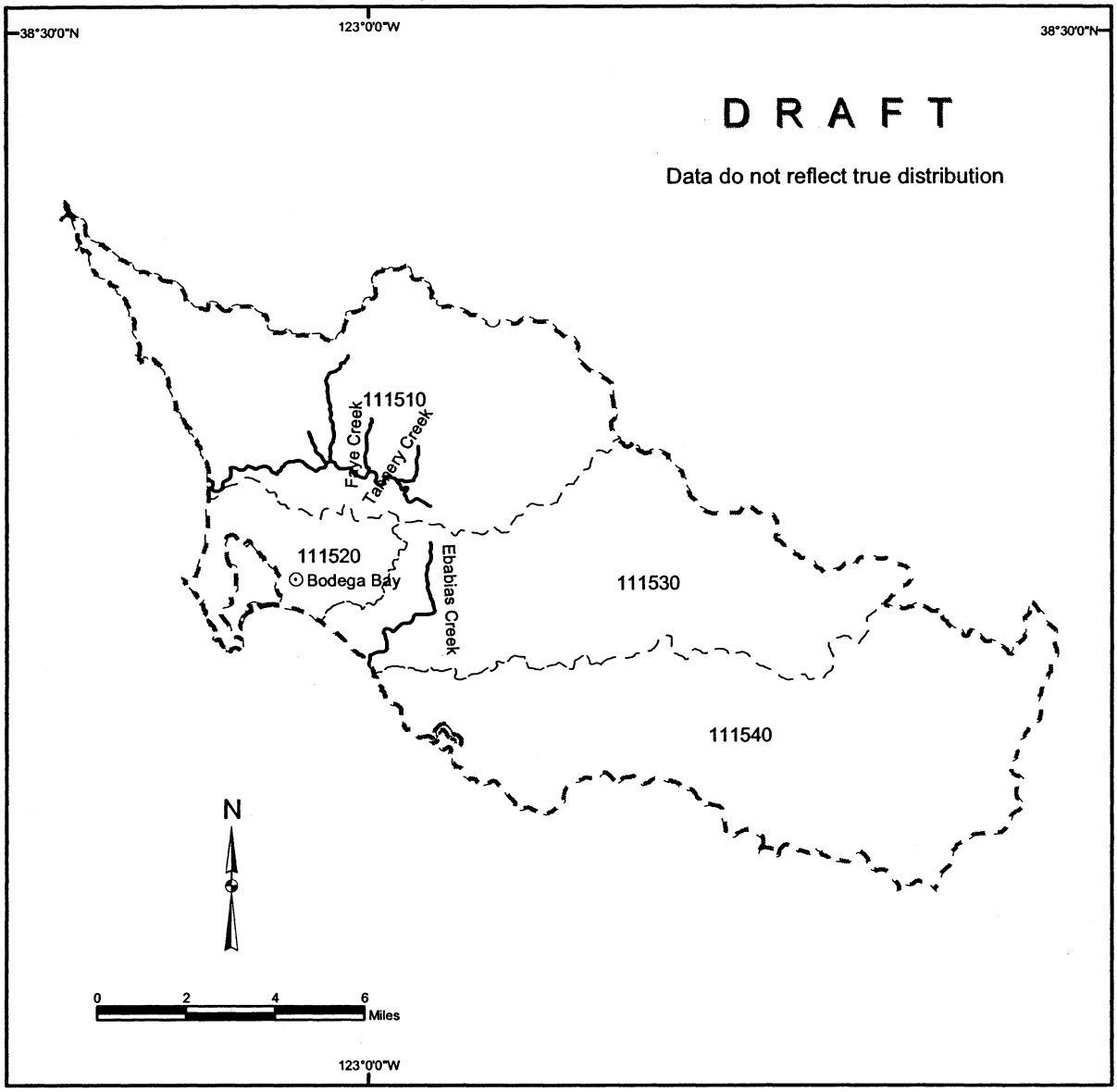
(11) Maps of proposed critical habitat for the Central California Coast O. mykiss ESU follow:

BILLING CODE 3510–22–P


Proposed Critical Habitat for the California Central Coast O. Mykiss
Russian River Hydrologic Unit 1114
123°30'0"W
123°0'0"W
122°30'0"W
39°0'0"N
38°30'0"N
111433
DRAFT
Data do not reflect true distribution
Ukiah
111431
111426
111424
111425
111422
111423
111411
Santa Rosa
111421
N
0 5 10 15
Miles
Cities/Towns
Proposed Critical Habitat
Occupied but excluded streams / areas
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California

Proposed Critical Habitat for the California Central Coast O. Mykiss

Bodega Hydrologic Unit 1115



⊙ Cities/Towns

Proposed Critical Habitat

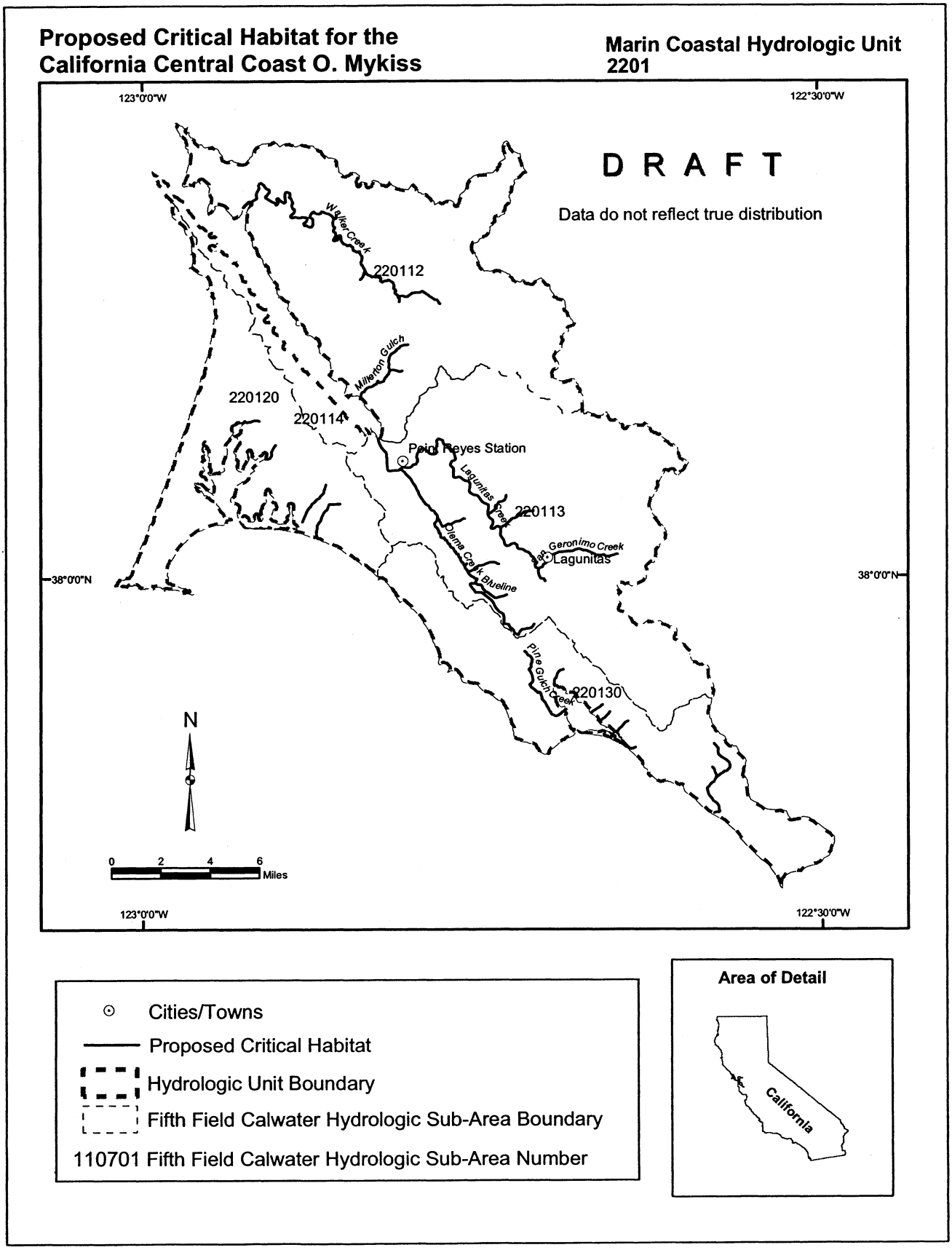
Hydrologic Unit Boundary

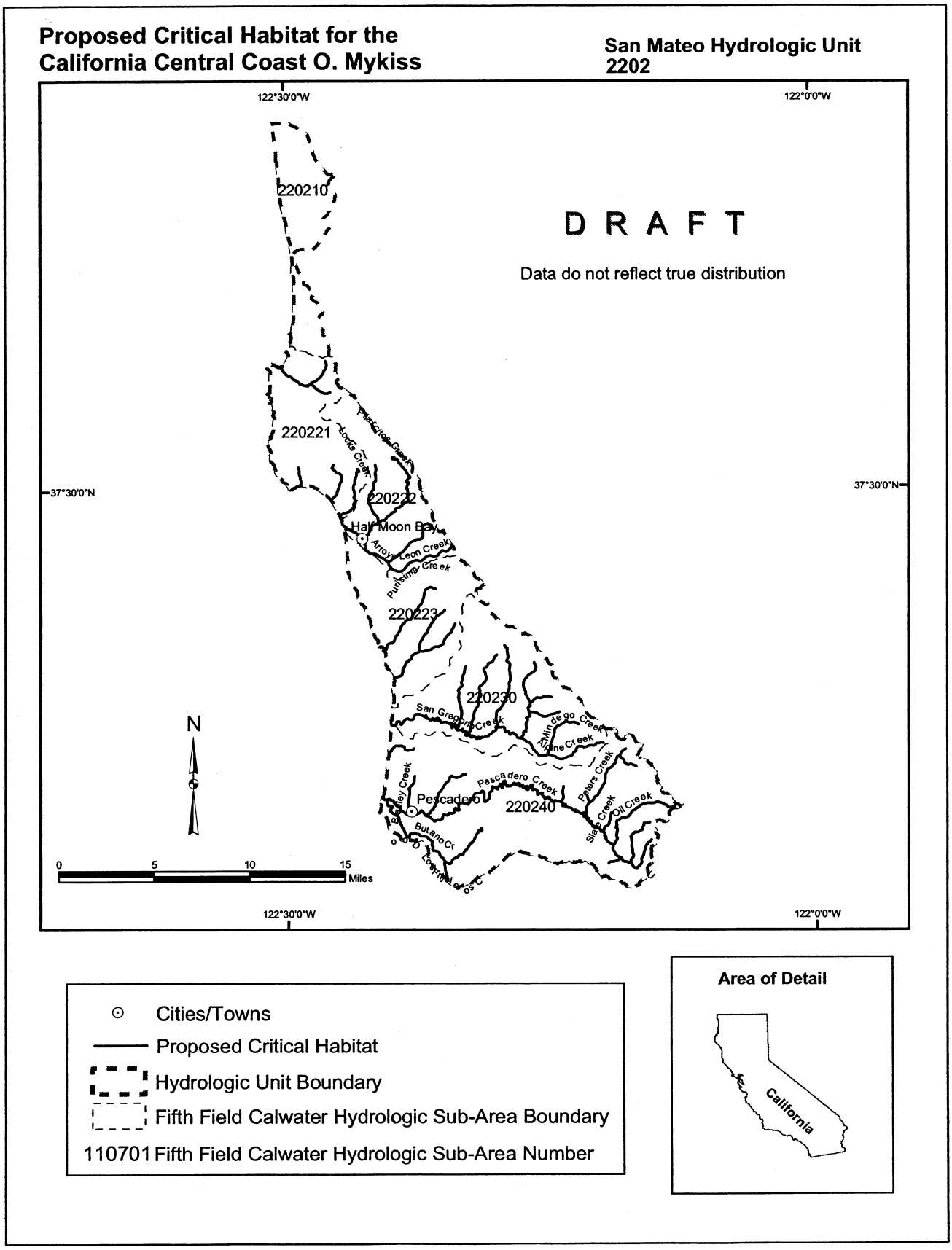
Fifth Field Calwater Hydrologic Sub-Area Boundary

110701 Fifth Field Calwater Hydrologic Sub-Area Number

Area of Detail

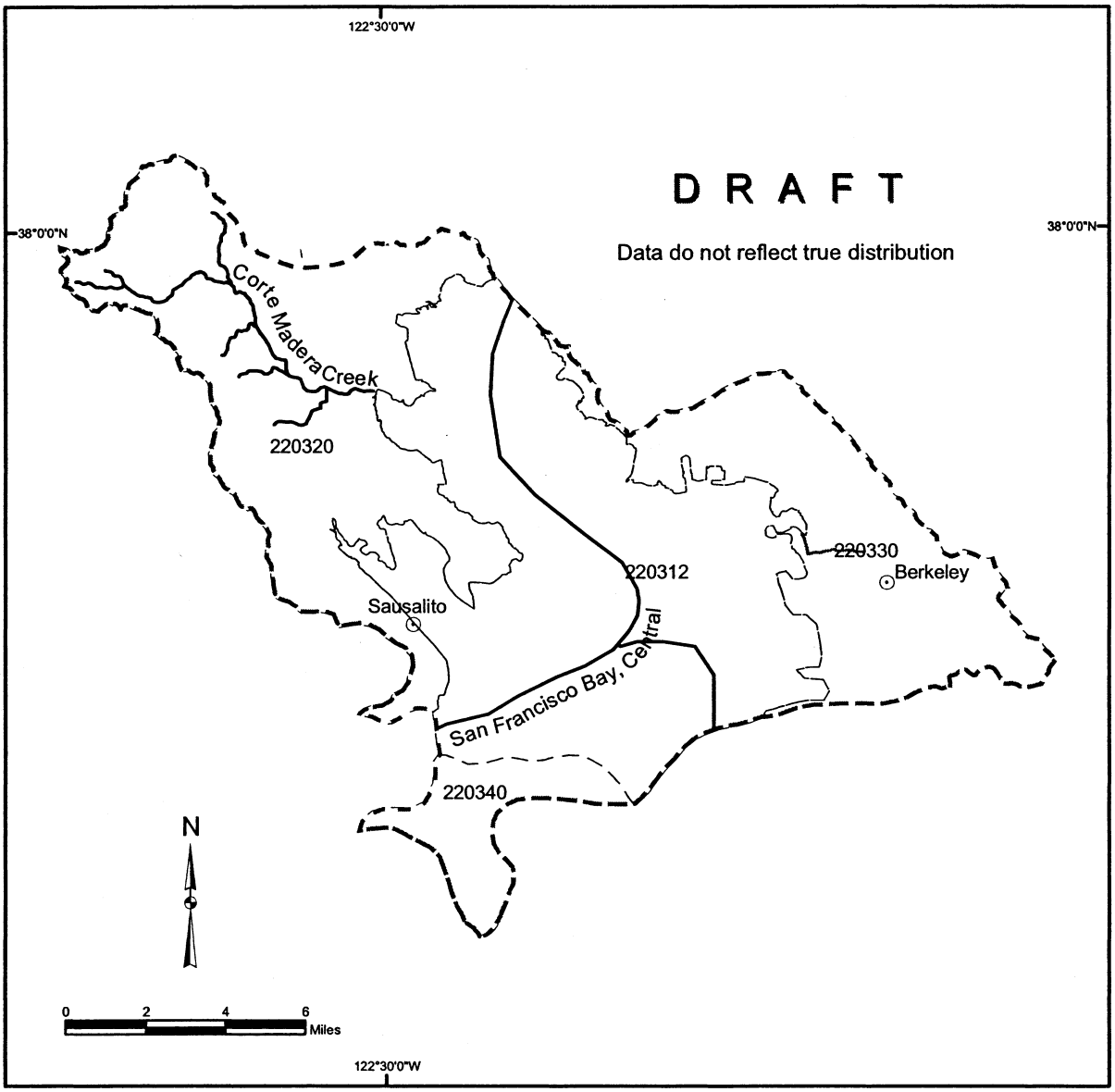



Proposed Critical Habitat for the California Central Coast O. Mykiss
Marin Coastal Hydrologic Unit 2201
123°0'0"W
122°30'0"W
38°0'0"N
DRAFT
Data do not reflect true distribution
Walker Creek
220112
Millerton Gulch
220120
220114
Point Reyes Station
Lagunitas Creek
220113
Geronimo Creek
Lagunitas
Pierce Creek
Blueline
Pine Gulch Creek
220130
N
0 2 4 6
Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the California Central Coast O. Mykiss
San Mateo Hydrologic Unit 2202
122°30'0"W
122°0'0"W
37°30'0"N
220210
220221
220222
220223
220230
220240
DRAFT
Data do not reflect true distribution
Half Moon Bay
Pescadero
Arroyo Leon Creek
Purisima Creek
Tunitas Creek
Lobitos Creek
San Gregorio Creek
Pescadero Creek
Peters Creek
Slate Creek
Gazos Creek
Butano Ct
Bradley Creek
Whitehouse Creek
Alpine Creek
Dill Creek
N
0 5 10 15 Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California

Proposed Critical Habitat for the California Central Coast O. Mykiss

Bay Bridges Hydrologic Unit 2203



⊙ Cities/Towns

Proposed Critical Habitat

Occupied but excluded streams / areas

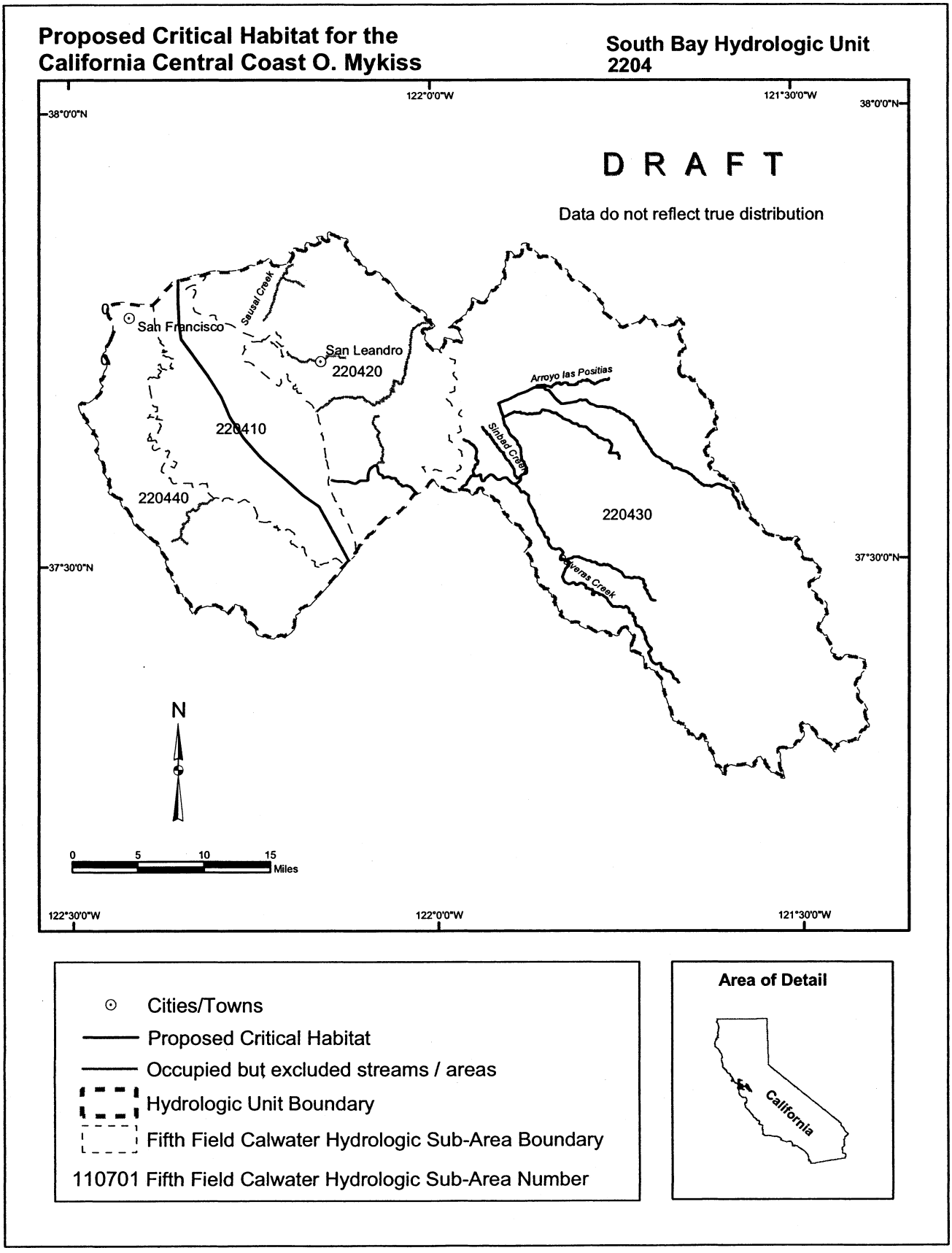
Hydrologic Unit Boundary

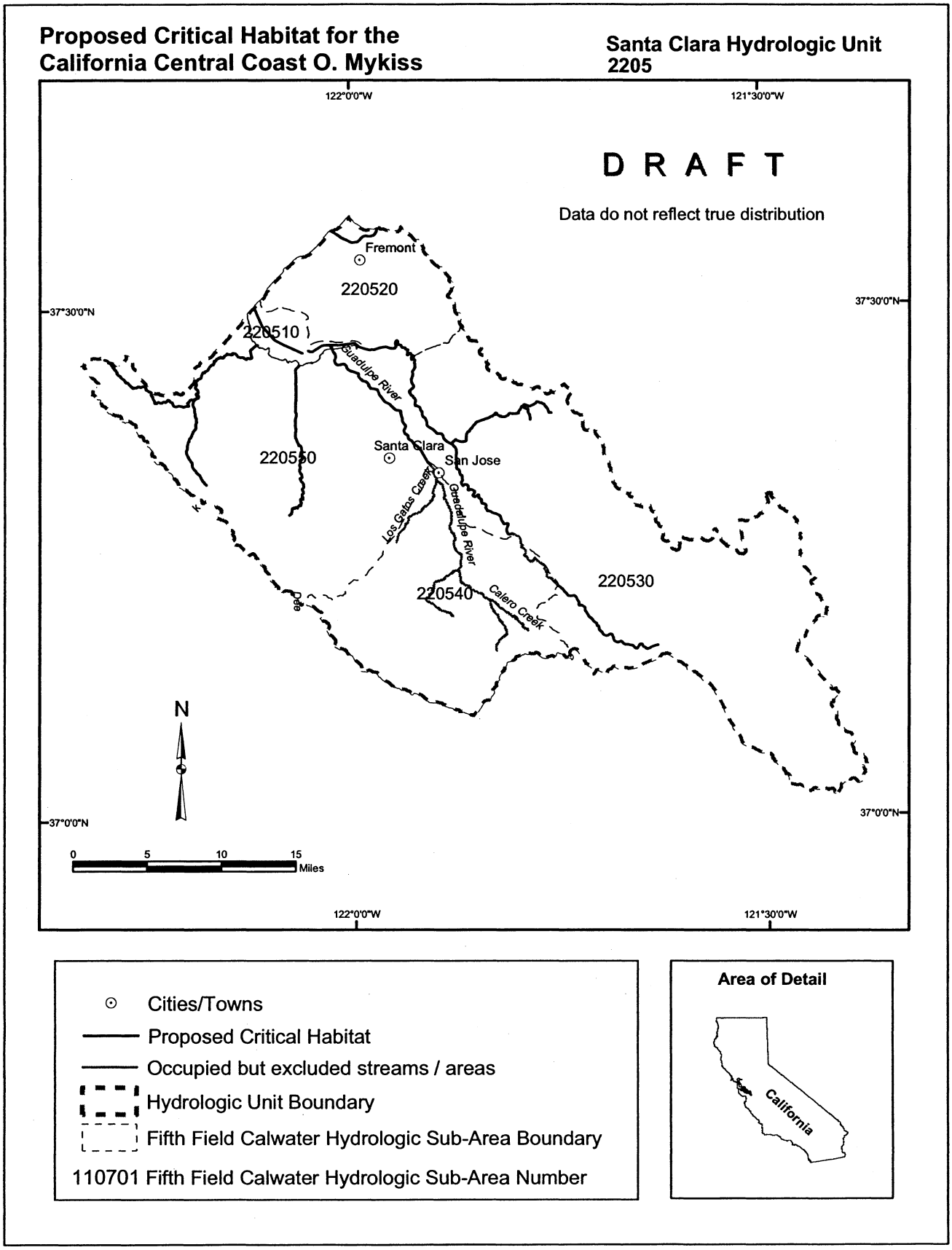
Fifth Field Calwater Hydrologic Sub-Area Boundary

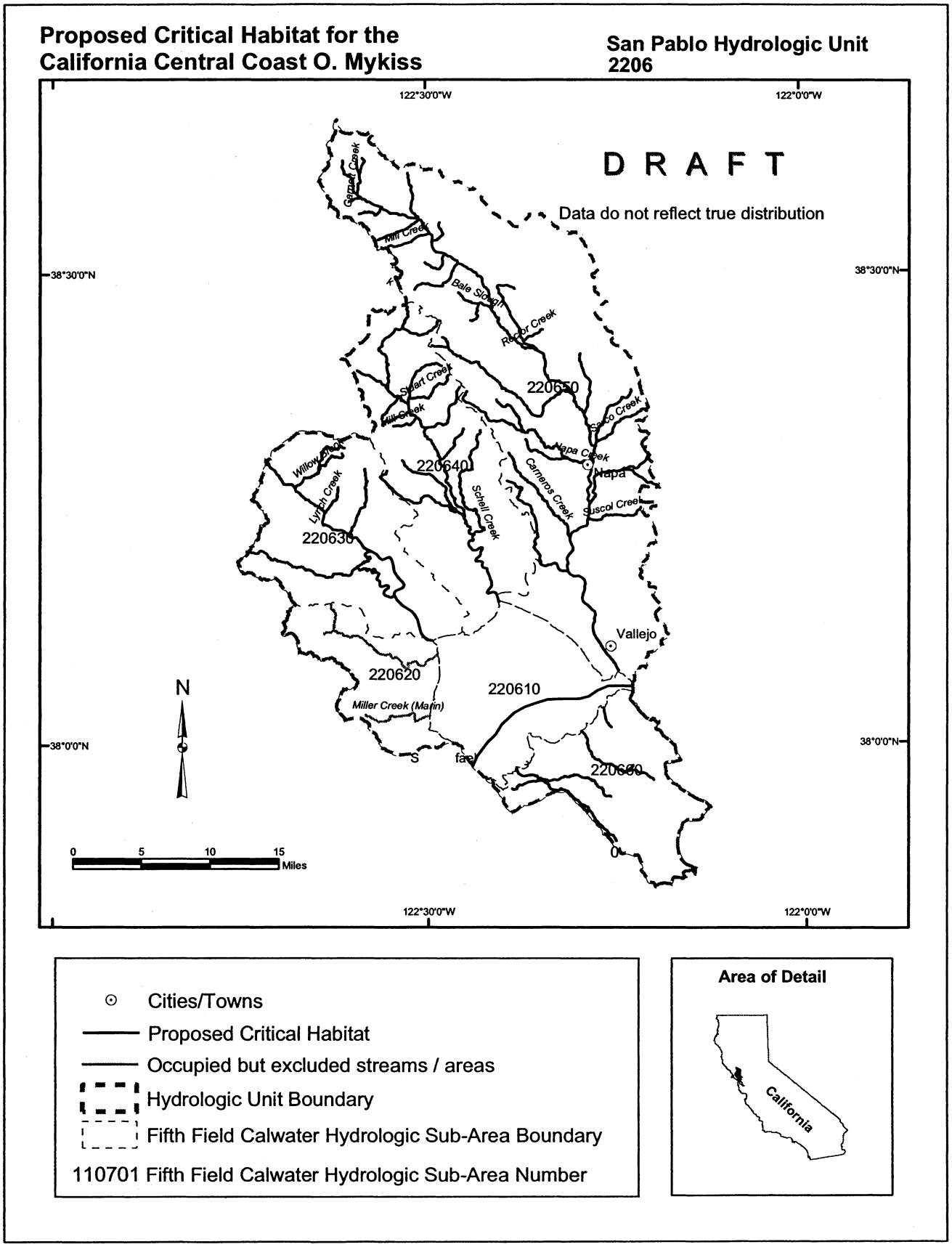
110701 Fifth Field Calwater Hydrologic Sub-Area Number

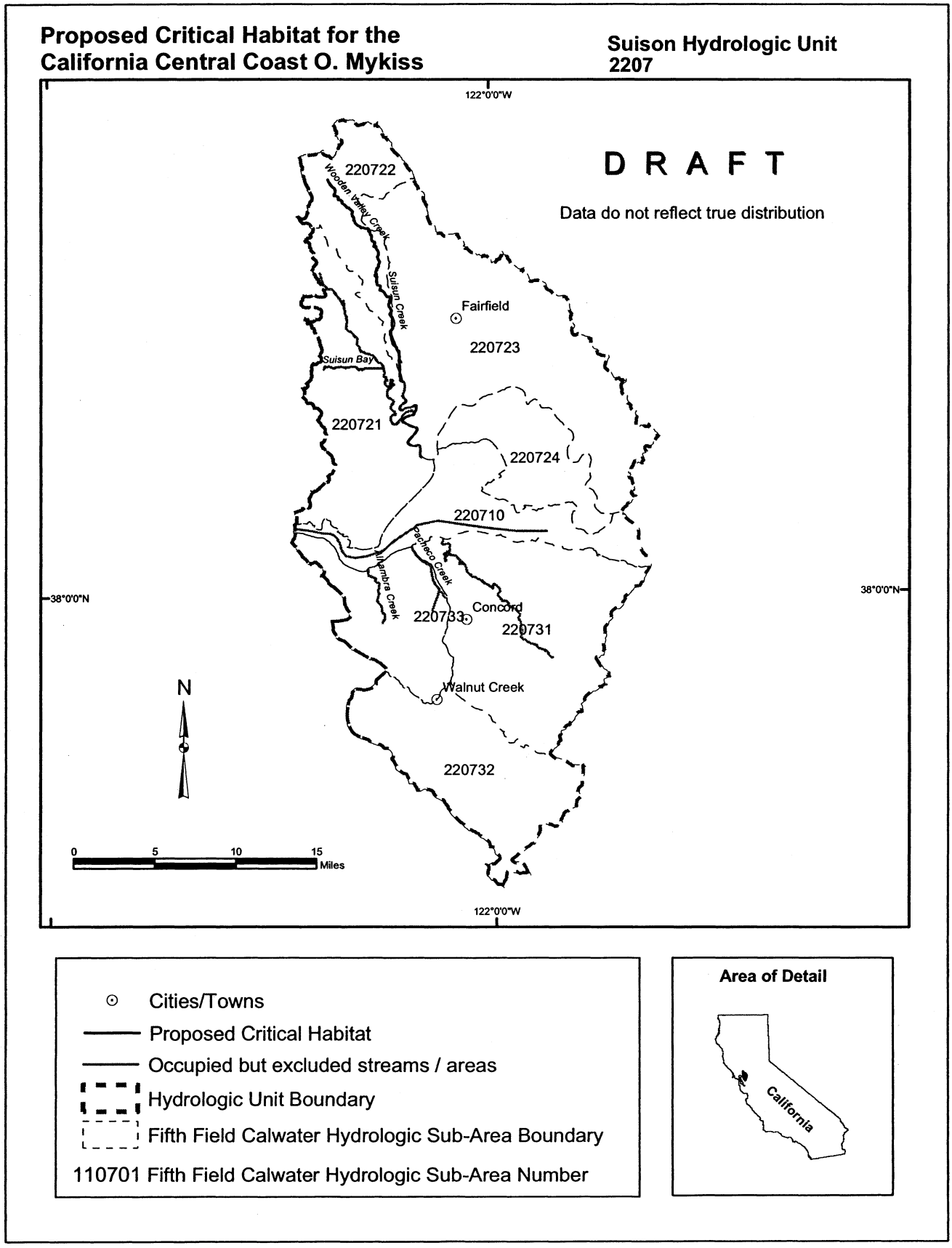
Area of Detail

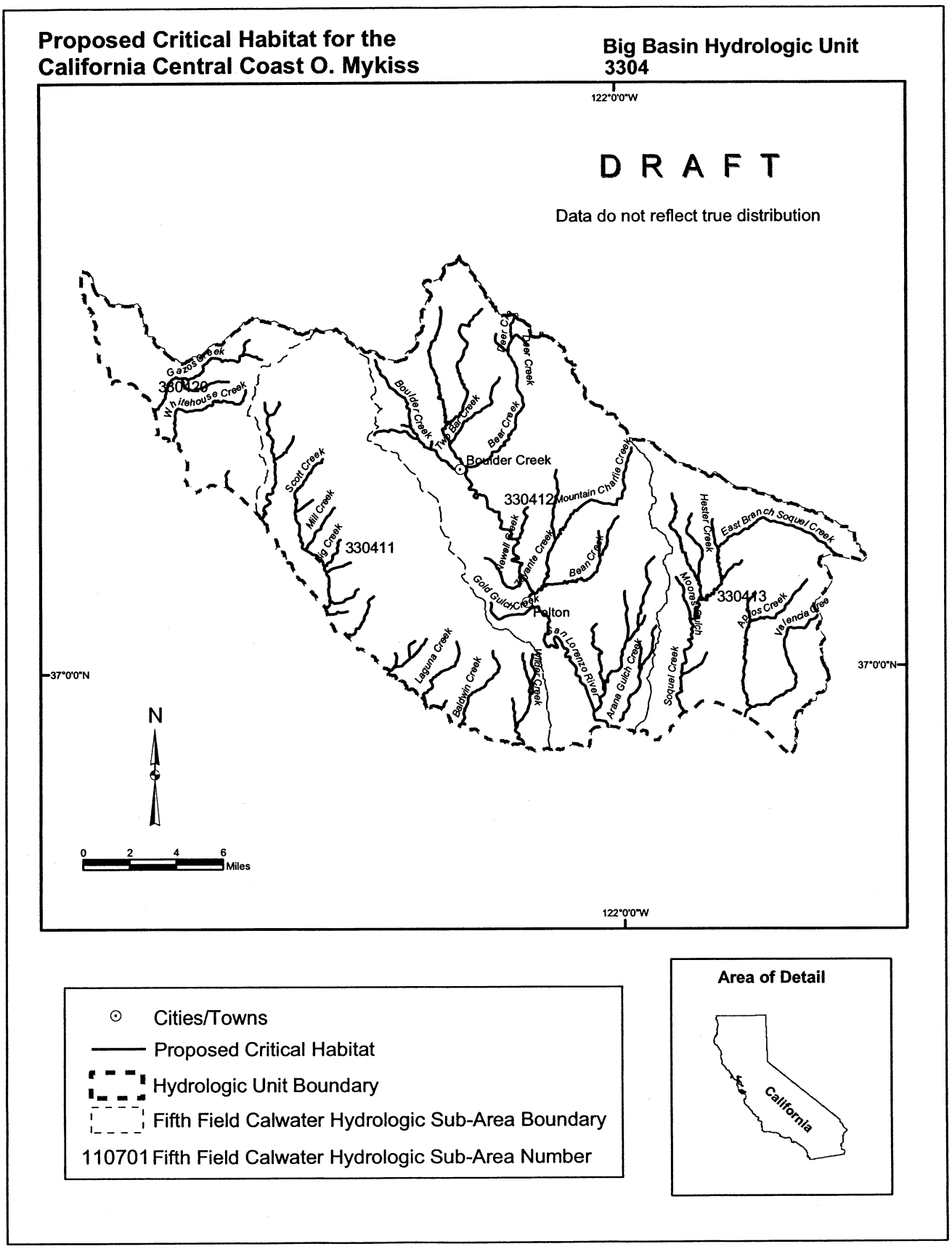



Proposed Critical Habitat for the California Central Coast O. Mykiss
South Bay Hydrologic Unit 2204
122°0'0"W
121°30'0"W
38°0'0"N
37°30'0"N
DRAFT
Data do not reflect true distribution
Sausal Creek
San Francisco
San Leandro
220420
Arroyo las Positas
220410
Sinbad Creek
220440
220430
Alameda Creek
N
0 5 10 15
Miles
122°30'0"W
Cities/Towns
Proposed Critical Habitat
Occupied but excluded streams / areas
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the California Central Coast O. Mykiss
Santa Clara Hydrologic Unit 2205
122°0'0"W
121°30'0"W
DRAFT
Data do not reflect true distribution
Fremont
220520
37°30'0"N
220510
Guadalupe River
220550
Santa Clara
San Jose
Los Gatos Creek
Guadalupe River
220530
220540
Calero Creek
Coyote
N
37°0'0"N
0 5 10 15
Miles
Cities/Towns
Proposed Critical Habitat
Occupied but excluded streams / areas
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the California Central Coast O. Mykiss
San Pablo Hydrologic Unit 2206
122°30'0"W
122°0'0"W
38°30'0"N
38°0'0"N
DRAFT
Data do not reflect true distribution
Gerrard Creek
Mill Creek
Bale Slough
Rector Creek
Stuart Creek
Hill Creek
220650
Sarco Creek
Napa Creek
Napa
Willow Slough
Lynch Creek
220640
Schell Creek
Carneros Creek
Suscol Creek
220630
Vallejo
220620
220610
Miller Creek (Marin)
220660
N
0 5 10 15
Miles
Cities/Towns
Proposed Critical Habitat
Occupied but excluded streams / areas
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the California Central Coast O. Mykiss
Suison Hydrologic Unit 2207
122°0'0"W
D R A F T
Data do not reflect true distribution
220722
Wooden Valley Creek
Suisun Creek
Fairfield
220723
Suisun Bay
220721
220724
220710
Pacheco Creek
Alhambra Creek
38°0'0"N
Concord
220733
220731
N
Walnut Creek
220732
0 5 10 15
Miles
122°0'0"W
Cities/Towns
Proposed Critical Habitat
Occupied but excluded streams / areas
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California



BILLING CODE 3510–22–C

(i) *South-central California Coast O. mykiss (Oncorhynchus mykiss).* Critical habitat is proposed to include the areas defined in the following units:

(1) Pajaro River Hydrologic Unit 3305—*(i) Watsonville Hydrologic Sub-area 330510.* Outlet(s) = Pajaro River (Lat 36.8506, Long −121.8101) upstream to endpoint(s) in: Banks Canyon Creek (36.9958, −121.7264); Browns Creek (37.0255, −121.7754); Casserly Creek (36.9902, −121.7359); Corralitos Creek (37.0666, −121.8359); Gaffey Creek (36.9905, −121.7132); Gamecock Canyon (37.0362, −121.7587); Green Valley Creek (37.0073, −121.7256); Ramsey Gulch (37.0447, −121.7755); Redwood Canyon (37.0342, −121.7975); Salsipuedes Creek (36.9350, −121.7426); Shingle Mill Gulch (37.0446, −121.7971).

(ii) Santa Cruz Mountains Hydrologic Sub-area 330520. Outlet(s) = Pajaro River (Lat 36.8963, Long −121.5620); Bodfish Creek (37.0020, −121.6715); Pescadero Creek (36.9125, −121.5882); Tar Creek (36.9304, −121.5520); Uvas Creek (37.0251, −121.6430) upstream to endpoint(s) in: Blackhawk Canyon (37.0168, −121.6912); Bodfish Creek (36.9985, −121.6859); Little Arthur Creek (37.0299, −121.6874); Pescadero Creek (36.9826, −121.6274); Tar Creek (36.9558, −121.6009); Uvas Creek (37.0660, −121.6912).

(iii) South Santa Clara Valley Hydrologic Sub-area 330530. Outlet(s) = San Benito River (Lat 36.8961, Long −121.5625); Pajaro River (36.9222, −121.5388) upstream to endpoint(s) in: Arroyo Dos Picachos (36.8866, −121.3184); Bird Creek (36.7837, −121.3731); Bodfish Creek (37.0080, −121.6652); Bodfish Creek (37.0041, −121.6667); Carnadero Creek (36.9603, −121.532); Llagas Creek (37.1159, −121.6938); Miller Canal (36.9516, −121.5115); San Felipe Lake (36.9835, −121.4604); Tar Creek (36.9297, −121.5419); Tequisquita Slough (36.9170, −121.3887); Uvas Creek (37.0146, −121.6314).

(iv) Pacheco-Santa Ana Creek Hydrologic Sub-area 330540. Outlet(s) = Arroyo Dos Picachos (Lat 36.8866, Long −121.3184); Pacheco Creek (37.0055, −121.3598) upstream to endpoint(s) in: Arroyo Dos Picachos (36.8912, −121.2305); Cedar Creek (37.0922, −121.3641); North Fork Pacheco Creek (37.0514, −121.2911); Pacheco Creek (37.0445, −121.2662); South Fork Pacheco Creek (37.0227, −121.2603).

(v) San Benito River Hyddrologic Sub-area 330550. Outlet(s) = San Benito River (Lat 36.7838, Long −121.3731) upstream to endpoint(s) in: Bird Creek (36.7604, −121.4506); Pescadero Creek (36.7202, −121.4187); San Benito River (36.3324, −120.6316); Sawmill Creek (36.3593, −120.6284).

(2) Carmel River Hydrologic Unit 3307—*Carmel River Hydrologic Sub-area 330700.* Outlet(s) = Carmel River (Lat36.5362, Long −121.9285) upstream to endpoint(s) in: Aqua Mojo Creek (36.4711, −121.5407); Big Creek (36.3935, −121.5419); Blue Creek (36.2796, −121.6530); Boronda Creek (36.3542, −121.6091); Bruce Fork (36.3221, −121.6385); Cachagua Creek (36.3909 , −121.5950); Carmel River (36.3701, −121.6621); Danish Creek (36.3730, −121.7590); Hitchcock Canyon Creek (36.4470, −121.7597); James Creek (36.3235, −121.5804); Las Garzas Creek (36.4607, −121.7944); Millers Fork (36.2961, −121.5697); Pinch Creek (36.3236, −121.5574); Pine Creek (36.3827, −121.7727); Potrero Creek (36.4801, −121.8258); Rana Creek (36.4877, −121.5840); Rattlesnake Creek (36.3442, −121.7080); Robertson Canyon Creek (36.4776, −121.8048); Robertson Creek (36.3658, −121.5165); San Clemente Creek (36.4227, −121.8115); Tularcitos Creek (36.4369, −121.5163); Ventana Mesa Creek (36.2977, −121.7116).

(3) Santa Lucia Hydrologic Unit 3308—*Santa Lucia Hydrologic Sub-area 330800.* Outlet(s) = Alder Creek (Lat 35.8578, Long −121.4165); Big Creek (36.0696, −121.6005); Big Sur River (36.2815, −121.8593); Bixby Creek (36.3713, −121.9029); Garrapata Creek (36.4176, −121.9157); Limekiln Creek (36.0084, −121.5196); Little Sur River (36.3327, −121.8853); Malpaso Creek (36.4814, −121.9384); Mill Creek (35.9825, −121.4917); Partington Creek (36.1753, −121.6973); Plaskett Creek (35.9195, −121.4717); Prewitt Creek (35.9353, −121.4760); Rocky Creek (36.3798, −121.9028); San Jose Creek (36.5259, −121.9253); Vicente Creek (36.0442, −121.5855); Villa Creek (35.8495, −121.4087); Willow Creek (35.8935, −121.4619) upstream to endpoint(s) in: Alder Creek (35.8685, −121.3974); Big Creek (36.0830, −121.5884); Bixby Creek (36.3715, −121.8440); Devil's Canyon Creek (36.0773, −121.5695); Garrapata Creek (36.4042, −121.8594); Joshua Creek (36.4182, −121.9000); Limekiln Creek (36.0154, −121.5146); Little Sur River (36.3327, −121.8853); Logwood Creek (36.2105, −121.6719); Malpaso Creek (36.4681, −121.8800); Mill Creek (35.9907, −121.4632); North Fork Big Sur River (36.2178, −121.5948); Partington Creek (36.1929, −121.6825); Plaskett Creek (35.9228, −121.4493); Prewitt Creek (35.9419, −121.4598); Redwood Creek (36.2825, −121.6745); Rocky Creek (36.3805, −121.84400); San Jose Creek (36.4662, −121.8118); South Fork Big Sur River (36.1903, −121.6114); South Fork Little Sur River (36.3026, −121.8093); Unnamed Tributary (36.2045, −121.6075); Vicente Creek (36.0463, −121.5780); Villa Creek (35.8525, −121.3973); Wildcat Canyon Creek (36.4124, −121.8680); Williams Canyon Creek (36.4466, −121.8526); Willow Creek (35.9050, −121.3851).

(4) Salinas River Hydrologic Unit 3309—*(i) Neponset Hydrologic Sub-area 330911.* Outlet(s) = Salinas River (Lat 36.7498, Long −121.8055); Old Salinas River (36.8080, −121.7854) upstream to endpoint(s) in: Gabilan Creek (36.6923, −121.6300); Old Salinas River (36.7728, −121.7884); Tembladero Slough (36.6865, −121.6409).

(ii) Chualar Hydrologic Sub-area 330920. Outlet(s) = Gabilan Creek (Lat 36.6923, Long −121.6300) upstream.

(iii) Soledad Hydrologic Sub-area 330930. Outlet(s) = Salinas River (Lat36.4878, Long −121.4688) upstream to endpoint(s) in: Arroyo Seco River (36.2644, −121.3812); Reliz Creek (36.2438, −121.2881).

(iv) Upper Salinas Valley Hydrologic Sub-area 330940. Outlet(s) = Salinas River (Lat 36.3183, Long −121.1837) upstream.

(v) Arroyo Seco Hydrologic Sub-area 330960. Outlet(s) = Arroyo Seco River (Lat 36.2644, Long −121.3812); Reliz Creek (36.2438, −121.2881); Vaqueros Creek (36.2642, −121.3369) upstream to endpoint(s) in: Arroyo Seco River (36.2041, −121.5002); Calaboose Creek (36.2942, −121.5082); Church Creek (36.2762, −121.5877); Paloma Creek (36.3195, −121.4894); Piney Creek (36.3023, −121.5629); Reliz Creek (36.1935, −121.2777); Rocky Creek (36.2676, −121.5225); Santa Lucia Creek (36.1999, −121.4785); Tassajara Creek (36.2679, −121.6149); Vaqueros Creek (36.2479, −121.3369); Willow Creek (36.2059, −121.5642); Zigzag Creek (36.1763, −121.5475).

(vi) Gabilan Range Hydrologic Sub-area 330970. Outlet(s) = Gabilan Creek (Lat 36.7800, −121.5836) upstream to endpoint(s) in: Gabilan Creek (36.7335, −121.4939).

(vii) Paso Robles Hydrologic Sub-area 330981. Outlet(s) = Salinas River (Lat 35.9241, Long −120.8650) upstream to endpoint(s) in: Atascadero Creek (35.4468, −120.7010); Eagle Creek (35.4209, −120.6760); Graves Creek (35.4838, −120.7631); Hale Creek (35.3964, −120.6702); Jack Creek (35.5815, −120.8560); Nacimiento River (35.7610, −120.8853); Paso Robles Creek (35.5636, −120.8455); Salinas River (35.3886, −120.5582); San Antonio River (35.7991, −120.8849); San Marcos Creek (35.6734, −120.8140); Santa Margarita Creek (35.3923, −120.6619); Santa Rita Creek (35.5262, −120.8396); Sheepcamp Creek (35.6145, −120.7795); Summit

Creek (35.6441, −120.8046); Tassajera Creek (35.3895, −120.6926); Trout Creek (35.3394, −120.5881); Willow Creek (35.6107, −120.7720).

(5) Estero Bay Hydrologic Unit 3310—

(i) San Carpoforo Hydrologic Sub-area 331011. Outlet(s) = San Carpoforo Creek (Lat 35.7646, Long −121.3247) upstream to endpoint(s) in: Dutra Creek (−121.3273, 35.8197); Estrada Creek (−121.2661, 35.7710); San Carpoforo Creek (−121.2745, 35.8202); Unnamed Tributary (−121.2703, 35.7503); Wagner Creek (−121.2387, 35.8166).

(ii) Arroyo De La Cruz Hydrologic Sub-area 331012. Outlet(s) = Arroyo De La Cruz (Lat 35.7097, Long −121.3080) upstream to endpoint(s) in: Arroyo De La Cruz (−121.1722, 35.6986); Burnett Creek (−121.1920, 35.7520); Green Canyon Creek (−121.2314, 35.7375); Marmolejo Creek (−121.1082, 35.6774); Spanish Cabin Creek (−121.1497, 35.7234); Unnamed Tributary (−121.1977, 35.7291); West Fork Burnett Creek (−121.2075, 35.7516).

(iii) San Simeon Hydrologic Sub-area 331013. Outlet(s) = Arroyo del Corral (Lat 35.6838, Long −121.2875); Arroyo del Puerto (35.6432, −121.1889); Little Pico Creek (35.6336, −121.1639); Oak Knoll Creek (35.6512, −121.2197); Pico Creek (35.6155, −121.1495); San Simeon Creek (35.5950, −121.1272) upstream to endpoint(s) in: Arroyo Laguna (35.6895, −121.2337); Arroyo del Corral (35.6885, −121.2537); Arroyo del Puerto (35.6773, −121.1713); Little Pico Creek (35.6890, −121.1375); Oak Knoll Creek (35.6718, −121.2010); North Fork Pico Creek (35.6886, −121.0861); Pico Creek (35.6640, −121.0685); San Simeon Creek (35.6228, −121.0561); Steiner Creek (35.6032, −121.0640); Unnamed Tributary (35.6482, −121.1067); Unnamed Tributary (35.6616, −121.0639); Unnamed Tributary (35.6741, −121.0981); Unnamed Tributary (35.6777, −121.1503); Unnamed Tributary (35.6604, −121.1571); Unnamed Tributary (35.6579, −121.1356); Unnamed Tributary (35.6744, −121.1187); Unnamed Tributary (35.6460, −121.1373); Unnamed Tributary (35.6839, −121.0955); Unnamed Tributary (35.6431, −121.0795); Unnamed Tributary (35.6820, −121.2130); Unnamed Tributary (35.6977, −121.2613); Unnamed Tributary (35.6702, −121.1884); Unnamed Tributary (35.6817, −121.0885); Van Gordon Creek (35.6286, −121.0942).

(iv) Santa Rosa Hydrologic Sub-area 331014. Outlet(s) = Santa Rosa Creek (Lat 35.5685, Long −121.1113) upstream to endpoint(s) in: Green Valley Creek (35.5511, −120.9471); Perry Creek (35.5323–121.0491); Santa Rosa Creek (35.5525, −120.9278); Unnamed Tributary (35.5965, −120.9413); Unnamed Tributary (35.5684, −120.9211); Unnamed Tributary (35.5746, −120.9746).

(v) Villa Hydrologic Sub-area 331015. Outlet(s) = Villa Creek (Lat 35.4601, Long −120.9704) upstream to endpoint(s) in: Unnamed Tributary (35.4798, −120.9630); Unnamed Tributary (35.5080, −121.0171); Unnamed Tributary (35.5348, −120.8878); Unnamed Tributary (35.5510, −120.9406); Unnamed Tributary (35.5151, −120.9497); Unnamed Tributary (35.4917, −120.9584); Unnamed Tributary (35.5173, −120.0171); Villa Creek (35.5352, −120.8942).

(vi) Cayucos Hydrologic Sub-area 331016. Outlet(s) = Cayucos Creek (Lat 35.4491, Long −120.9079) upstream to endpoint(s) in: Cayucos Creek (35.4887, −120.8968); Unnamed Tributary (35.5157, −120.9005); Unnamed Tributary (35.4943, −120.9513); Unnamed Tributary (35.5257, −120.9271).

(vii) Old Hydrologic Sub-area 331017. Outlet(s) = Old Creek (Lat 35.4345, Long −120.8868) upstream to endpoint(s) in: Old Creek (35.4480, −120.8871)

(viii) Toro Hydrologic Sub-area 331018. Outlet(s) = Toro Creek (Lat 35.4126, Long −120.8739) upstream to endpoint(s) in: Toro Creek (35.4945, −120.7934); Unnamed Tributary (35.4917, −120.7983).

(ix) Morro Hydrologic Sub-area 331021. Outlet(s) = Morro Creek (Lat 35.3762, Long −120.8642) upstream to endpoint(s) in: East Fork Morro Creek (35.4218, −120.7282); Little Morro Creek (35.4155, −120.7532); Morro Creek (35.4280, −120.7518); Unnamed Tributary (35.4292, −120.8122); Unnamed Tributary (35.4458, −120.7906); Unnamed Tributary (35.4122, −120.8335); Unnamed Tributary (35.4420, −120.7796).

(x) Chorro Hydrologic Sub-area 331022. Outlet(s) = Chorro Creek (Lat 35.3413, Long −120.8388) upstream to endpoint(s) in: Chorro Creek (35.3340, −120.6897); Dairy Creek (35.3699, −120.6911); Pennington Creek (35.3655, −120.7144); San Bernardo Creek (35.3935, −120.7638); San Luisito (35.3755, −120.7100); Unnamed Tributary (35.3821, −120.7217); Unnamed Tributary (35.3815, −120.7350).

(xi) Los Osos Hydrologic Sub-area 331023. Outlet(s) = Los Osos Creek (Lat 35.3166, Long −120.8112) upstream to endpoint(s) in: Los Osos Creek (35.2727, −120.7636).

(xii) San Luis Obispo Creek Hydrologic Sub-area 331024. Outlet(s) = San Luis Obispo Creek (Lat 35.1822, Long −120.7303) upstream to endpoint(s) in: Brizziolari Creek (35.3236, −120.6411); Froom Creek (35.2525, −120.7144); Prefumo Creek (35.2615, −120.7081); San Luis Obispo Creek (35.3393, −120.6301); See Canyon Creek (35.2306, −120.7675); Stenner Creek (35.3447, −120.6584); Unnamed Tributary (35.2443, −120.7655).

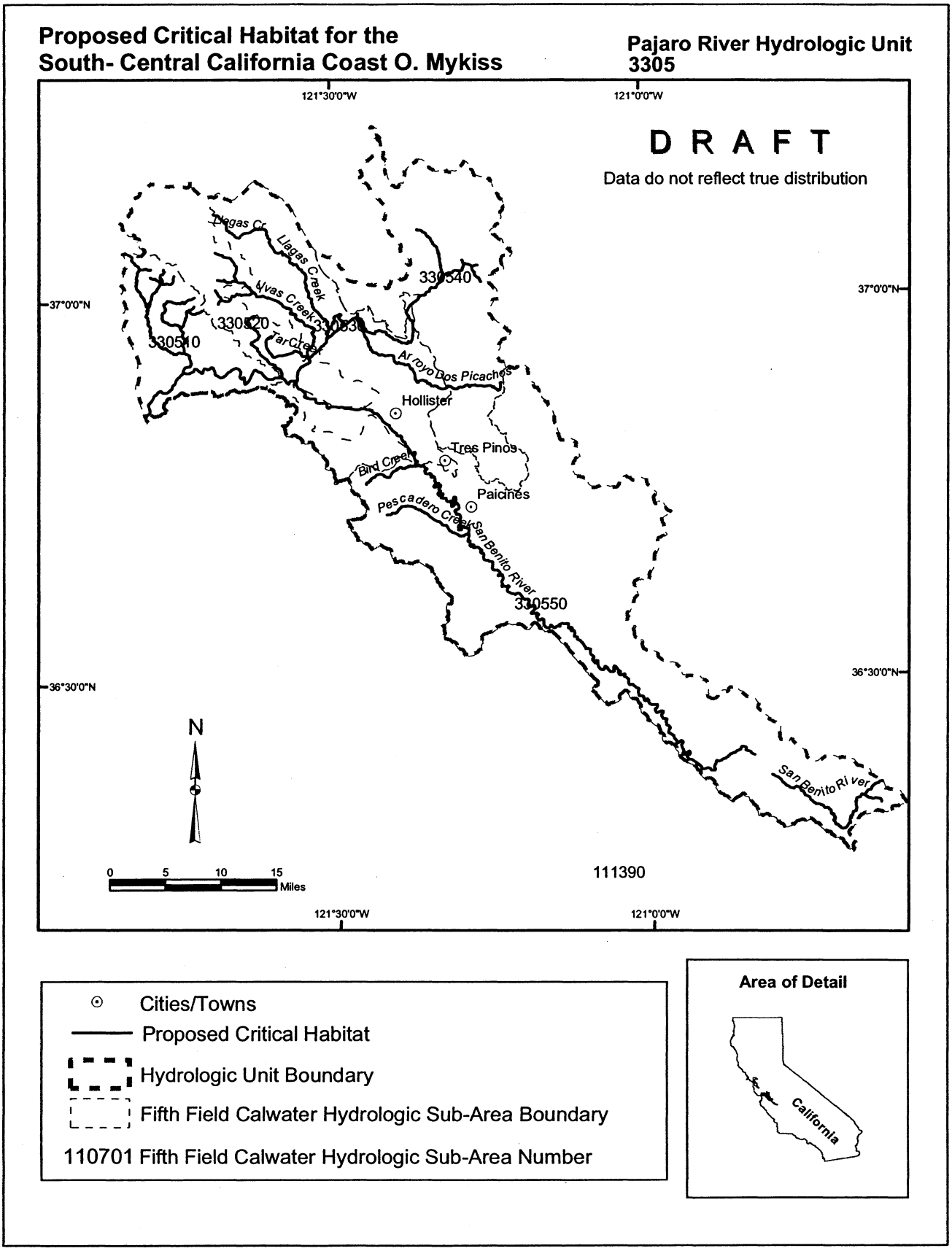
(xiii) Point San Luis Hydrologic Sub-area 331025. Outlet(s) = Coon Creek (Lat 35.2590, Long −120.8951); Islay Creek (35.2753, −120.8884) upstream to endpoint(s) in: Coon Creek (35.2493, −120.7774); Islay Creek (35.2574, −120.7810); Unnamed Tributary (35.2753, −120.8146); Unnamed Tributary (35.2809, −120.8147); Unnamed Tributary (35.2648, −120.7936).

(xiv) Pismo Hydrologic Sub-area 331026. Outlet(s) = Pismo Creek (Lat 35.1336, Long −120.6408) upstream to endpoint(s) in: East Corral de Piedra Creek (35.2343, −120.5571); Pismo Creek (35.1969, −120.6107); Unnamed Tributary (35.2462, −120.5856).

(xvi) Oceano Hydrologic Sub-area 331031. Outlet(s) = Arroyo Grande Creek (Lat 35.1011, Long −120.6308) upstream to endpoint(s) in: Arroyo Grande Creek (35.1868, −120.4881); Los Berros Creek (35.0791, −120.4423).

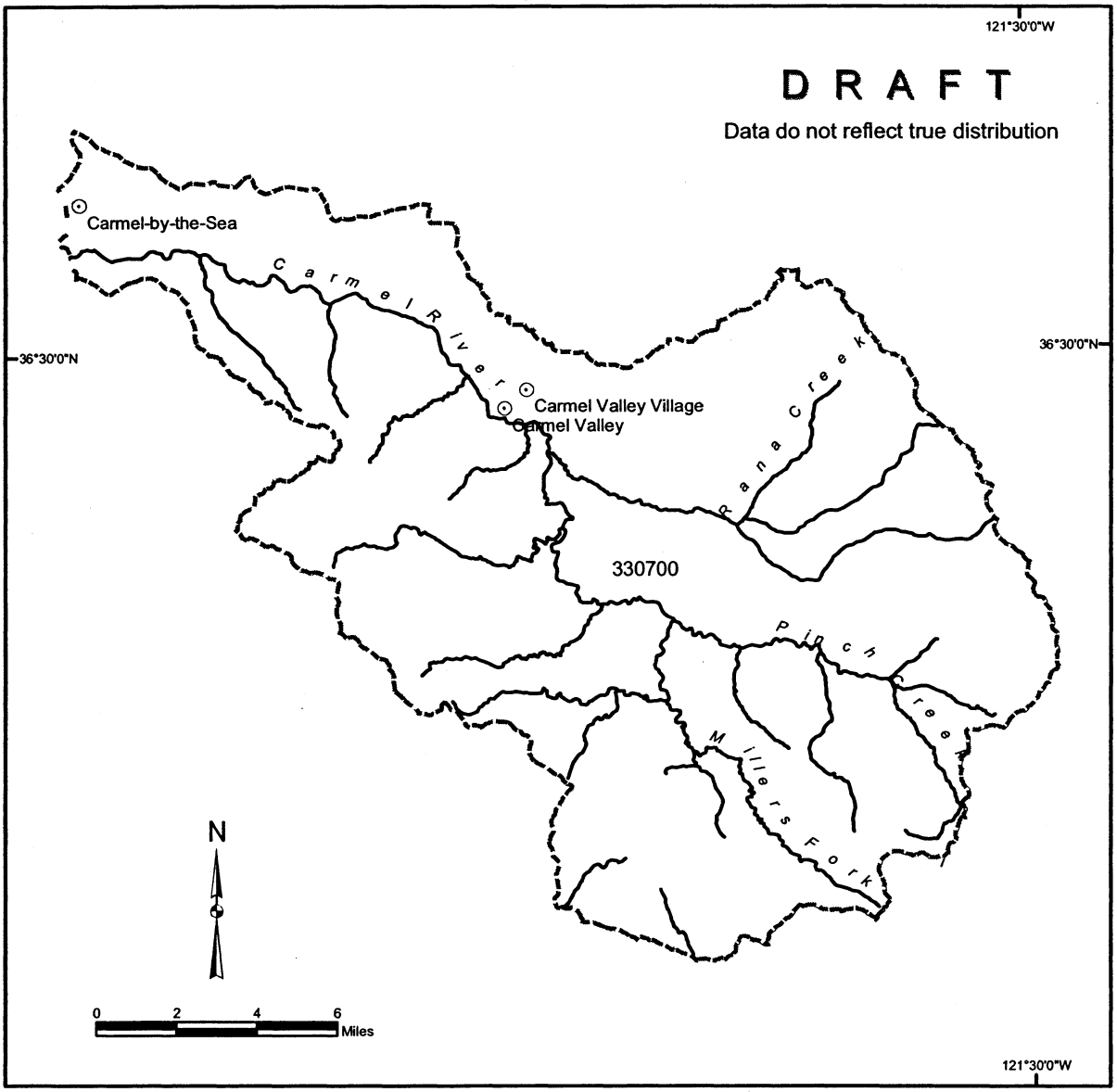
(6) Maps of proposed critical habitat for the South-central California Coast *O. mykiss* ESU follow:

BILLING CODE 3510–22–P


Proposed Critical Habitat for the
South- Central California Coast O. Mykiss
Pajaro River Hydrologic Unit
3305
121°30'0"W
121°0'0"W
DRAFT
Data do not reflect true distribution
37°0'0"N
36°30'0"N
Llagas Cr
Llagas Creek
Nivas Creek
Tar Creek
330540
330520
330530
330510
Arroyo Dos Picachos
Hollister
Tres Pinos
Bird Creek
Paicines
Pescadero Creek
San Benito River
330550
San Benito River
N
0 5 10 15
Miles
111390
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California

Proposed Critical Habitat for the South- Central California Coast O. Mykiss

Carmel River Hydrologic Unit 3307



⊙ Cities/Towns

——— Proposed Critical Habitat

Hydrologic Unit Boundary

Fifth Field Calwater Hydrologic Sub-Area Boundary

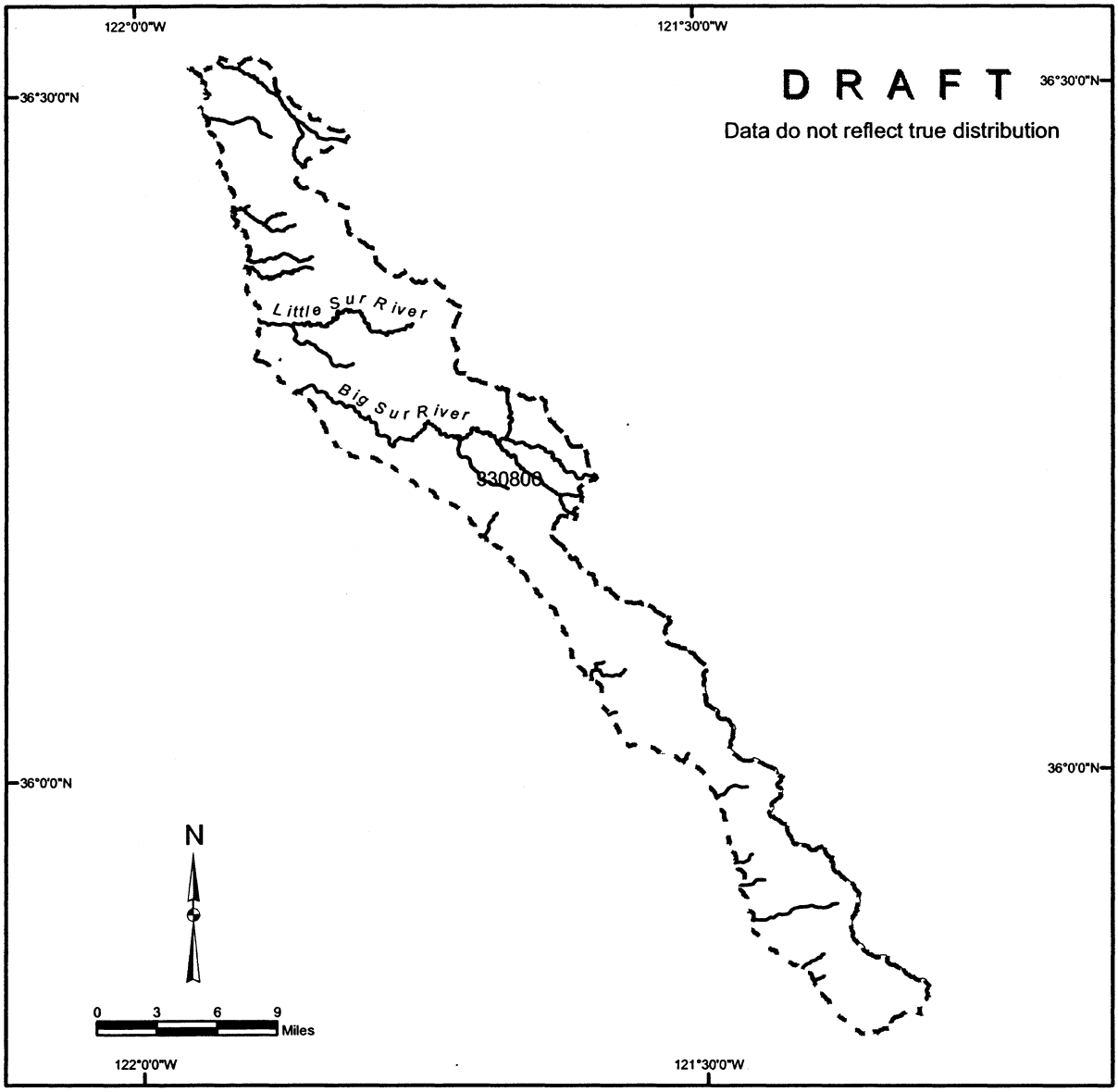
110701 Fifth Field Calwater Hydrologic Sub-Area Number

Area of Detail



Proposed Critical Habitat for the South- Central California Coast O. Mykiss

Santa Lucia Hydrologic Unit 3308



Cities/Towns

Proposed Critical Habitat

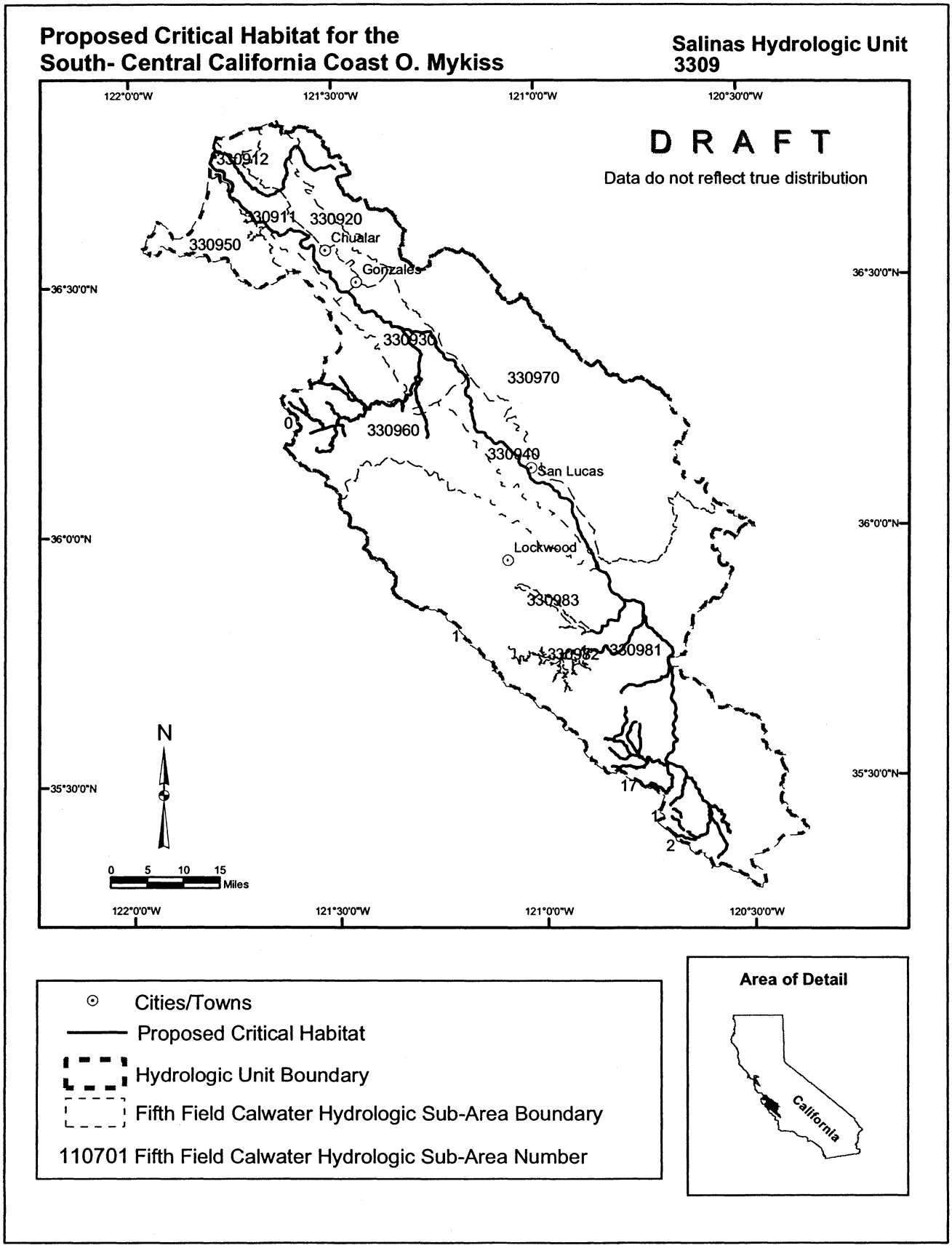
Hydrologic Unit Boundary

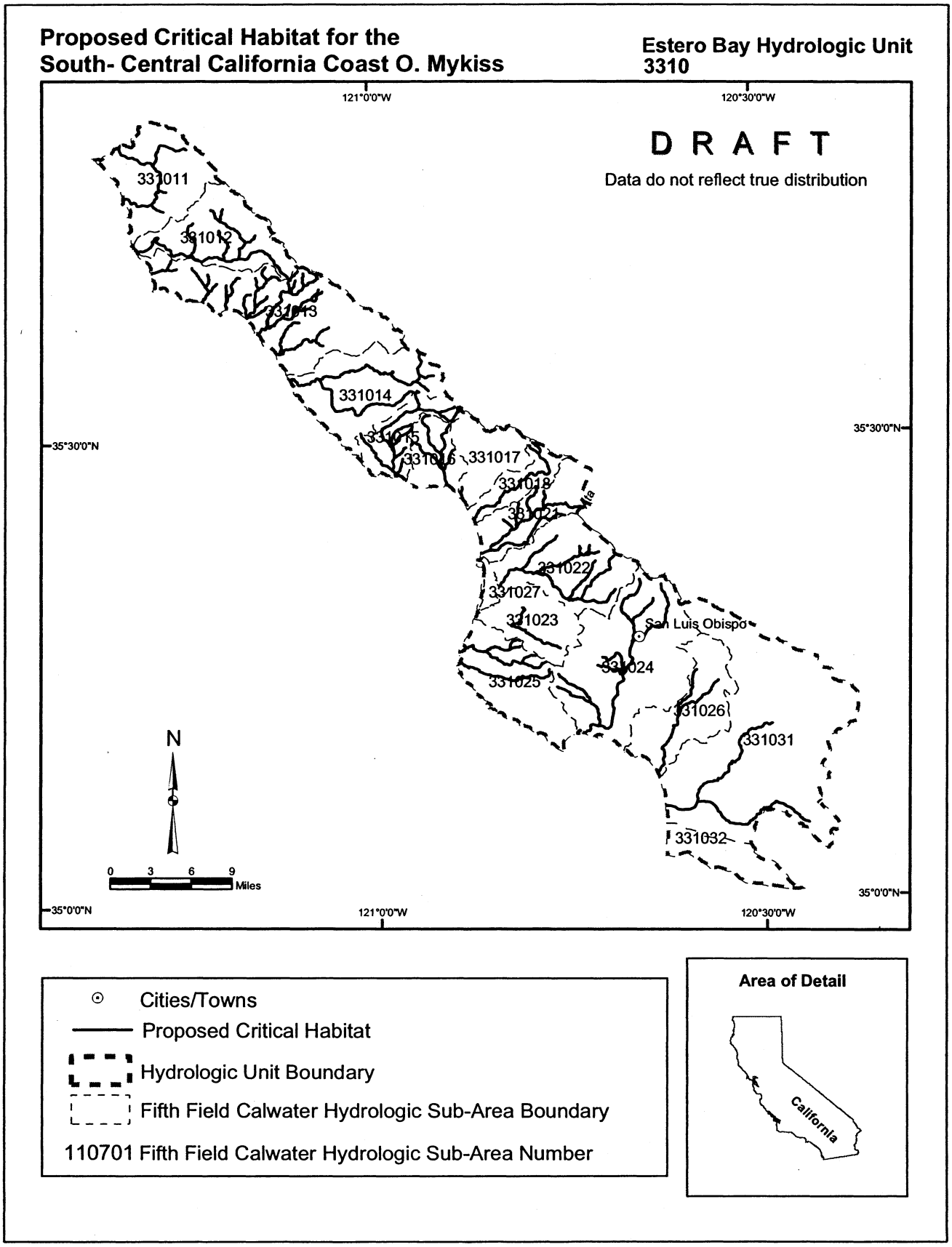
Fifth Field Calwater Hydrologic Sub-Area Boundary

110701 Fifth Field Calwater Hydrologic Sub-Area Number

Area of Detail




Proposed Critical Habitat for the
South- Central California Coast O. Mykiss
Salinas Hydrologic Unit
3309
122°0'0"W
121°30'0"W
121°0'0"W
120°30'0"W
DRAFT
Data do not reflect true distribution
330912
330911
330920
Chualar
330950
Gonzales
36°30'0"N
330930
330970
330960
330940
San Lucas
36°0'0"N
Lockwood
330983
330982
330981
35°30'0"N
N
0 5 10 15
Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California



BILLING CODE 3510–22–C

(j) *Southern California O. mykiss (Oncorhynchus mykiss).* Critical habitat is proposed to include the areas defined in the following units:

(1) Santa Maria River Hydrologic Unit 3312—*(i) Santa Maria Hydrologic Sub-area 331210.* Outlet(s) = Santa Maria River (Lat 34.9710, Long −120.6494); Sisquoc River (Lat 34.9042, Long −120.3067); Cuyama River (Lat 34.9042, Long −120.3067) upstream to endpoint(s) in: Santa Maria River (Lat 34.9042, Long −120.3067); Cuyama River (Lat 34.9058, Long −120.3018).

(ii) Sisquoc Hydrologic Sub-area 331220. Outlet(s) = Sisquoc River (Lat 34.8942, Long −120.3053) upstream to endpoint(s) in: La Brea Creek (Lat 34.8804, Long −120.1308); South Fork La Brea Creek (Lat 34.9543, Long −119.9783); Unnamed Tributary (Lat 34.9342, Long −120.0579); Unnamed Tributary (Lat 34.9511, Long −120.0130); North Fork La Brea Creek (Lat 34.9681, Long −120.0102); Unnamed Tributary (Lat 34.9687, Long −120.1410); Unnamed Tributary (Lat 34.9626, Long −120.1490); Unnamed Tributary (Lat 34.9672, Long −120.1184); Unnamed Tributary (Lat 34.9682, Long −120.0980); Unnamed Tributary (Lat 34.9973, Long −120.0652); Unnamed Tributary (Lat 34.9922, Long −120.0284); Unnamed Tributary (Lat 35.0158, Long −120.0328); Unnamed Tributary (Lat 34.9464, Long −120.0298); Horse Creek (Lat 34.8373, Long −120.0161); Manzana Creek (Lat 34.7082, Long −119.8314); Davey Brown Creek (Lat 34.7541, Long −119.9641); Unnamed Tributary (Lat 34.7544, Long −119.9466); Fish Creek (Lat 34.7532, Long −119.9090); Unnamed Tributary (Lat 34.7466, Long −119.9038); Unnamed Tributary (Lat 34.7647, Long −119.8664); Water Canyon (Lat 34.8754, Long −119.9314); Unnamed Tributary (Lat 34.8726, Long −119.9515); Unnamed Tributary (Lat 34.8884, Long −119.9315); Unnamed Tributary (Lat 34.8660, Long −119.8972); Abel Canyon (Lat 34.8662, Long −119.8344); Unnamed Tributary (Lat 34.8677, Long −119.8503); Unnamed Tributary (Lat 34.8608, Long −119.8531); Unnamed Tributary (Lat 34.8785, Long −119.8448); Unnamed Tributary (Lat 34.8615, Long −119.8149); Unnamed Tributary (Lat 34.8694, Long −119.8220); Unnamed Tributary (Lat 34.7931, Long −119.8475); Unnamed Tributary (Lat 34.7846, Long −119.8327); Foresters Leap (Lat 34.8112, Long −119.7445); Unnamed Tributary (Lat 34.7873, Long −119.7674); Unnamed Tributary (Lat 34.7866, Long −119.7542); Unnamed Tributary (Lat 34.8129, Long −119.7704); Unnamed Tributary (Lat 34.7760, Long −119.7439); South Fork Sisquoc River (Lat 34.7300, Long −119.7868); Unnamed Tributary (Lat 34.7579, Long −119.7989); Unnamed Tributary (Lat 34.7510, Long −119.7912); Unnamed Tributary (Lat 34.7769, Long −119.7139); Unnamed Tributary (Lat 34.7617, Long −119.6868); Judell Creek (Lat 34.7613, Long −119.6486); Unnamed Tributary (Lat 34.7680, Long −119.6494); Unnamed Tributary (Lat 34.7738, Long −119.6483); Unnamed Tributary (Lat 34.7333, Long −119.6277); Unnamed Tributary (Lat 34.7519, Long −119.6199); Unnamed Tributary (Lat 34.7188, Long −119.6663); Sisquoc River (Lat 34.7087, Long −119.6399).

(2) Santa Ynez Hydrologic Unit 3314—*(i) Mouth of Santa Ynez Hydrologic Sub-area 331410.* Outlet(s) = Santa Ynez River (Lat 34.6930, Long −120.6023) upstream to endpoint(s) in: San Miguelito Creek (Lat 34.6310, Long −120.4623).

(ii) Santa Ynez, Salsipuedes Hydrologic Sub-area 331420. Outlet(s) = Santa Ynez River (Lat 34.6335, Long −120.4116) upstream to endpoint(s) in: Salsipuedes Creek (Lat 34.5711, Long −120.4066); El Jaro Cr (Lat 34.5327, Long −120.2851); Llanito Cr (Lat 34.5500, Long −120.2752); El Callejon (Lat 34.5476, Long −120.2691).

(iii) Santa Ynez, Zaca Hydrologic Sub-area 331430. Outlet(s) = Santa Ynez River (Lat 34.6172, Long −120.2352) upstream.

(iv) Santa Ynez to Bradbury Hydrologic Sub-area 331440. Outlet(s) = Santa Ynez River (Lat 34.5847, Long −120.1435) upstream to endpoint(s) in: Alisal Creek (Lat 34.5465, Long −120.1348); Alamo Pintado Creek (Lat 34.7207, Long −120.1047); Quiota Creek (Lat 34.5370, Long −120.0311); Santa Agueda Creek (Lat 34.7288, Long −119.9720); San Lucas Creek (Lat 34.5558, Long −120.0109); Unnamed Tributary (Lat 34.5646, Long −120.0033); Hilton Creek (Lat 34.5839, Long −119.9845); Santa Ynez River (Lat 34.5829, Long −119.9795).

(3) South Coast Hydrologic Unit 3315—*(i) Arroyo Hondo Hydrologic Sub-area 331510.* Outlet(s) = Jalama Creek (Lat 34.5119, Long −120.5013); Cojo Creek (Lat 34.4531, Long −120.4155); San Augustine Creek (Lat 34.4588, Long −120.3532); Santa Anita Creek (Lat 34.4669, Long −120.3056); Sacate Creek (Lat 34.4935, Long −120.2990); Alegria Creek (Lat 34.4688, Long −120.2710); Gaviota Creek (Lat 34.4706, Long −120.2257); San Onofre Creek (Lat 34.4699, Long −120.1863); Arroyo Hondo Creek (Lat 34.4735, Long −120.1405); Refugio Creek (Lat 34.4627, Long −120.0686); El Capitan Creek (Lat 34.4577, Long −120.0215); Gato Creek (Lat 34.4498, Long −119.9876); Dos Pueblos Creek (Lat 34.4408, Long −119.9636); Tecolote Creek (Lat 34.4306, Long −119.9163) upstream to endpoint(s) in: Jalama Creek (Lat 34.5031, Long −120.3605); Escondido Creek (Lat 34.5663, Long −120.4633); Unnamed Tributary (Lat 34.5527, Long −120.4538); Cojo Creek (Lat 34.4840, Long −120.4096); La Olla (Lat 34.4836, Long −120.4061); San Augustine Creek (Lat 34.4598, Long −120.3551); Santa Anita Creek (Lat 34.4742, Long −120.3075); Sacate Creek (Lat 34.4984, Long −120.2983); Unnamed Tributary (Lat 34.4972, Long −120.3016); Alegria Creek (Lat 34.4713, Long −120.2704); Gaviota Creek (Lat 34.5176, Long −120.2170); San Onofre Creek (Lat 34.4853, Long −120.1881); Arroyo Hondo Creek (Lat 34.5112, Long −120.1694); Refugio Creek (Lat 34.5110, Long −120.0499); El Capitan Creek (Lat 34.5238, Long −119.9796); Gato Creek (Lat 34.5204, Long −119.9748); Dos Pueblos Creek (Lat 34.5230, Long −119.9239); Tecolote Creek (Lat 34.5133, Long −119.9049).

(ii) UCSB Slough Hydrologic Sub-area 331531. Outlet(s) = Tecolito Creek (Lat 34.4179, Long −119.8285); San Pedro Creek (Lat 34.4179, Long −119.8285) upstream to endpoint(s) in: Carneros Creek (Lat 34.4674, Long −119.8574); Tecolito Creek (Lat 34.4478, Long −119.8754); Glen Annie Creek (Lat 34.4985, Long −119.8657); Unnamed Tributary (Lat 34.4774, Long −119.8836); Maria Ygnacio Creek (Lat 34.4900, Long −119.7820); San Antonio Creek (Lat 34.4553, Long −119.7816); Atascadero Creek (Lat 34.4690, Long −119.7555); San Jose Creek (Lat 34.4919, Long −119.8023); San Pedro Creek (Lat 34.4774, Long −119.8349).

(iii) Mission Hydrologic Sub-area 331532. Outlet(s) = Arroyo Burro Creek (Lat 34.4023, Long −119.7420); Mission Creek (Lat 34.4124, Long −119.6866); Sycamore Creek (Lat 34.4166, Long −119.6658) upsream to endpoint(s) in: San Roque Creek (Lat 34.4530, Long −119.7314); Arroyo Burro Creek (Lat 34.4620, Long −119.7451); Rattlesnake Creek (Lat 34.4633, Long −119.6893); Mission Creek (Lat 34.4482, Long −119.7079); Sycamore Creek (Lat 34.4609, Long −119.6832).

(iv) San Ysidro Hydrologic Sub-area 331533. Outlet(s) = Montecito Creek (Lat 34.4167, Long −119.6334); San Ysidro Creek (Lat 34.4191, Long −119.6244); Romero Creek (Lat 34.4186, Long −119.6198) upstream to endpoint(s) in: Montecito Creek (Lat 34.4594, Long −119.6532); Unnamed Tributary (Lat 34.4753, Long −119.6428); Cold Springs Creek (Lat 34.4794, Long −119.6594); San Ysidro Creek (Lat

34.4686, Long −119.6220); Romero Creek (Lat 34.4452, Long −119.5914).

(v) Carpinteria Hydrologic Sub-area 331534. Outlet(s) = Arroyo Paredon (Lat 34.4146, Long −119.5551); Carpenteria Salt Marsh (Santa Monica Creek) (Lat 34.3961, Long −119.5365); Carpenteria Lagoon (Carpenteria Creek) (Lat 34.3904, Long −119.5195); Rincon Lagoon (Rincon Creek) (Lat 34.3733, Long −119.4759) upstream to endpoint(s) in: Arroyo Paredon (Lat 34.4371, Long −119.5471); Carpenteria Salt Marsh (Santa Monica Creek) (Lat 34.4003, Long −119.5289); Carpenteria Salt Marsh (Franklin Creek) (Lat 34.3992, Long −119.5265); Carpinteria Creek (Lat 34.4429, Long −119.4955); Unnamed Tributary (Lat 34.4481, Long −119.5102); Gobernador Creek (Lat 34.4249, Long −119.4737); Steer Creek (Lat 34.4687, Long −119.4586); El Dorado Creek (Lat 34.4682, Long −119.4800); Rincon Lagoon (Rincon Creek) (Lat 34.3757, Long −119.4767).

(4) Ventura River Hydrologic Unit 4402—*(i) Ventura Hydrologic Sub-area 440210.* Outlet(s) = Ventura Estuary (Ventura River) (Lat 34.2742, Long −119.3067) upstream to endpoint(s) in: Canada Larga (Lat 34.3675, Long −119.2367); Sulphur Canyon (Lat 34.3727, Long −119.2353); Hammond Canyon (Lat 34.3903, Long −119.2220); Unnamed Tributary (Lat 34.3344, Long −119.2416); Unnamed Tributary (Lat 34.3901, Long −119.2737).

(ii) Ventura Hydrologic Sub-area 440220. Outlet(s) = Ventura River (Lat 34.3517, Long −119.3059); San Antonio Creek (Lat 34.3797, Long −119.3063) upstream to endpoint(s) in: Ventura River (Lat 34.4852, Long −119.2985); Matilija Creek (Lat 34.4846, Long −119.3076); North Fork Matilija Creek (Lat 34.5129, Long −119.2728); Coyote Creek (lower) (Lat 34.3735, Long −119.3327).

(iii) Lions Hydrologic Sub-area 440231. Outlet(s) = Lion Creek (Lat 34.4222, Long −119.2632) upstream to endpoint(s) in: Lion Creek (Lat 34.4331, Long −119.1995).

(iv) Thatcher Hydrologic Sub-area 440232. Outlet(s) = San Antonio Creek (Lat 34.4224, Long −119.2635) upstream to endpoint(s) in: San Antonio Creek (Lat 34.4674, Long −119.2029); Unnamed Tributary (Lat 34.4729, Long −119.2250); Unnamed Tributary (Lat 34.4948, Long −119.1934); Thacher Creek (Lat 34.5016, Long −119.1863); Unnamed Tributary (Lat 34.4876, Long −119.2127); Unnamed Tributary (Lat 34.4992, Long −119.2125); Thacher Creek (Lat 34.4876, Long −119.1675); Reeves Creek (Lat 34.4902, Long −119.1426).

(5) Santa Clara-Calleguas Hydrologic Unit 4403—*(i) Mouth of Santa Clara Hydrologic Sub-area 440310.* Outlet(s) = Santa Clara River (Lat 34.2348, Long −119.2559) upstream.

(ii) Santa Clara, Santa Paula Hydrologic Sub-area 440321. Outlet(s) = Santa Clara River (Lat 34.2731, Long −119.1464) upstream to endpoint(s) in: Santa Paula Creek (Lat 34.4500, Long −119.0554).

(iii) Sisar Hydrologic Sub-area 440322. Outlet(s) = Sisar Creek (Lat 34.4271, Long −119.0900) upstream to endpoint(s) in: Sisar Creek (Lat 34.4615, Long −119.1303).

(iv) Sespe, Santa Clara Hydrologic Sub-area 440331. Outlet(s) = Santa Clara River (Lat 34.3513, Long −119.0388); Sespe Creek (Lat 34.3774, Long −118.9562) upstream to endpoint(s) in: Pole Creek (Lat 34.4384, Long −118.8876).

(v) Sespe Hydrologic Sub-area 440332. Outlet(s) = Sespe Creek (Lat 34.4509, Long −118.9249) upstream to endpoint(s) in: Little Sespe Creek (Lat 34.4598, Long −118.8929); Fourfork Creek (Lat 34.4735, Long −118.8884); Pine Canyon Creek (Lat 34.4488, Long −118.9651); Unnamed Tributary (Lat 34.5125, Long −118.9302); West Fork Sespe Creek (Lat 34.5106, Long −119.0492); Alder Creek (Lat 34.5691, Long −118.9519); Unnamed Tributary (Lat 34.5537, Long −119.0039); Unnamed Tributary (Lat 34.5537, Long −119.0078); Park Creek (Lat 34.5537, Long −119.0019); Red Reef Creek (Lat 34.5344, Long −119.0432); Timber Creek (Lat 34.5184, Long −119.0688); Bear Creek (Lat 34.5314, Long −119.1031); Trout Creek (Lat 34.5869, Long −119.1350); Piedra Blanca Creek (Lat 34.6109, Long −119.1828); Lion Creek (Lat 34.5047, Long −119.1092); Howard Creek (Lat 34.5459, Long −119.2144); Rose Valley Creek (Lat 34.5195, Long −119.1747); Tule Creek (Lat 34.5615, Long −119.2977); Unnamed Tributary (Lat 34.5757, Long −119.3042); Unnamed Tributary (Lat 34.5988, Long −119.2726); Portrero John Creek (Lat 34.6010, Long −119.2685); Munson Creek (Lat 34.6152, Long −119.2954); Chorro Grande Creek (Lat 34.6285, Long −119.3236); Unnamed Tributary (Lat 34.5691, Long −119.3418); Lady Bug Creek (Lat 34.5724, Long −119.3163); Abadi Creek (Lat 34.6099, Long −119.4213); Sespe Creek (Lat 34.6295, Long −119.4402).

(vi) Santa Clara, Hopper Canyon, Piru Hydrologic Sub-area 440341. Outlet(s) = Santa Clara River (Lat 34.3860, Long −118.8702) upstream to endpoint(s) in: Hopper Creek (Lat 34.4264, Long −118.8299); Santa Clara River (Lat 34.3996, Long −118.7828); Piru Creek (Lat 34.4613, Long −118.7528).

(6) Santa Monica Bay Hydrologic Unit 4404—*(i) Topanga Hydrologic Sub-area 440411.* Outlet(s) = Topanga Creek (Lat 34.0397, Long −118.5821) upstream to endpoint(s) in: Topanga Creek (Lat 34.0838, Long −118.5971).

(ii) Malibu Hydrologic Sub-area 440421. Outlet(s) = Malibu Creek (Lat 34.0322, Long −118.6787) upstream to endpoint(s) in: Malibu Creek (Lat 34.0648, Long −118.6978).

(iii) Arroyo Sequit Hydrologic Sub-area 440444. Outlet(s) = Arroyo Sequit (Lat 34.0445, Long −118.9329) upstream to endpoint(s) in: Arroyo Sequit (Lat 34.0834, Long −118.9178); West Fork Arroyo Sequit (Lat 34.0909, Long −118.9225).

(7) Calleguas Hydrologic Unit 4408—*Calleguas Estuary Hydrologic Sub-area 440813.* Outlet(s) = Mugu Lagoon (Calleguas Creek) (Lat 34.1093, Long −119.0917) upstream to endpoint(s) in: Mugu Lagoon (Calleguas Creek) (Lat 34.1125, Long −119.0816).

(8) San Juan Hydrologic Unit 4901—*(i) Trabuco Hydrologic Sub-area 490121.* Outlet(s) = Trabuco Creek (Lat 33.5164, Long −117.6718); upstream.

(ii) Upper Trabuco Hydrologic Sub-area 490122. Outlet(s) = Trabuco Creek (Lat 33.6619, Long −117.5789) upstream to endpoint(s) in: Trabuco Creek (Lat 33.6827, Long −117.4572).

(iii) Middle Trabuco Hydrologic Sub-area 490123. Outlet(s) = Trabuco Creek (Lat 33.5185, Long −117.6718) upstream.

(iv) Middle San Juan Hydrologic Sub-area 490124. Outlet(s) = San Juan Creek (Lat 33.5238, Long −117.6127) upstream.

(v) Upper San Juan Hydrologic Sub-area 490125. Outlet(s) = San Juan Creek (Lat 33.5199, Long −117.5605) upstream to endpoint(s) in: San Juan Creek (Lat 33.6092, Long −117.4387).

(vi) Mid-upper San Juan Hydrologic Sub-area 490126. Outlet(s) = San Juan Creek (Lat 33.5241, Long −117.6124) upstream.

(vii) Lower San Juan Hydrologic Sub-area 490127. Outlet(s) = San Juan Creek (Lat 33.4621, Long −117.6833); Trabuco Creek (Lat 33.5164, Long −117.6718) upstream.

(viii) Middle San Juan Hydrologic Sub-area 490128. Outlet(s) = San Juan Creek (Lat 33.4969, Long −117.6551) upstream.

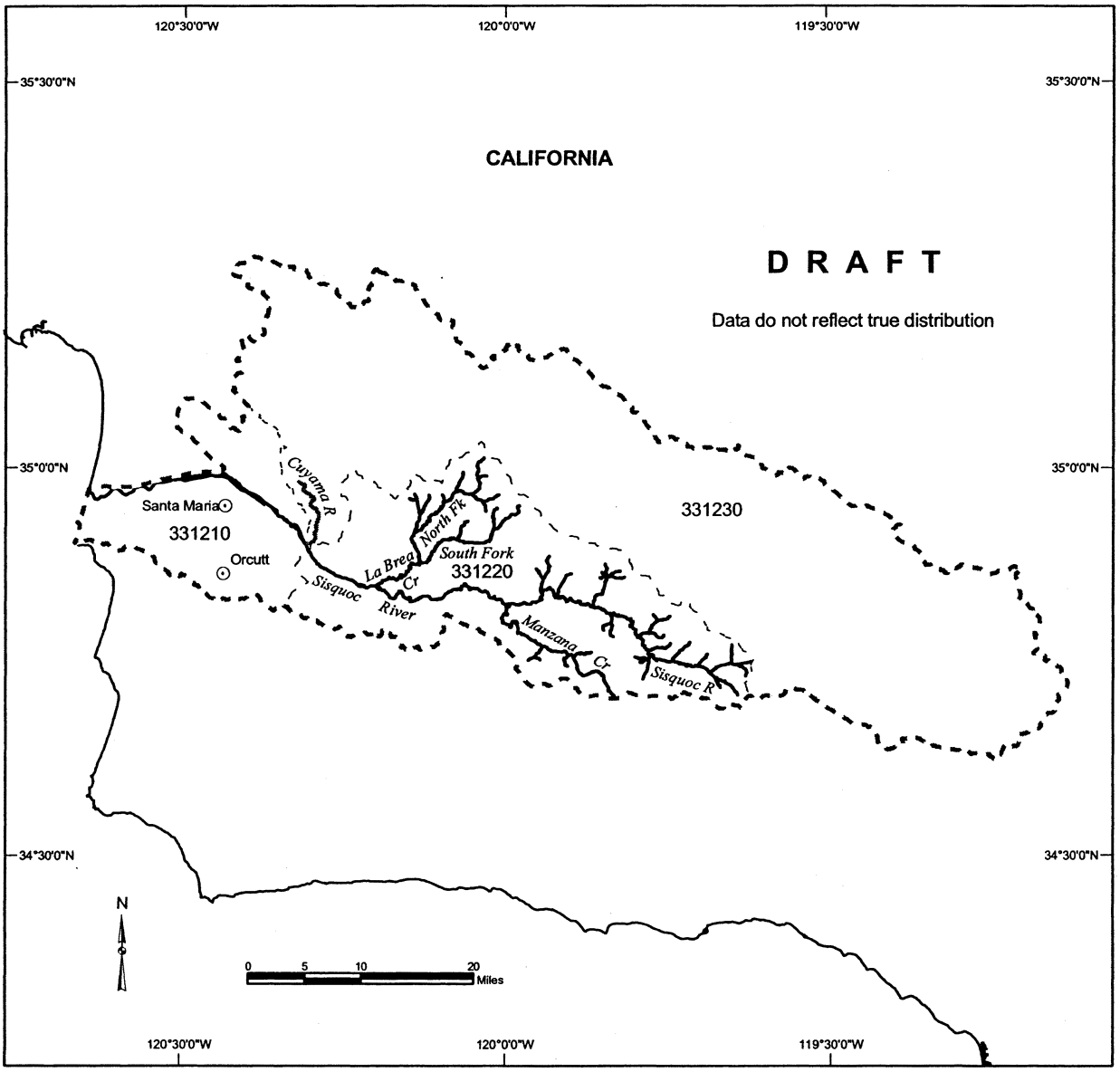
(ix) San Mateo Hydrologic Sub-area 490140. Outlet(s) = San Mateo Creek (Lat 33.3851, Long −117.5924) upstream to endpoint(s) in: San Mateo Creek (Lat 33.4827, Long −117.3692); San Mateo Canyon (Lat 33.4957, Long −117.4513).

(9) Maps of proposed critical habitat for the Southern California *O. mykiss* ESU follow:

BILLING CODE 3510–22–P

Proposed Critical Habitat for the Southern California O. Mykiss ESU

Santa Maria River Hydrologic Unit 3312



Legend

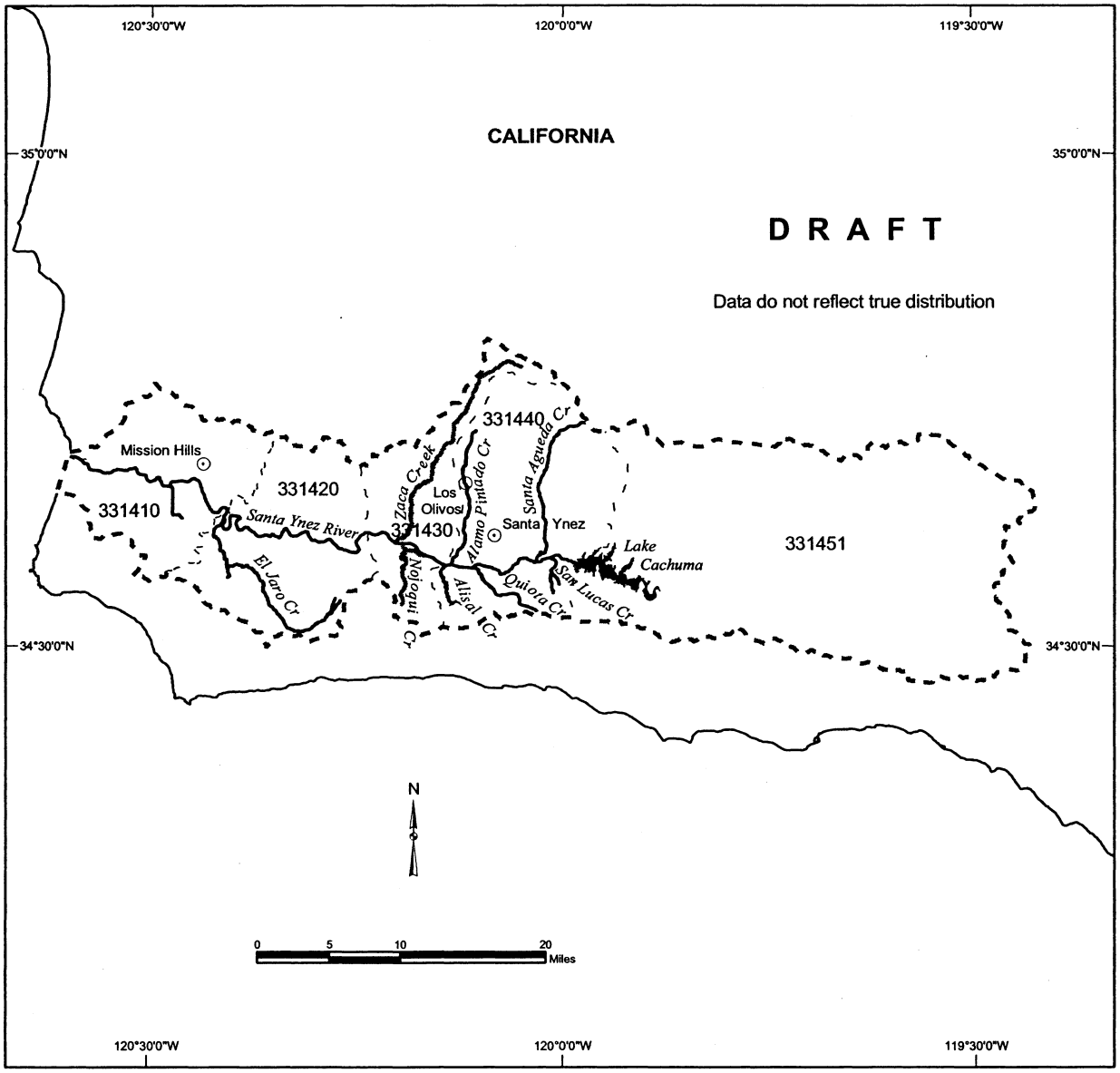
- ⊙ Cities/Towns
- Proposed Critical Habitat
- Occupied but excluded streams / areas
- CalWater Hydrologic Unit (HU) Boundary
- CalWater Hydrologic Sub-Area (HSA) Boundary
- State Boundary
- **331210** CalWater HSA Number

Area of Detail



Proposed Critical Habitat for the Southern California O. Mykiss ESU

Santa Ynez Hydrologic Unit 3314

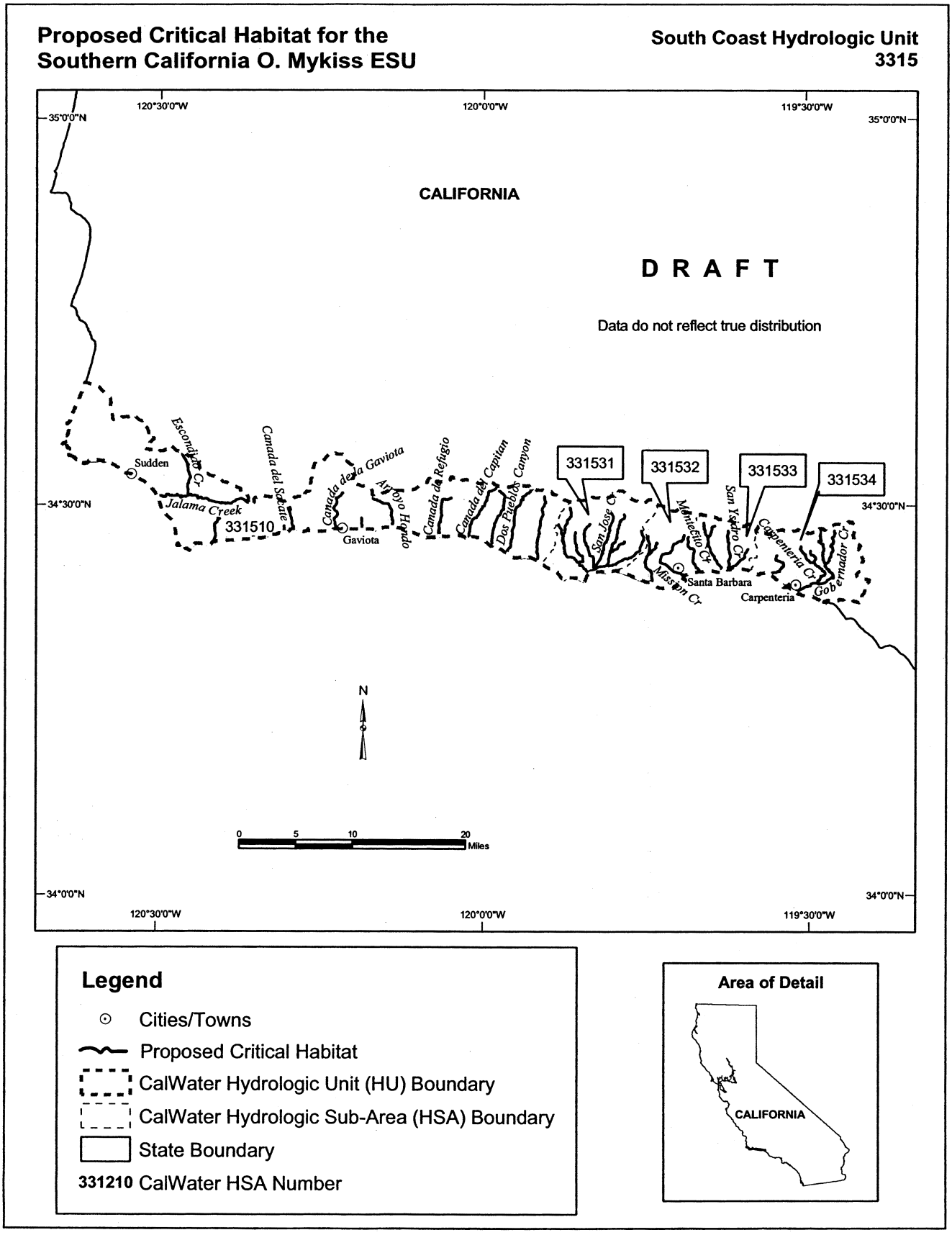


Legend

- ⊙ Cities/Towns
- Proposed Critical Habitat
- Occupied but excluded streams / areas
- CalWater Hydrologic Unit (HU) Boundary
- CalWater Hydrologic Sub-Area (HSA) Boundary
- State Boundary
- **331210** CalWater HSA Number

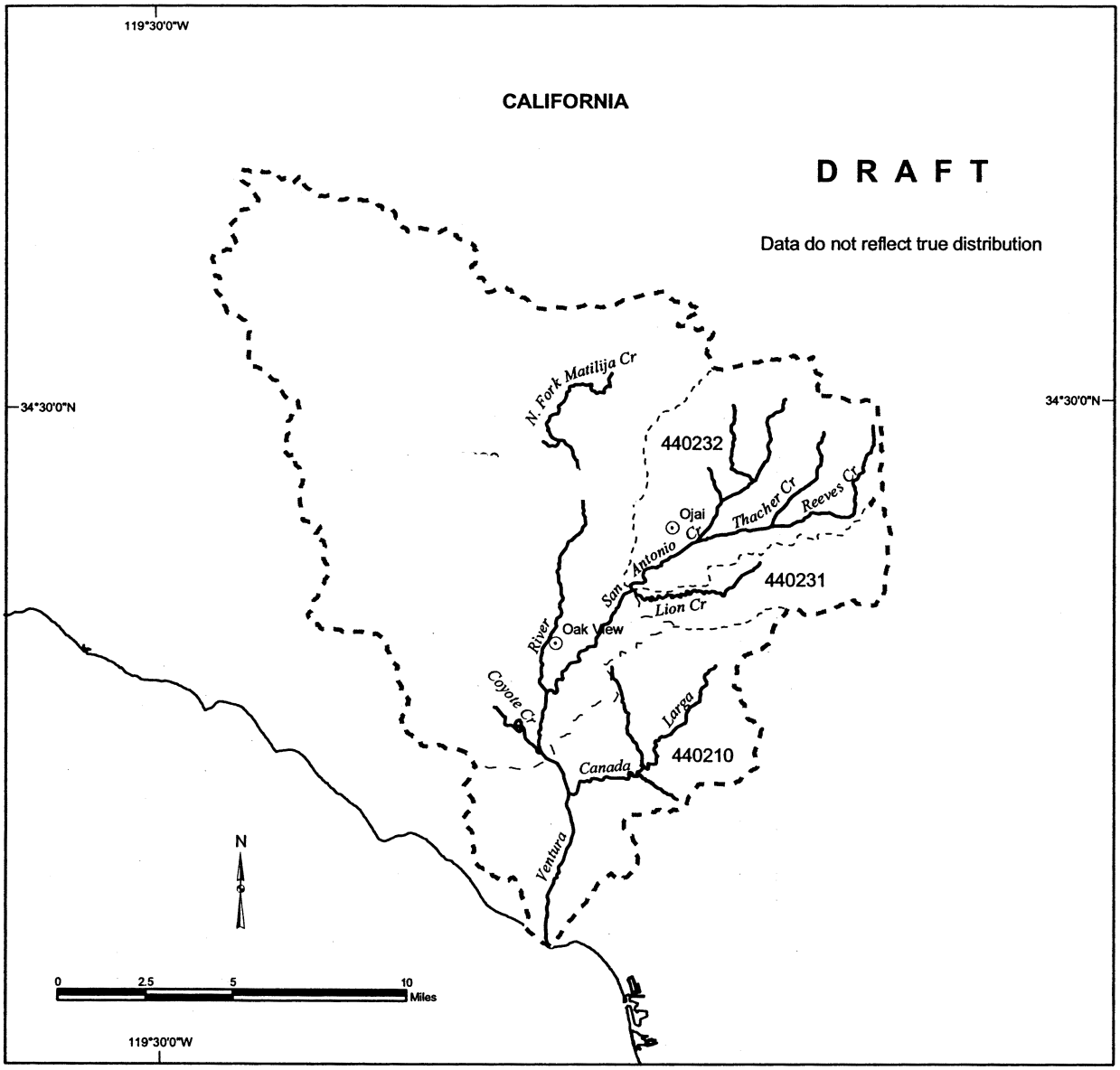
Area of Detail




Proposed Critical Habitat for the Southern California O. Mykiss ESU
South Coast Hydrologic Unit 3315
120°30'0"W
120°0'0"W
119°30'0"W
35°0'0"N
34°30'0"N
34°0'0"N
CALIFORNIA
DRAFT
Data do not reflect true distribution
Sudden
Escondido Cr.
Jalama Creek
331510
Canada del Sotare
Canada de la Gaviota
Arroyo Hondo
Gaviota
Canada del Refugio
Canada del Capitan
Dos Pueblos Canyon
331531
San Jose Cr.
331532
Montecito Cr.
Mission Cr.
Santa Barbara
San Ysidro Cr.
331533
Carpenteria Cr.
Carpenteria
331534
Gobernador Cr.
N
0 5 10 20
Miles
Legend
Cities/Towns
Proposed Critical Habitat
CalWater Hydrologic Unit (HU) Boundary
CalWater Hydrologic Sub-Area (HSA) Boundary
State Boundary
331210 CalWater HSA Number
Area of Detail
CALIFORNIA

Proposed Critical Habitat for the Southern California O. Mykiss ESU

Ventura River Hydrologic Unit 4402

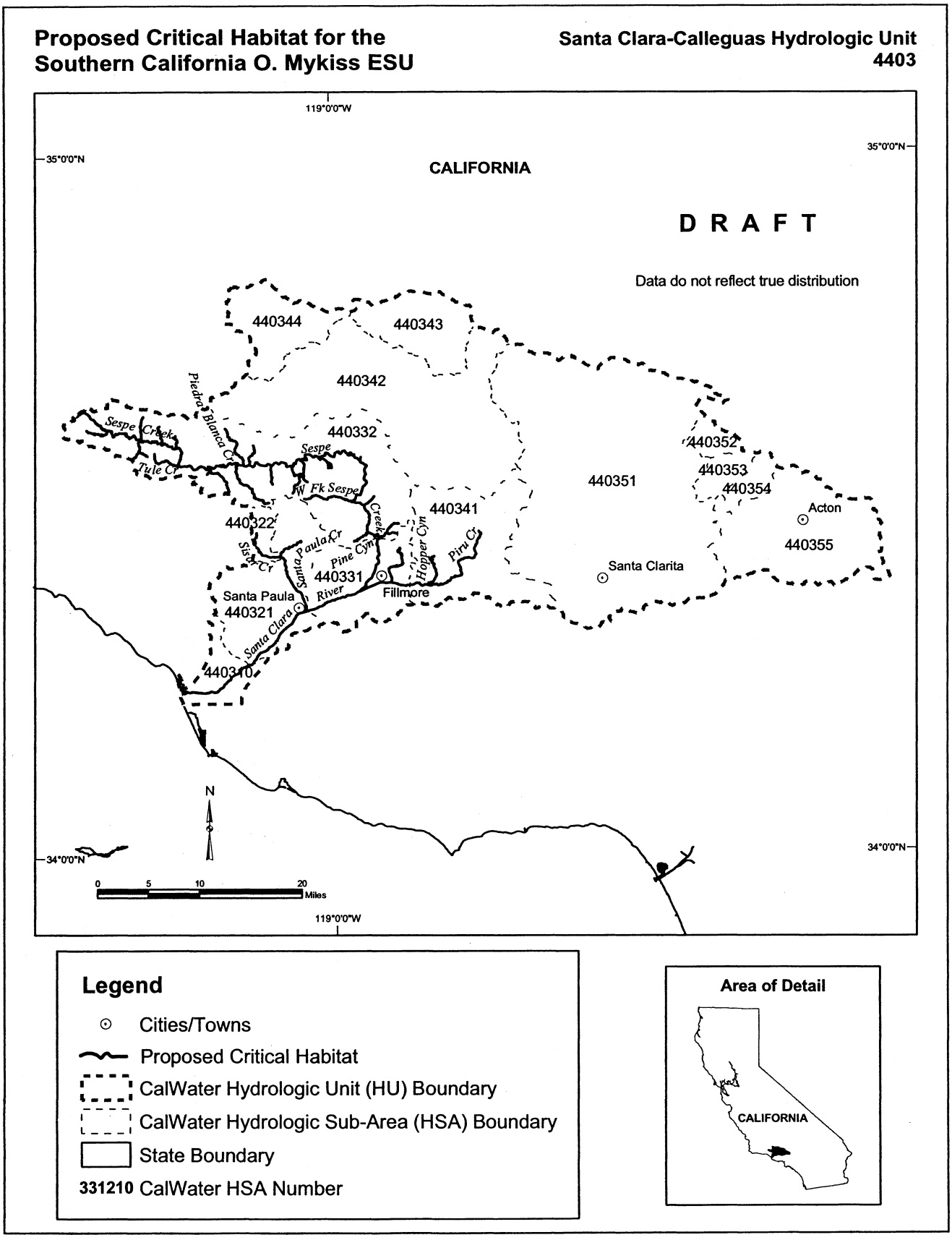


Legend

- ⊙ Cities/Towns
- Proposed Critical Habitat
- CalWater Hydrologic Unit (HU) Boundary
- CalWater Hydrologic Sub-Area (HSA) Boundary
- State Boundary
- **331210** CalWater HSA Number

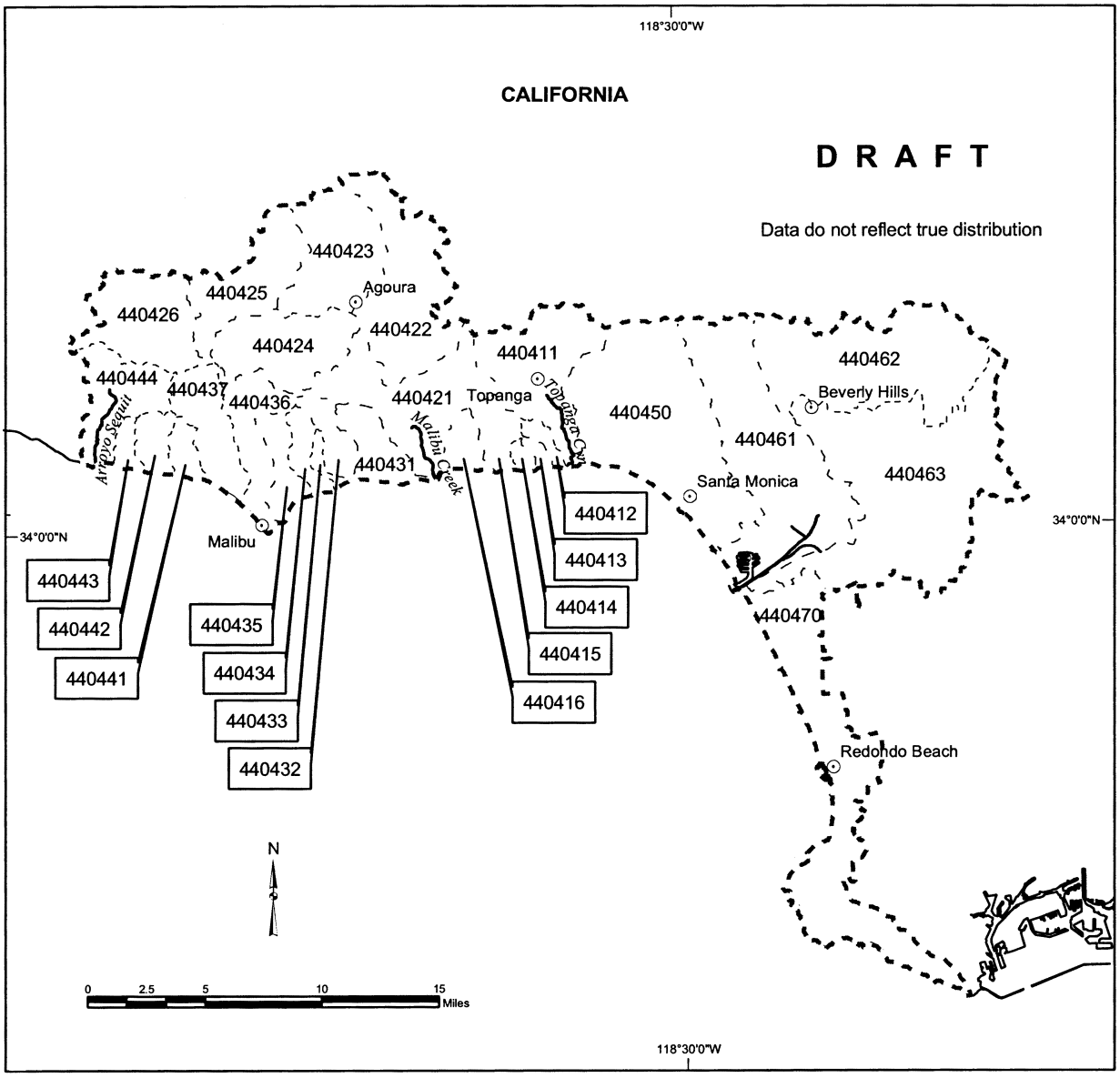
Area of Detail




Proposed Critical Habitat for the Southern California O. Mykiss ESU
Santa Clara-Calleguas Hydrologic Unit 4403
119°0'0"W
35°0'0"N
CALIFORNIA
DRAFT
Data do not reflect true distribution
440344
440343
440342
440332
440352
440353
440354
440351
440341
440322
440331
440355
Acton
Santa Clarita
Fillmore
Santa Paula
440321
440310
Piedra Blanca Cr
Sespe Creek
Tyle Cr
Sespe
W Fk Sespe Creek
Sisar Cr
Santa Paula Cr
Pine Cyn
Topper Cyn
Piru Cr
Santa Clara River
N
34°0'0"N
0 5 10 20 Miles
Legend
Cities/Towns
Proposed Critical Habitat
CalWater Hydrologic Unit (HU) Boundary
CalWater Hydrologic Sub-Area (HSA) Boundary
State Boundary
331210 CalWater HSA Number
Area of Detail
CALIFORNIA

Proposed Critical Habitat for the Southern California O. Mykiss ESU

Santa Monica Bay Hydrologic Unit 4404



Legend

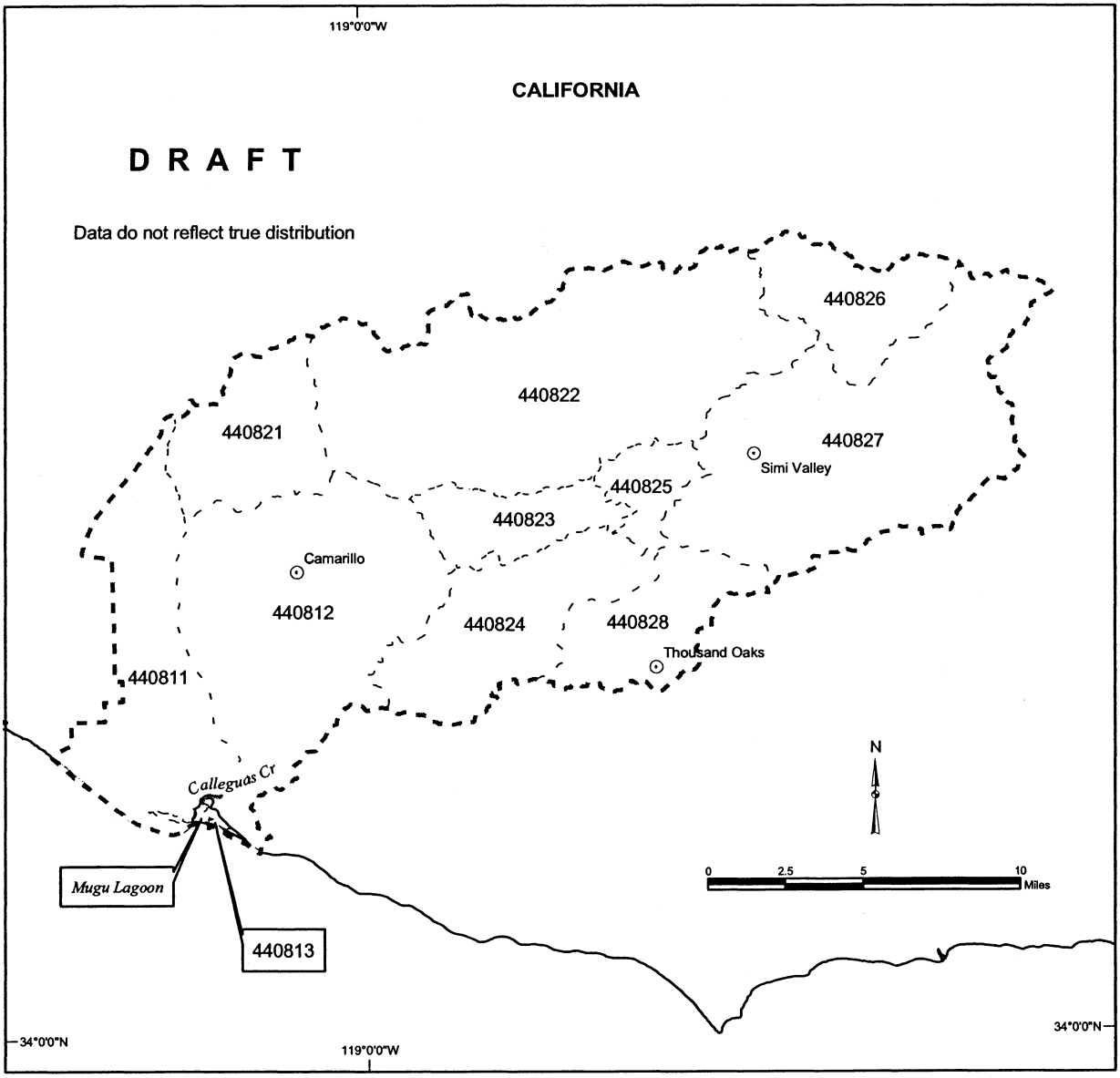
- Cities/Towns
- Proposed Critical Habitat
- CalWater Hydrologic Unit (HU) Boundary
- CalWater Hydrologic Sub-Area (HSA) Boundary
- State Boundary
- **331210** CalWater HSA Number

Area of Detail



Proposed Critical Habitat for the Southern California O. Mykiss ESU

Calleguas Hydrologic Unit 4408

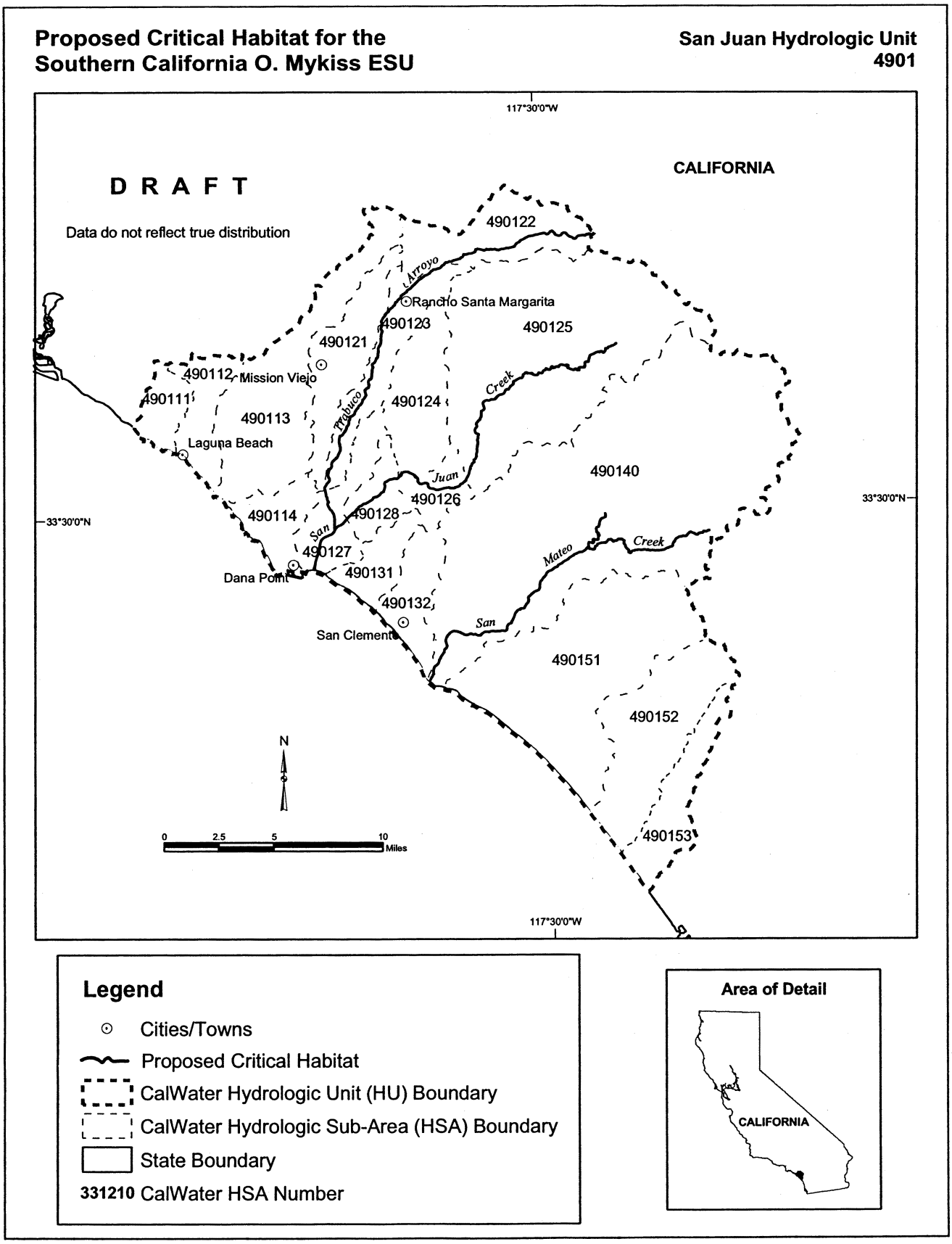


Legend

- Cities/Towns
- Proposed Critical Habitat
- Occupied but excluded streams / areas
- CalWater Hydrologic Unit (HU) Boundary
- CalWater Hydrologic Sub-Area (HSA) Boundary
- State Boundary
- **331210** CalWater HSA Number

Area of Detail





BILLING CODE 3510–22–C

(k) *Central Valley spring-run chinook (Oncorhynchus tshawytscha).* Critical habitat is proposed to include the areas defined in the following units:

(1) Tehama Hydrologic Unit 5504—*(i) Lower Stony Creek Hydrologic Sub-area 550410.* Outlet(s) = Glenn-Colusa Canal (Lat 39.6762, Long −122.0151); Stony Creek (39.7122, −122.0072) upstream to endpoint(s) in: Glenn−Colusa Canal (39.7122, −122.0072); Stony Creek (39.8178, −122.3253).

(ii) Red Bluff Hydrologic Sub-area 550420. Outlet(s) = Sacramento River (Lat 39.6998, Long −121.9419) upstream to endpoint(s) in: Antelope Creek (40.2023, −122.1275); Big Chico Creek (39.7757, −121.7525); Blue Tent Creek (40.2284, −122.2551); Burch Creek (39.8526, −122.1502); Coyote Creek (40.0929, −122.1621); Craig Creek (40.1617, −122.1350); Deer Creek (40.0144, −121.9481); Dibble Creek (40.2003, −122.2420); Dye Creek (40.0904, −122.0767); Elder Creek (40.0526, −122.1717); Jewet Creek (39.8913, −122.1005); Kusal Slough (39.7577, −121.9699); Lindo Channel (39.7623, −121.7923); McClure Creek (40.0074, −122.1729); Mill Creek (40.0550, −122.0317); Mud Creek (39.7931, −121.8865); New Creek (40.1873, −122.1350); Oat Creek (40.0847, −122.1658); Pine Creek (39.8760, −121.9777); Red Bank Creek (40.1391, −122.2157); Reeds Creek (40.1687, −122.2377); Rice Creek (39.8495, −122.1626); Rock Creek (39.8189, −121.9124); Salt Creek (40.1869, −122.1845); Singer Creek (39.9200, −121.9612); Thomes Creek (39.8822, −122.5527); Toomes Creek (39.9808, −122.0642); Unnamed Tributary (39.8532, −122.1627); Unnamed Tributary (40.1682, −122.1459).

(2) Whitmore Hydrologic Unit 5507—*(i) Inks Creek Hydrologic Sub-area 550711.* Outlet(s) = Inks Creek (Lat 40.3305, Long −122.1520) upstream to endpoint(s) in: Inks Creek (40.3418, −122.1332).

(ii) Battle Creek Hydrologic Sub-area 550712. Outlet(s) = Battle Creek (Lat 40.4083, Long −122.1102) upstream to endpoint(s) in: Battle Creek (40.4228, −121.9975); North Fork Battle Creek (40.4746, −121.8436); South Fork Battle Creek (40.3549, −121.6861).

(iii) Inwood Hydrologic Sub-area 550722. Outlet(s) = Bear Creek (Lat 40.4352, Long −122.2039) upstream to endpoint(s) in: Bear Creek (40.4859, −122.1529); Dry Creek (40.4574, −122.1993).

(3) Redding Hydrologic Unit 5508—*(i) Enterprise Flat Hydrologic Sub-area 550810.* Outlet(s) = Sacramento River (Lat 40.2526, Long −122.1707) upstream to endpoint(s) in: Anderson Creek (40.3910, −122.1984); Ash Creek (40.4451, −122.1815); Battle Creek (40.4083, −122.1102); Churn Creek (40.5431, −122.3395); Clear Creek (40.5158, −122.5256); Cow Creek (40.5438, −122.1318); Olney Creek (40.5262, −122.3783); Paynes Creek (40.2810, −122.1587); South Cow Creek (40.5440, −122.1314); Stillwater Creek (40.4789, −122.2597).

(ii) Lower Cottonwood Hydrologic Sub-area 550820. Outlet(s) = Cottonwood Creek (Lat 40.3777, Long −122.1991) upstream to endpoint(s) in: Cottonwood Creek (40.3943, −122.5254); Middle Fork Cottonwood Creek (40.3314, −122.6663); South Fork Cottonwood Creek (40.1578, −122.5809).

(4) Eastern Tehama Hydrologic Unit 5509—*(i) Big Chico Creek Hydrologic Sub-area 550914.* Outlet(s) = Big Chico Creek (Lat 39.7777, Long −121.7495) upstream to endpoint(s) in: Big Chico Creek (39.8873, −121.6979).

(ii) Deer Creek Hydrologic Sub-area 550920. Outlet(s) = Deer Creek (Lat 40.0144, Long −121.9481) upstream to endpoint(s) in: Deer Creek (40.2019, −121.5130).

(iii) Upper Mill Creek Hydrologic Sub-area 550942. Outlet(s) = Mill Creek (Lat 40.0550, Long −122.0317) upstream to endpoint(s) in: Mill Creek (40.3997, −121.5135).

(iv) Antelope Creek Hydrologic Sub-area 550963. Outlet(s) = Antelope Creek (Lat 40.2023, Long −122.1272) upstream to endpoint(s) in: Antelope Creek (40.2416, −121.8630); North Fork Antelope Creek (40.2691, −121.8226); South Fork Antelope Creek (40.2309, −121.8325).

(5) Sacramento Delta Hydrologic Unit 5510—*Sacramento Delta Hydrologic Sub-area 551000.* Outlet(s) = Sacramento River (Lat 38.0612, Long −121.7948) upstream to endpoint(s) in: Cache Slough (38.3078, −121.7592); Delta Cross Channel (38.2433, −121.4964); Elk Slough (38.4140, −121.5212); Elkhorn Slough (38.2898, −121.6271); Georgiana Slough (38.2401, −121.5172); Miners Slough (38.2864, −121.6051); Prospect Slough (38.1477, −121.6641); Sevenmile Slough (38.1171, −121.6298); Steamboat Slough (38.1123, −121.5966); Sutter Slough (38.3321, −121.5838); Threemile Slough (38.1155, −121.6835); Yolo Bypass (38.5800, −121.5838).

(6) Valley-Putah-Cache Hydrologic Unit 5511—*Lower Putah Creek Hydrologic Sub-area 551120.* Outlet(s) = Yolo Bypass (Lat 38.5800, Long −121.5838) upstream to endpoint(s) in: Sacramento Bypass (38.6057, −121.5563); Yolo Bypass (38.7627, −121.6325).

(7) Marysville Hydrologic Unit 5515—*(i) Lower Yuba River Hydrologic Sub-area 551530.* Outlet(s) = Yuba River (Lat 39.1270, Long −121.5981) upstream to endpoint(s) in: Yuba River (39.2203, −121.3314).

(ii) Lower Feather River Hydrologic Sub-area 551540. Outlet(s) = Feather River (Lat 39.1270, Long −121.5981) upstream to endpoint(s) in: Feather River (39.5203, −121.5475).

(8) Yuba River Hydrologic Unit 5517—*(i) Browns Valley Hydrologic Sub-area 551712.* Outlet(s) = Dry Creek (Lat 39.2207, Long −121.4088); Yuba River (39.2203, −121.3314) upstream to endpoint(s) in: Dry Creek (39.3201, −121.3117); Yuba River (39.2305, −121.2813).

(ii) Englebright Hydrologic Sub-area 551714. Outlet(s) = Yuba River (Lat 39.2305, Long −121.2813) upstream to endpoint(s) in: Yuba River (39.2388, −121.2698).

(iii) Nevada City Hydrologic Sub-area 551720. Outlet(s) = Deer Creek (Lat 39.2303, Long −121.2813) upstream to endpoint(s) in: Deer Creek (39.2354, −121.2192).

(9) Valley-American Hydrologic Unit 5519—*Pleasant Grove Hydrologic Sub-area 551922.* Outlet(s) = Sacramento River (Lat 38.5965, Long −121.5086) upstream to endpoint(s) in: Feather River (39.1264, −121.5984).

(10) Colusa Basin Hydrologic Unit 5520—*(i) Sycamore-Sutter Hydrologic Sub-area 552010.* Outlet(s) = Sacramento River (Lat 38.7604, Long −121.6767) upstream.

(ii) Sutter Bypass Hydrologic Sub-area 552030. Outlet(s) = Sacramento River (Lat 38.7851, Long −121.6238) upstream to endpoint(s) in: Butte Creek (39.1987, −121.9285); Butte Slough (39.1987, −121.9285); Nelson Slough (38.8901, −121.6352); Sacramento Slough (38.7843, −121.6544); Sutter Bypass (39.1417, −121.8196; 39.1484, −121.8386); Unnamed Tributary (39.1586, −121.8747).

(iii) Butte Basin Hydrologic Sub-area 552040. Outlet(s) = Butte Creek (Lat 39.1990, Long −121.9286); Sacramento River (39.4141, −122.0087) upstream to endpoint(s) in: Butte creek (39.1949, −121.9361); Colusa Bypass (39.2276, −121.9402); Unnamed Tributary (39.6762, −122.0151).

(11) Butte Creek Hydrologic Unit 5521—*Upper Little Chico Hydrologic Sub-area 552130.* Outlet(s) = Butte Creek (Lat 39.7096, −121.7504) upstream to endpoint(s) in Butte Creek 3(9.8665, −121.6344).

(12) Shasta Bally Hydrologic Unit 5524—*(i) Platina Hydrologic Sub-area 552436.* Outlet(s) = Middle Fork Cottonwood Creek (Lat 40.3314, −122.6663) upstream to endpoint(s) in Beegum Creek (40.3066, −122.9205);

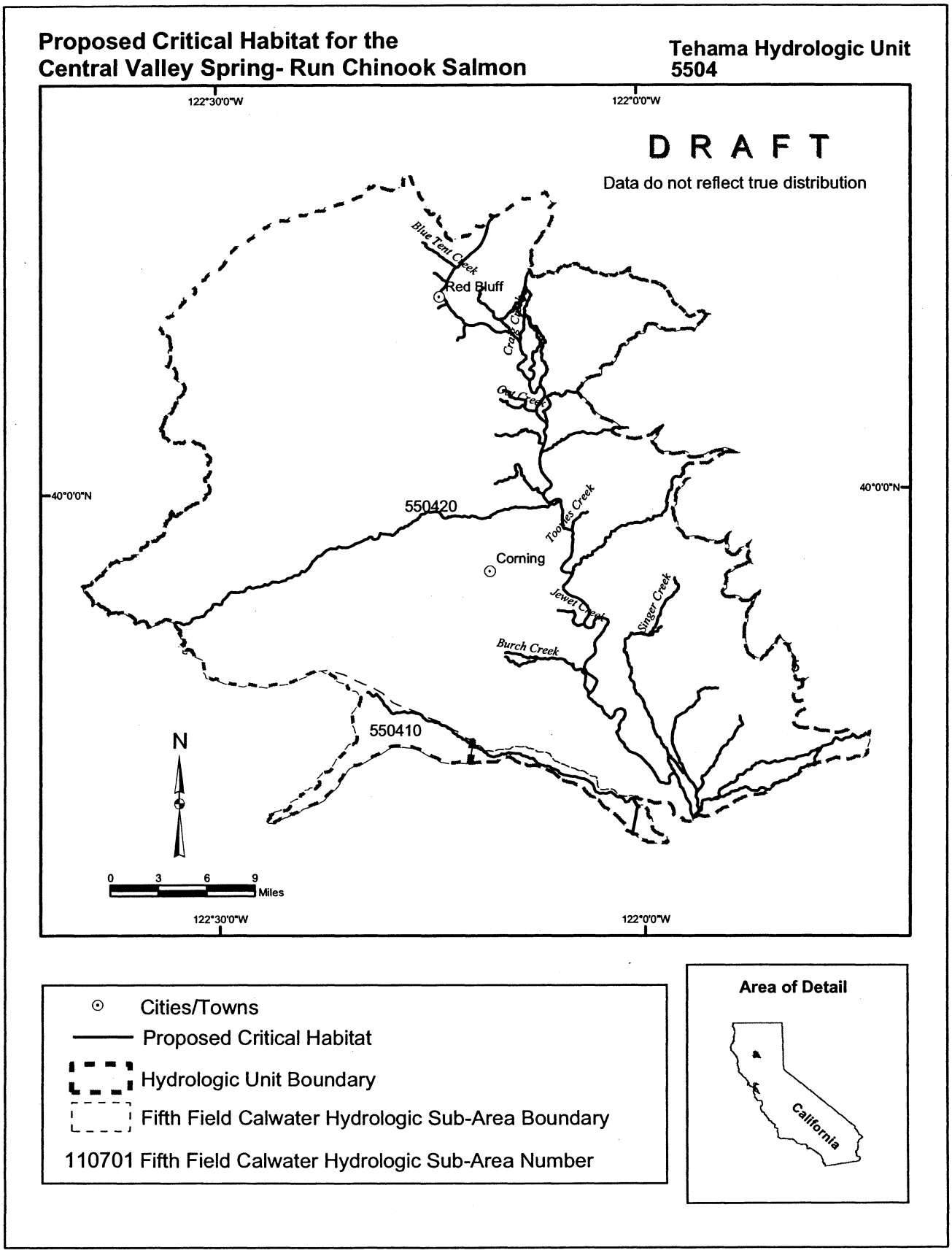
Middle Fork Cottonwood Creek (40.3655, −122.7451).

(ii) Spring Creek Hydrologic Sub-area 552440. Outlet(s) = Sacramento River (Lat 40.5943, Long −122.4343) upstream to endpoint(s) in: Sacramento River (40.6116, −122.4462)

(iii) Kanaka Peak Hydrologic Sub-area 552462. Outlet(s) = Clear Creek (Lat 40.5158, Long −122.5256) upstream to endpoint(s) in: Clear Creek (40.5992, −122.5394).

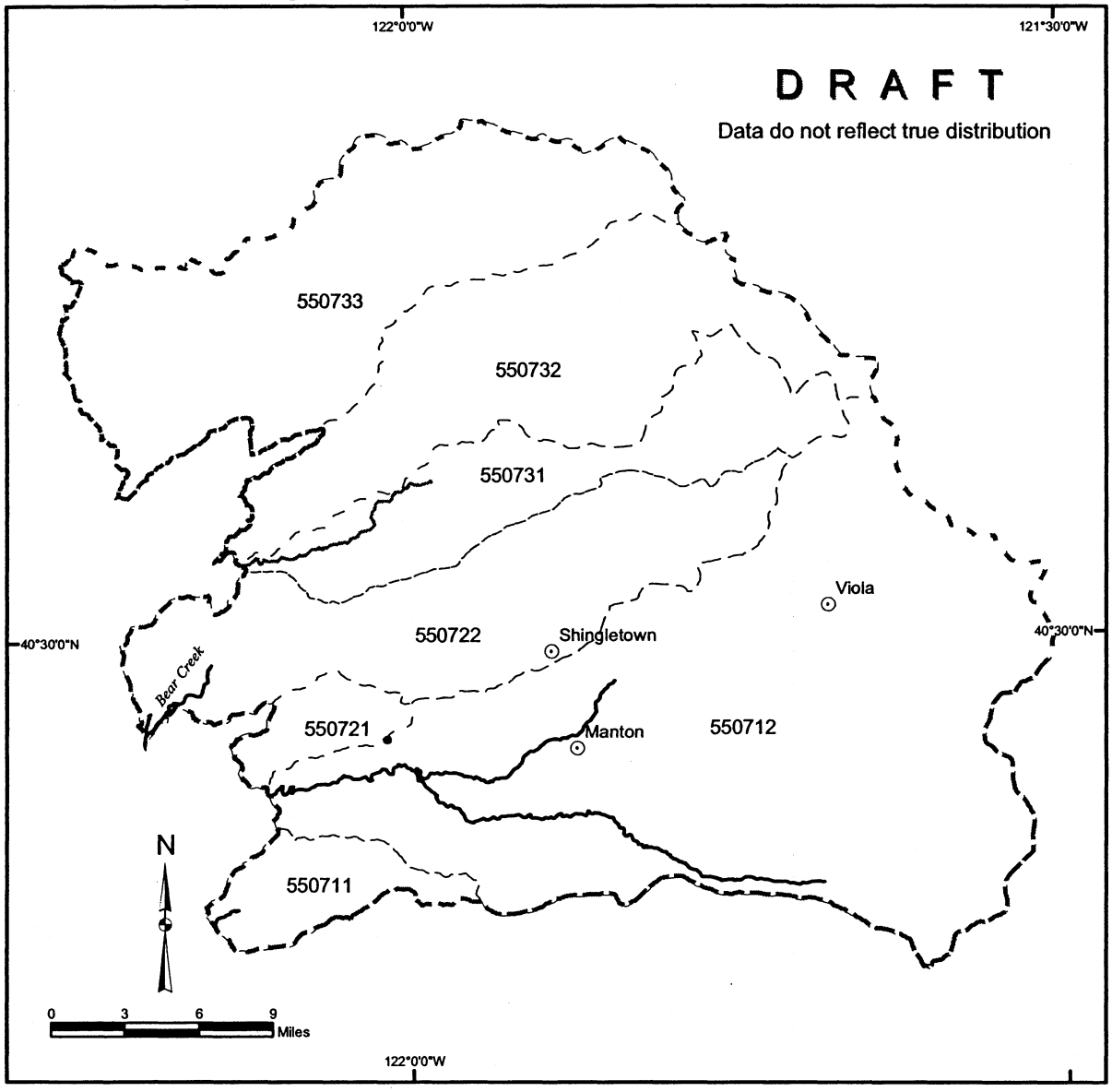
(13) Maps of proposed critical habitat for the Central Valley spring−run chinook salmon ESU follow:

BILLING CODE 3510–22–P


Proposed Critical Habitat for the
Central Valley Spring- Run Chinook Salmon
Tehama Hydrologic Unit
5504
122°30'0"W
122°0'0"W
DRAFT
Data do not reflect true distribution
Blue Tent Creek
Red Bluff
Oat Creek
40°0'0"N
550420
Toomes Creek
Corning
Jewett Creek
Singer Creek
Burch Creek
550410
N
0 3 6 9
Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California

Proposed Critical Habitat for the Central Valley Spring- Run Chinook Salmon

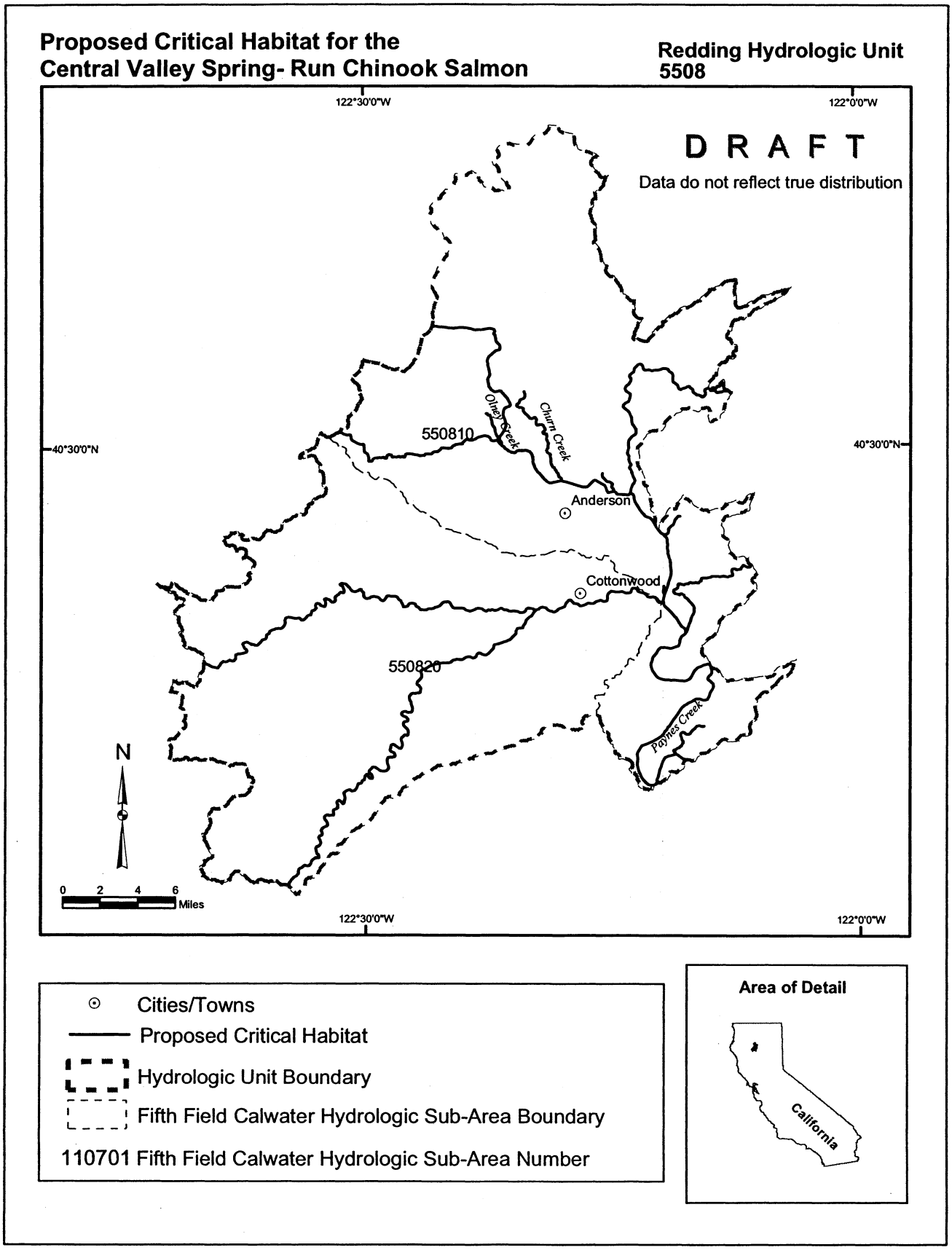
Whitmore Hydrologic Unit 5507



- Cities/Towns
- Proposed Critical Habitat
- Occupied but excluded streams / areas
- Hydrologic Unit Boundary
- Fifth Field Calwater Hydrologic Sub-Area Boundary
- 110701 Fifth Field Calwater Hydrologic Sub-Area Number

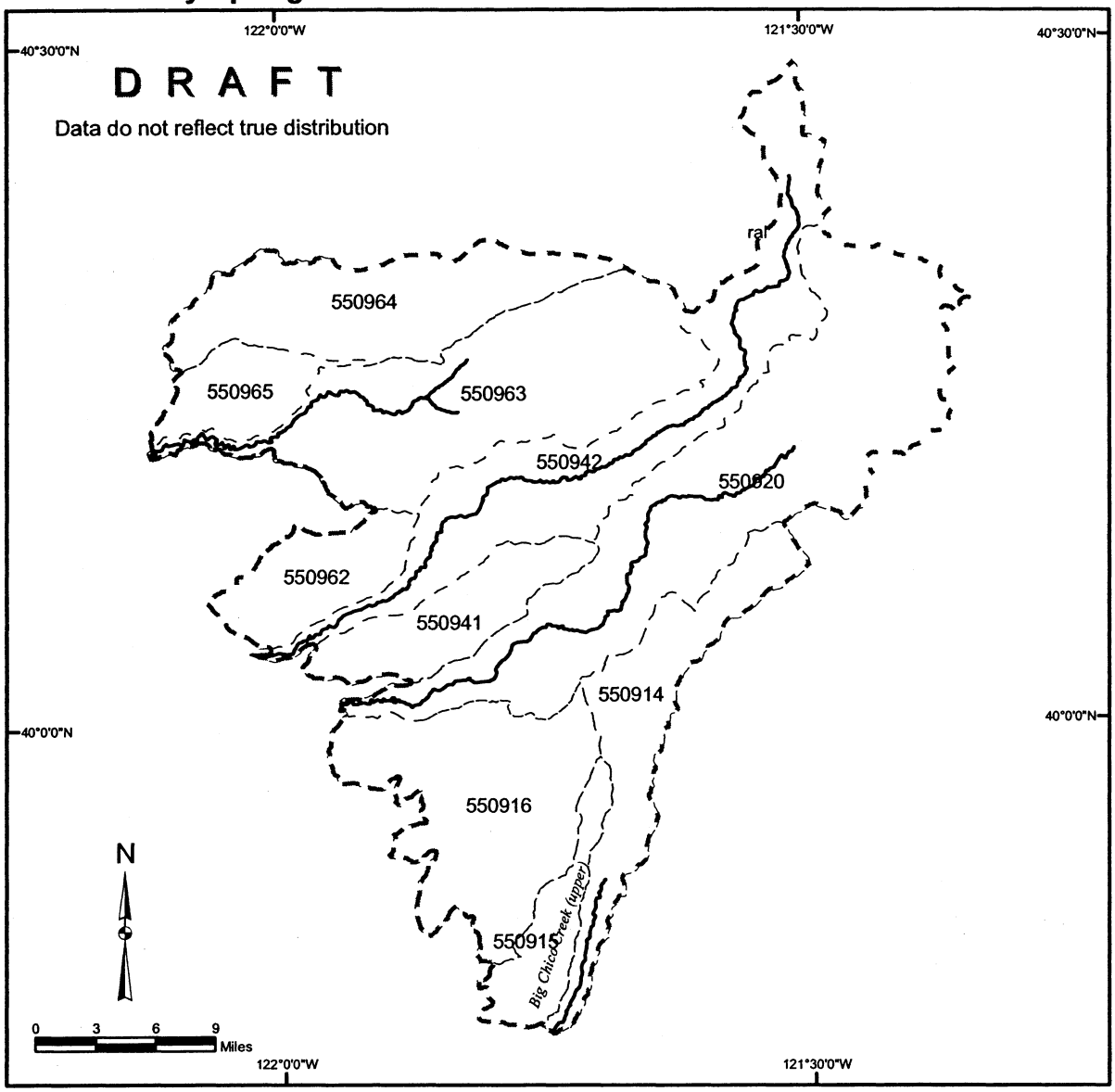
Area of Detail




Proposed Critical Habitat for the
Central Valley Spring- Run Chinook Salmon
Redding Hydrologic Unit
5508
122°30'0"W
122°0'0"W
D R A F T
Data do not reflect true distribution
40°30'0"N
40°30'0"N
Olney Creek
Churn Creek
550810
Anderson
Cottonwood
550820
Paynes Creek
N
0 2 4 6
Miles
122°30'0"W
122°0'0"W
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California

Proposed Critical Habitat for the Central Valley Spring- Run Chinook Salmon

Eastern Tehama Hydrologic Unit 5509



⊙ Cities/Towns

——— Proposed Critical Habitat

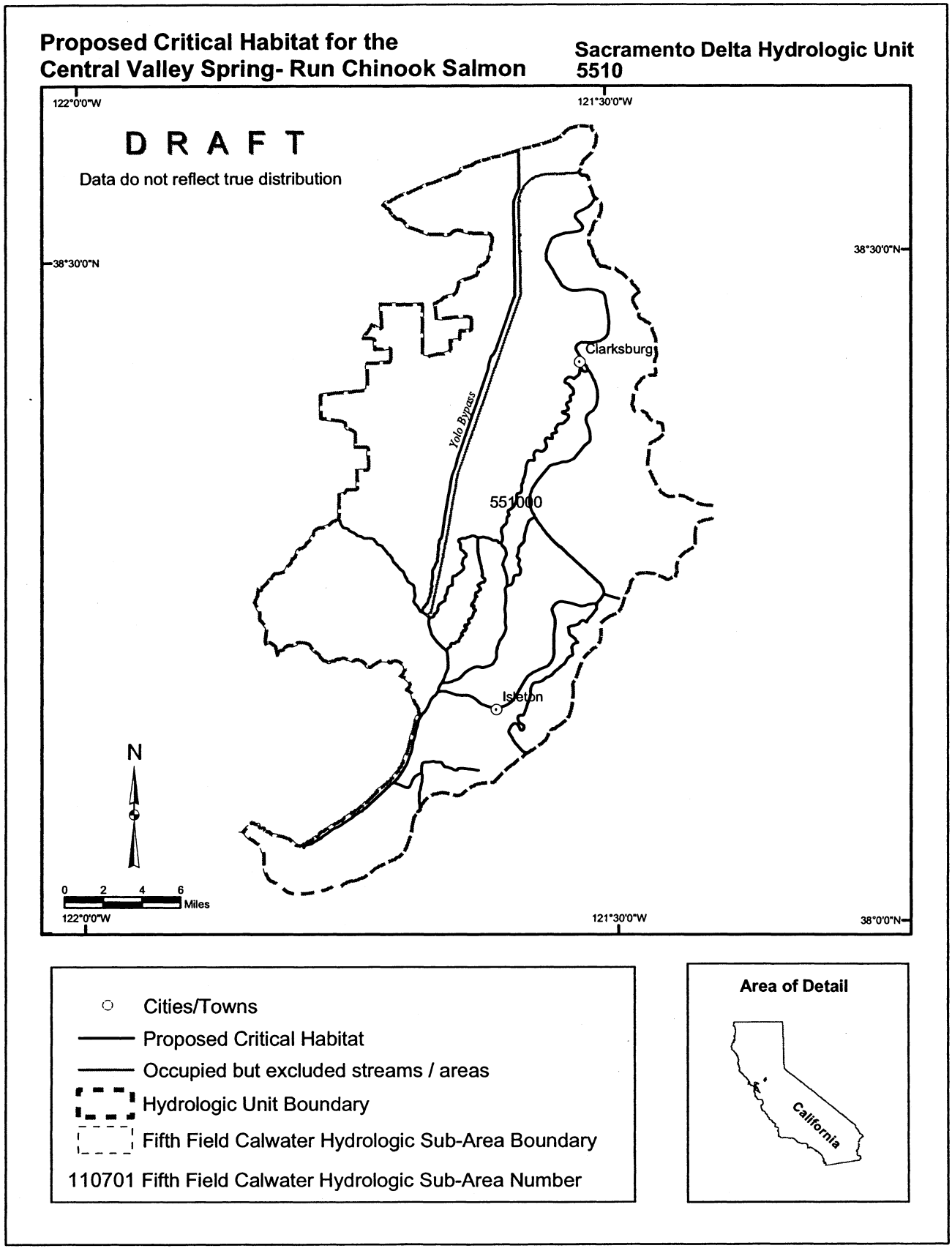
Hydrologic Unit Boundary

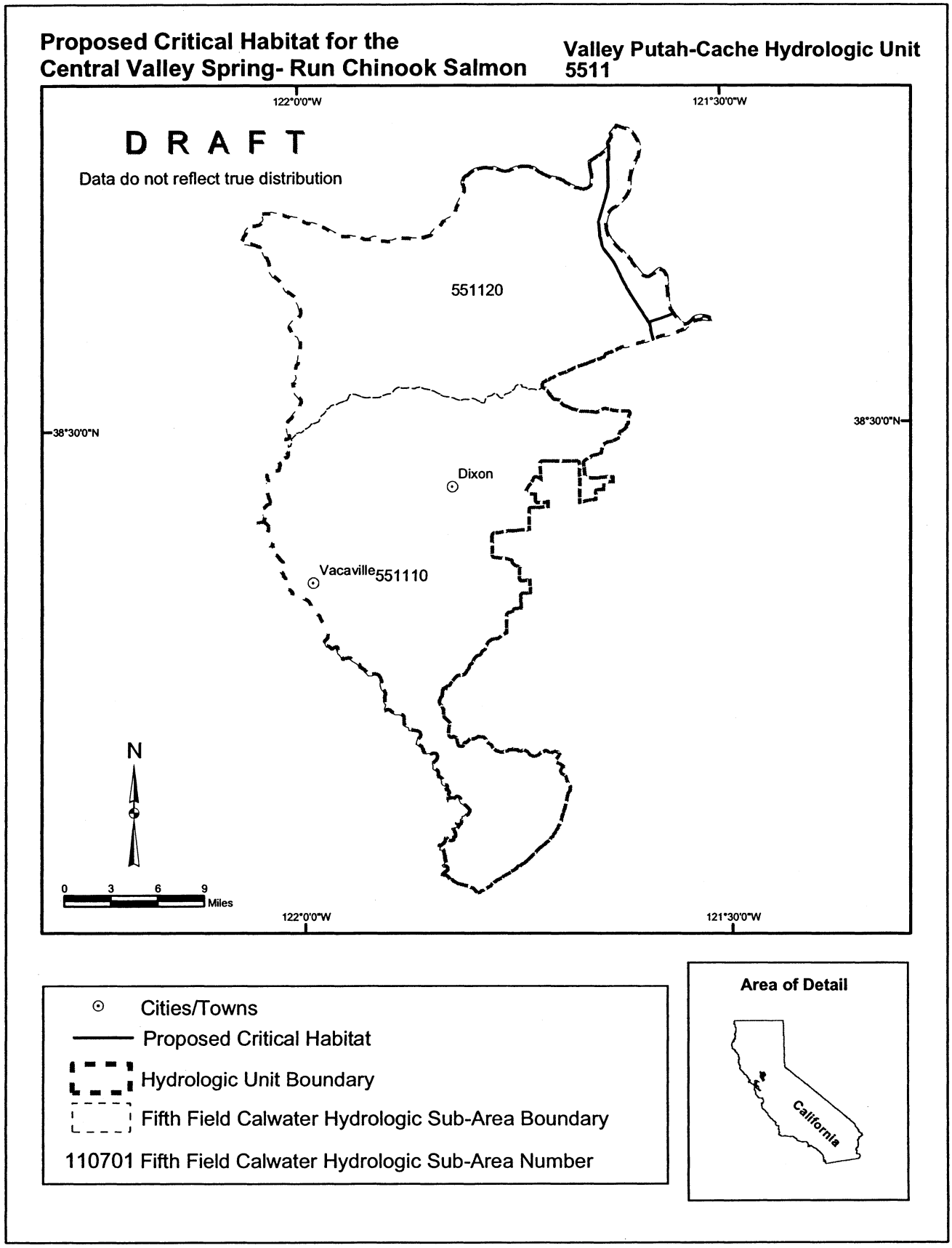
Fifth Field Calwater Hydrologic Sub-Area Boundary

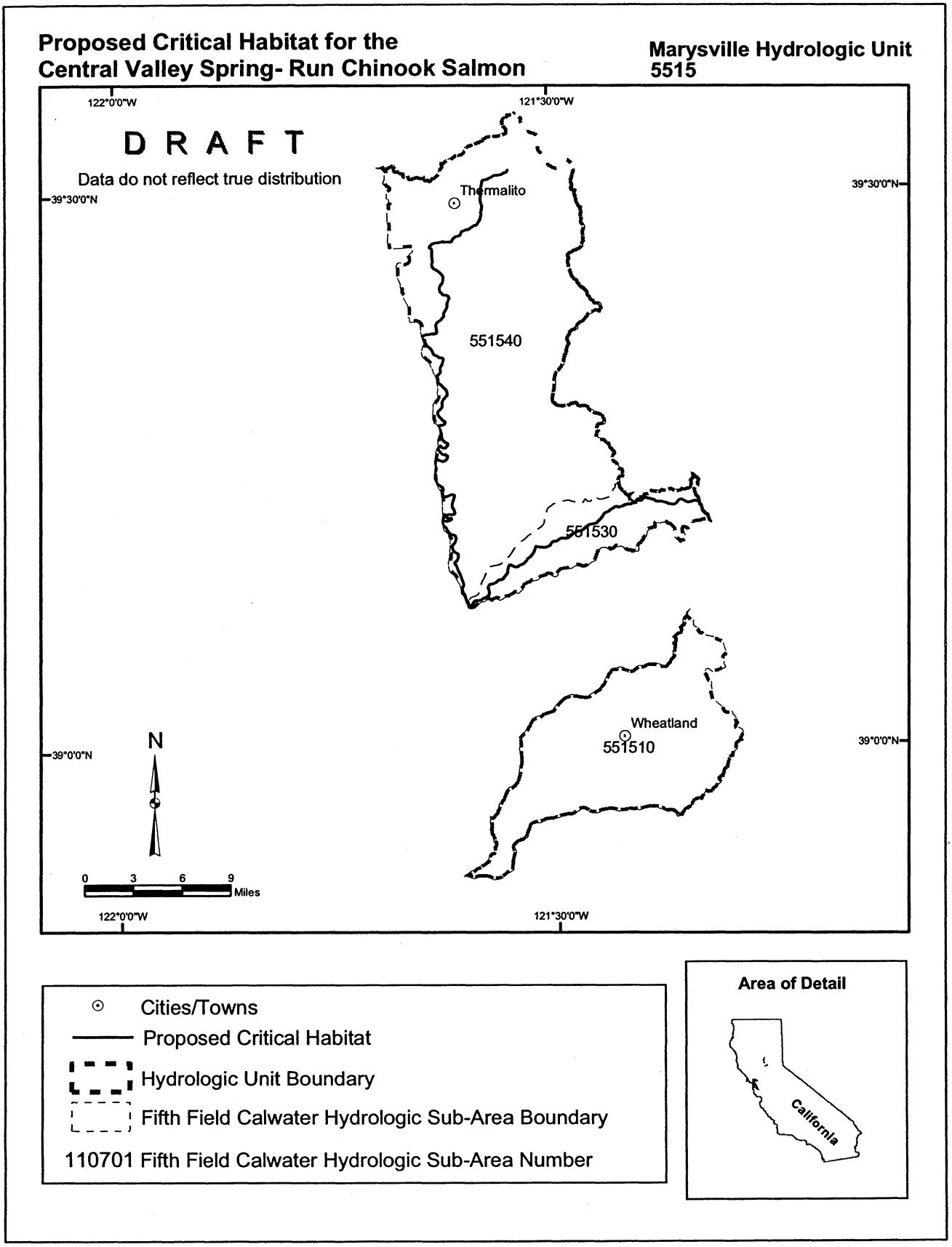
110701 Fifth Field Calwater Hydrologic Sub-Area Number

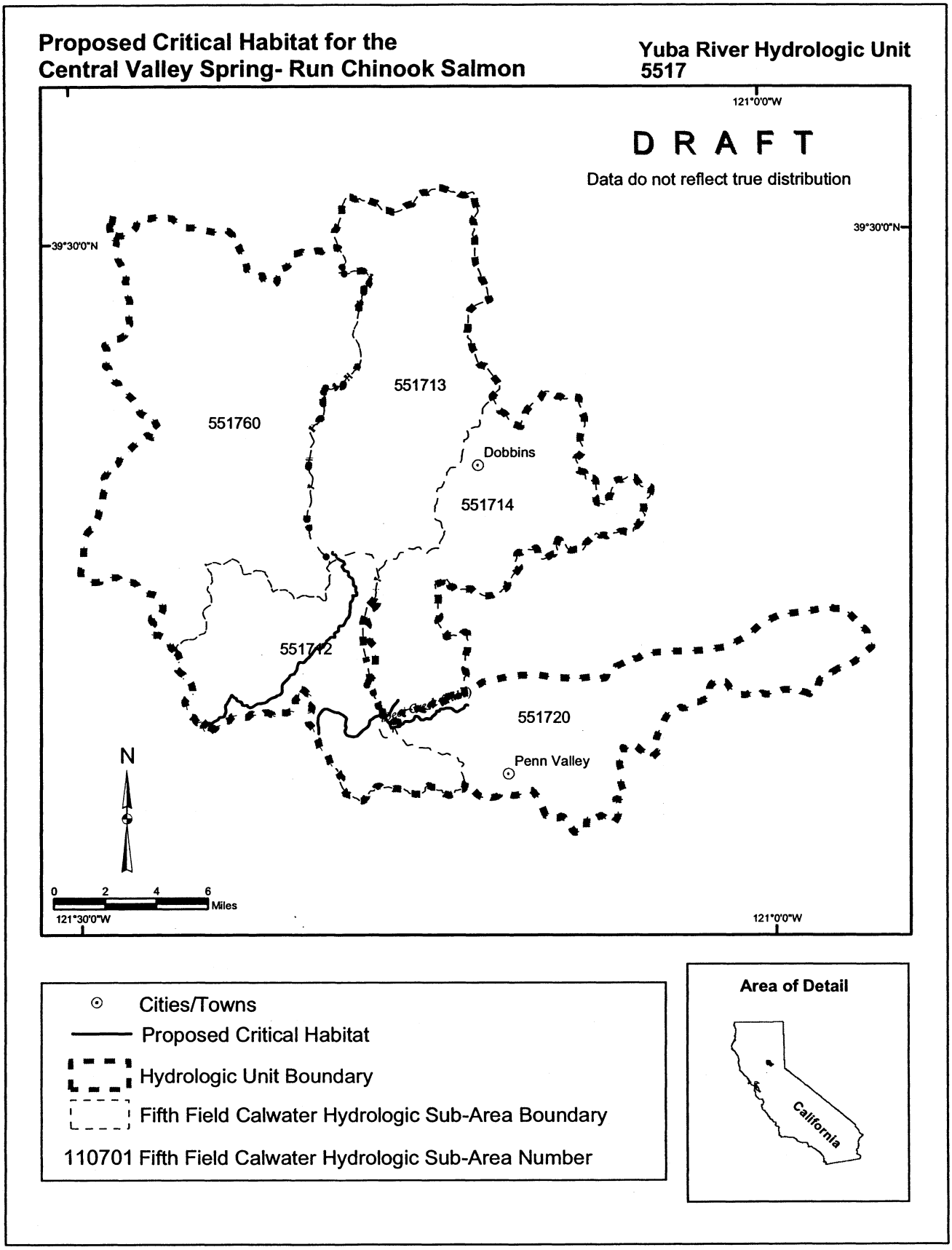
Area of Detail

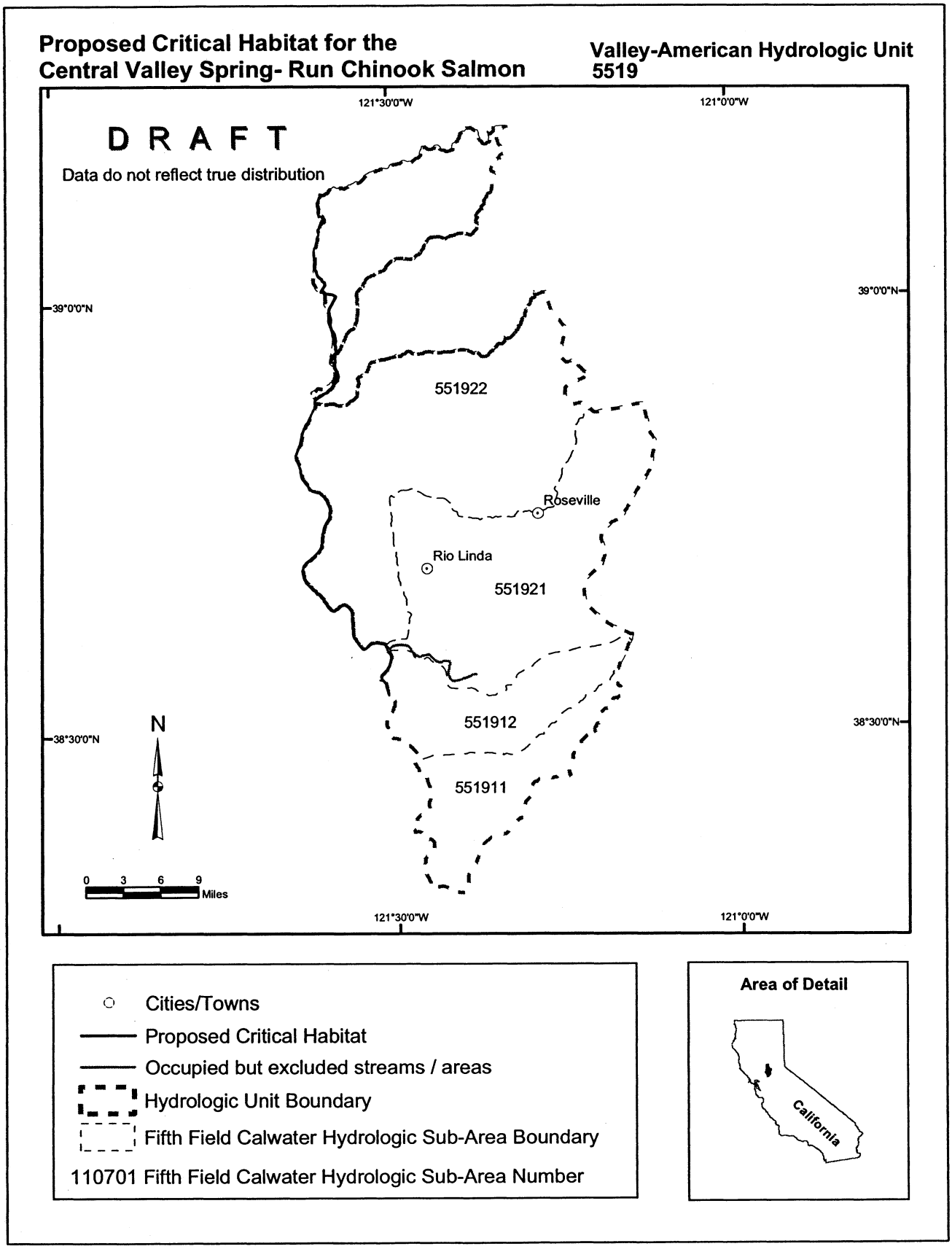


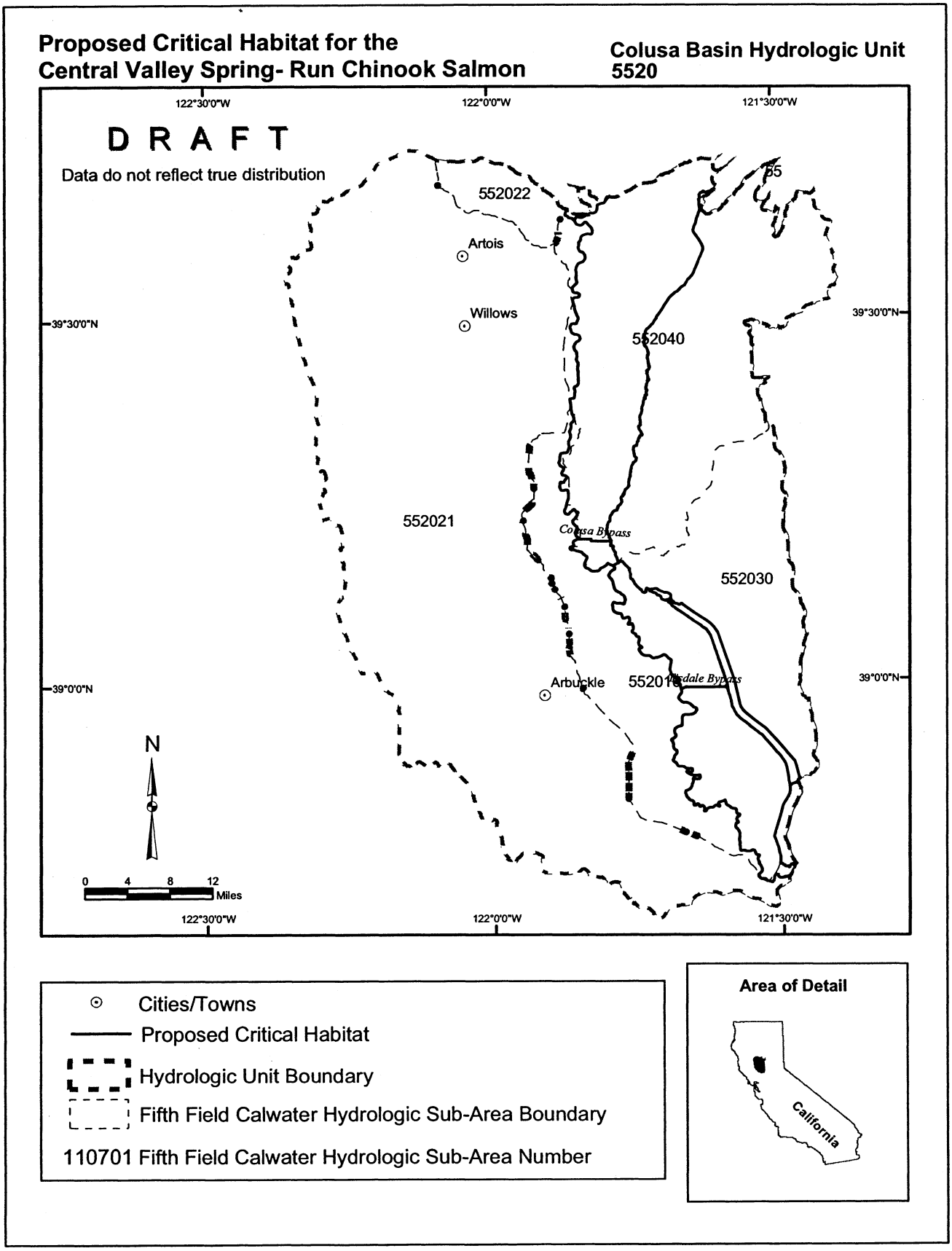

Proposed Critical Habitat for the
Central Valley Spring- Run Chinook Salmon
Sacramento Delta Hydrologic Unit
5510
122°0'0"W
121°30'0"W
D R A F T
Data do not reflect true distribution
38°30'0"N
38°30'0"N
Clarksburg
Yolo Bypass
551000
Isleton
N
0 2 4 6
Miles
122°0'0"W
121°30'0"W
38°0'0"N
Cities/Towns
Proposed Critical Habitat
Occupied but excluded streams / areas
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California

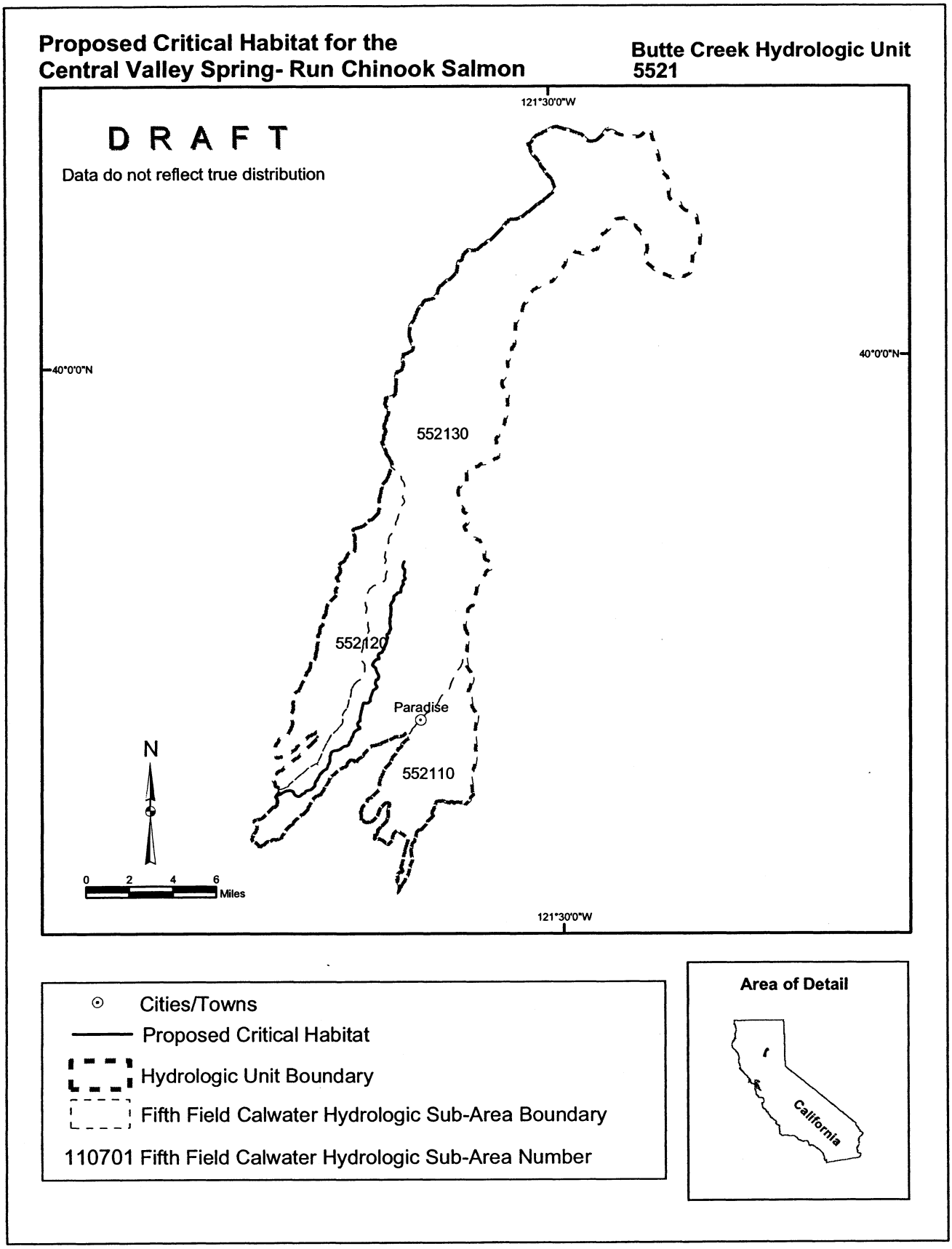

Proposed Critical Habitat for the
Central Valley Spring- Run Chinook Salmon
Valley Putah-Cache Hydrologic Unit
5511
122°0'0"W
121°30'0"W
D R A F T
Data do not reflect true distribution
551120
38°30'0"N
Dixon
Vacaville
551110
N
0 3 6 9
Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California

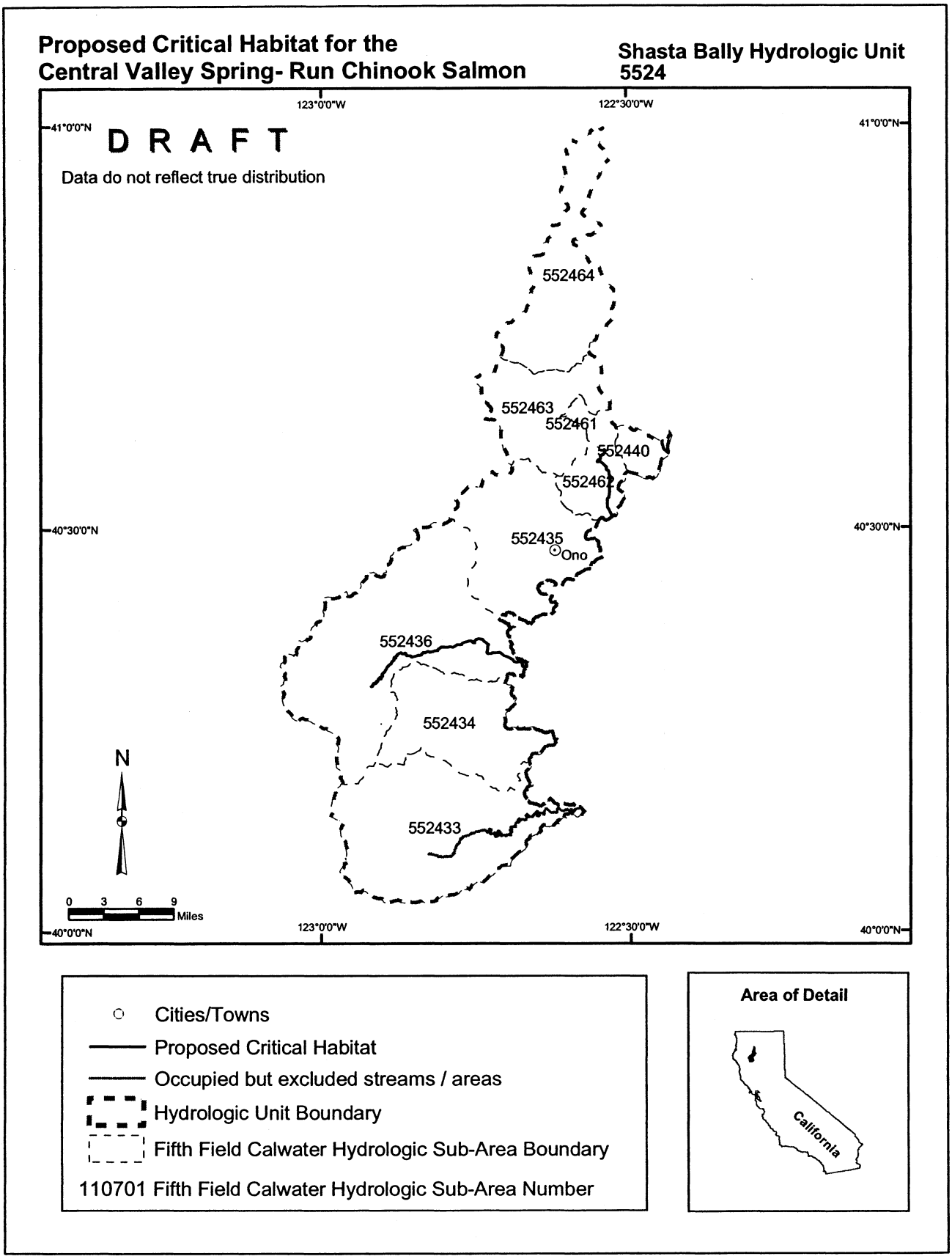

Proposed Critical Habitat for the
Central Valley Spring- Run Chinook Salmon
Marysville Hydrologic Unit
5515
122°0'0"W
121°30'0"W
D R A F T
Data do not reflect true distribution
39°30'0"N
39°0'0"N
Thermalito
551540
551530
Wheatland
551510
N
0 3 6 9
Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the
Central Valley Spring- Run Chinook Salmon
Yuba River Hydrologic Unit
5517
121°0'0"W
D R A F T
Data do not reflect true distribution
39°30'0"N
39°30'0"N
551713
551760
Dobbins
551714
551712
551720
Penn Valley
N
0 2 4 6
Miles
121°30'0"W
121°0'0"W
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the Central Valley Spring- Run Chinook Salmon
Valley-American Hydrologic Unit 5519
121°30'0"W
121°0'0"W
D R A F T
Data do not reflect true distribution
39°0'0"N
38°30'0"N
551922
Roseville
Rio Linda
551921
551912
551911
N
0 3 6 9
Miles
Cities/Towns
Proposed Critical Habitat
Occupied but excluded streams / areas
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the
Central Valley Spring- Run Chinook Salmon
Colusa Basin Hydrologic Unit
5520
122°30'0"W
122°0'0"W
121°30'0"W
D R A F T
Data do not reflect true distribution
552022
Artois
Willows
39°30'0"N
552040
552021
Colusa Bypass
552030
39°0'0"N
Arbuckle
Yolo Bypass
N
0 4 8 12
Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the
Central Valley Spring- Run Chinook Salmon
Butte Creek Hydrologic Unit
5521
DRAFT
Data do not reflect true distribution
121°30'0"W
40°0'0"N
552130
552120
Paradise
552110
N
0 2 4 6
Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California



BILLING CODE 3510–22–C

(l) Central Valley O. mykiss (Oncorhynchus mykiss). Critical habitat is proposed to include the areas defined in the following units:

(1) Tehama Hydrologic Unit 5504—*(i) Lower Stony Creek Hydrologic Sub-area 550410.* Outlet(s) = Stony Creek (Lat 39.6760, Long −121.9732) upstream to endpoint(s) in: Stony Creek (39.8199, −122.3391).

(ii) Red Bluff Hydrologic Sub-area 550420. Outlet(s) = Sacramento River (Lat 39.6998, Long −121.9419) upstream to endpoint(s) in: Antelope Creek (40.2023, −122.1272); Big Chico Creek (39.7757, −121.7525); Blue Tent Creek (40.2166, −122.2362); Burch Creek (39.8495, −122.1615); Butler Slough (40.1579, −122.1320); Craig Creek (40.1617, −122.1350); Deer Creek (40.0144, −121.9481); Dibble Creek (40.2002, −122.2421); Dye Creek (40.0910, −122.0719); Elder Creek (40.0438, −122.2133); Lindo Channel (39.7623, −121.7923); McClure Creek (40.0074, −122.1723); Mill Creek (40.0550, −122.0317); Mud Creek (39.7985, −121.8803); New Creek (40.1873, −122.1350); Oat Creek (40.0769, −122.2168); Red Bank Creek (40.1421, −122.2399); Rice Creek (39.8484, −122.1252); Rock Creek (39.8034, −121.9403); Salt Creek (40.1572, −122.1646); Thomes Creek (39.8822, −122.5527); Unnamed Tributary (40.1867, −122.1353); Unnamed Tributary (40.1682, −122.1459); Unnamed Tributary (40.1143, −122.1259); Unnamed Tributary (40.0151, −122.1148); Unnamed Tributary (40.0403, −122.1009); Unnamed Tributary (40.0514, −122.0851); Unnamed Tributary (40.0530, −122.0769).

(2) Whitmore Hydrologic Unit 5507—*(i) Inks Creek Hydrologic Sub-area 550711.* Outlet(s) = Inks Creek (Lat 40.3305, Long −122.1520) upstream to endpoint(s) in: Inks Creek (40.3418, −122.1332).

(ii) Battle Creek Hydrologic Sub-area 550712. Outlet(s) = Battle Creek (Lat 40.4083, Long −122.1102) upstream to endpoint(s) in: Baldwin Creek (40.4369, −121.9885); Battle Creek (40.4228, −121.9975); Brush Creek (40.4913, −121.8664); Millseat Creek (40.4808, −121.8526); Morgan Creek (40.3654, −121.9132); North Fork Battle Creek (40.4877, −121.8185); Panther Creek (40.3897, −121.6106); South Ditch (40.3997, −121.9223); Ripley Creek (40.4099, −121.8683); Soap Creek (40.3904, −121.7569); South Fork Battle Creek (40.3531, −121.6682); Unnamed Tributary (40.3567, −121.8293); Unnamed Tributary (40.4592, −121.8671).

(iii) Ash Creek Hydrologic Sub-area 550721. Outlet(s) = Ash Creek (Lat 40.4401, Long −122.1375) upstream to endpoint(s) in: Ash Creek (40.4628, −122.0066).

(iv) Inwood Hydrologic Sub-area 550722. Outlet(s) = Ash Creek (Lat 40.4628, Long −122.0066); Bear Creek (40.4352, −122.2039) upstream to endpoint(s) in: Ash Creek (40.4859, −121.8993); Bear Creek (40.5368, −121.9560); North Fork Bear Creek (40.5736, −121.8683).

(v) South Cow Creek Hydrologic Sub-area 550731. Outlet(s) = South Cow Creek (Lat 40.5438, Long −122.1318) upstream to endpoint(s) in: South Cow Creek (40.6023, −121.8623).

(vi) Old Cow Creek Hydrologic Sub-area 550732. Outlet(s) = Clover Creek (Lat 40.5788, Long −122.1252); Old Cow Creek (40.5438, −122.1318) upstream to endpoint(s) in: Clover Creek (40.6305, −122.0304); Old Cow Creek (40.5442, −122.1317).

(vii) Little Cow Creek Hydrologic Sub-area 550733. Outlet(s) = Little Cow Creek (Lat 40.6148, −122.2271); Oak Run Creek (40.6171, −122.1225) upstream to endpoint(s) in: Little Cow Creek (40.7114, −122.0850); Oak Run Creek (40.6379, −122.0856).

(3) Redding Hydrologic Unit 5508—*(i) Enterprise Flat Hydrologic Sub-area 550810.* Outlet(s) = Sacramento River (Lat 40.2526, Long −122.1707) upstream to endpoint(s) in: Ash Creek (40.4401, −122.1375); Battle Creek (40.4083, −122.1102); Bear Creek (40.4360, −122.2036); Churn Creek (40.5986, −122.3418); Clear Creek (40.5158, −122.5256); Clover Creek (40.5788, −122.1252); Cottonwood Creek (40.3777, −122.1991); Cow Creek (40.5437, −122.1318); East Fork Stillwater Creek (40.6495, −122.2934); Inks Creek (40.3305, −122.1520); Little Cow Creek (40.6148, −122.2271); Oak Run (40.6171, −122.1225); Old Cow Creek (40.5442, −122.1317); Olney Creek (40.5439, −122.4687); Paynes Creek (40.3024, −122.1012); Stillwater Creek (40.6264, −122.3056); Sulphur Creek (40.6164, −122.4077).

(ii) Lower Cottonwood Hydrologic Sub-area 550820. Outlet(s) = Creek (Lat 40.3777, Long −122.1991) upstream to endpoint(s) in: Cold Fork Cottonwood Creek (40.2060, −122.6608); Cottonwood Creek (40.3943, −122.5254); Middle Fork Cottonwood Creek (40.3314, −122.6663); North Fork Cottonwood Creek (40.4539, −122.5610); South Fork Cottonwood Creek (40.1578, −122.5809).

(4) Eastern Tehama Hydrologic Unit 5509—*(i) Big Chico Creek Hydrologic Sub-area 550914.* Outlet(s) = Big Chico Creek (Lat 39.7757, Long −121.7525) upstream to endpoint(s) in: Big Chico Creek (39.8898, −121.6952).

(ii) Deer Creek Hydrologic Sub-area 550920. Outlet(s) = Deer Creek (Lat 40.0142, Long −121.9476) upstream to endpoint(s) in: Deer Creek (40.2025, −121.5130).

(iii) Upper Mill Creek Hydrologic Sub-area 550942. Outlet(s) = Mill Creek (Lat 40.0550, Long −122.0317) upstream to endpoint(s) in: Mill Creek (40.3766, −121.5098); Rocky Gulch Creek (40.2888, −121.5997).

(iv) Dye Creek Hydrologic Sub-area 550962. Outlet(s) = Dye Creek (Lat 40.0910, Long −122.0719) upstream to endpoint(s) in: Dye Creek (40.0996, −121.9612).

(v) Antelope Creek Hydrologic Sub-area 550963. Outlet(s) = Antelope Creek (Lat 40.2023, Long −122.1272) upstream to endpoint(s) in: Antelope Creek (40.2416, −121.8630); Middle Fork Antelope Creek (40.2673, −121.7744); North Fork Antelope Creek (40.2807, −121.7645); South Fork Antelope Creek (40.2521, −121.7575).

(vi) Paynes Creek Hydrologic Sub-area 550964. Outlet(s) = Paynes Creek (Lat 40.3024, Long −122.1012) upstream to endpoint(s) in: Paynes Creek (40.3357, −121.8300).

(5) Sacramento Delta Hydrologic Unit 5510—*Sacramento Delta Hydrologic Sub-area 551000.* Outlet(s) = Sacramento River (Lat 38.0653, Long −121.8418) upstream to endpoint(s) in: Cache Slough (38.2984, −121.7490); Elk Slough (38.4140, −121.5212); Elkhorn Slough (38.2898, −121.6271); Georgiana Slough (38.2401, −121.5172); Horseshoe Bend (38.1078, −121.7117); Lindsey Slough (38.2592, −121.7580); Miners Slough (38.2864, −121.6051); Prospect Slough (38.2830, −121.6641); Putah Creek (38.5155, −121.5885); Sevenmile Slough (38.1171, −121.6298); Streamboat Slough (38.3052, −121.5737); Sutter Slough (38.3321, −121.5838); Threemile Slough (38.1155, −121.6835); Ulatis Creek (38.2961, −121.7835); Unnamed Tributary (38.2937, −121.7803); Unnamed Tributary (38.2937, −121.7804); Yolo Bypass (38.5800, −121.5838).

(6) Valley−Putah−Cache Hydrologic Unit 5511—*Lower Putah Creek Hydrologic Sub-area 551120.* Outlet(s) = Sacramento Bypass (Lat 38.6057, Long −121.5563); Yolo Bypass (38.5800, −121.5838) upstream to endpoint(s) in: Sacramento Bypass (38.5969, −121.5888); Yolo Bypass (38.7627, −121.6325).

(7) American River Hydrologic Unit 5514—*Auburn Hydrologic Sub-area 551422.* Outlet(s) = Aubourn Ravine (Lat 38.8921, Long −121.2181); Coon Creek (38.9891, −121.2556); Doty Creek (38.9401, −121.2434) upstream to endpoint(s) in: Auburn Ravine (38.8888, −121.1151); Coon Creek (38.9659,

−121.1781); Doty Creek (38.9105, −121.1244).

(8) Marysville Hydrologic Unit 5515—*(i) Lower Yuba River Hydrologic Sub-area 551530.* Outlet(s) = Yuba River (Lat 39.1270, Long −121.5981) upstream to endpoint(s) in: Bear River (39.2203, −121.3314).

(ii) Lower Feather River Hydrologic Sub-area 551540. Outlet(s) = Feather River (Lat 39.1264, Long −121.5984) upstream to endpoint(s) in: Feather River (39.5205, −121.5475).

(9) Yuba River Hydrologic Unit 5517—*(i) Browns Valley Hydrologic Sub-area 551712.* Outlet(s) = Dry Creek (Lat 39.2215, Long −121.4082); Yuba River (39.2203, −121.3314) upstream to endpoint(s) in: Dry Creek (39.3232, Long −121.3155); Yuba River (39.2305, −121.2813).

(ii) Englebright Hydrologic Sub-area 551714. Outlet(s) = Yuba River (Lat 39.2305, Long −121.2813) upstream to endpoint(s) in: Yuba River (39.2399, −121.2689).

(10) Valley−American Hydrologic Unit 5519—*(i) Lower American Hydrologic Sub-area 551921.* Outlet(s) = American River (Lat 38.5971, −121.5088) upstream to endpoint(s) in: American River (38.6373, −121.2202); Dry Creek (38.7554, −121.2676); Miner's Ravine (38.8429, −121.1178); Natomas East Main Canal (38.6646, −121.4770); Secret Ravine(38.8541, −121.1223).

(ii) Pleasant Grove Hydrologic Sub-area 551922. Outlet(s) = Sacramento River (Lat 38.6026, Long −121.5155) upstream to endpoint(s) in: Auburn Ravine (38.8913, −121.2424); Coon Creek (38.9883, −121.2609); Doty Creek (38.9392, −121.2475); Feather River (39.1264, −121.5984).

(11) Colusa Basin Hydrologic Unit 5520—*(i) Sycamore−Sutter Hydrologic Sub-area 552010.* Outlet(s) = Sacramento River (Lat 38.7604, Long −121.6767) upstream to endpoint(s) in: Tisdale Bypass (39.0261, −121.7456).

(ii) Sutter Bypass Hydrologic Sub-area 552030. Outlet(s) = Sacramento River (Lat 38.7851, Long −121.6238) upstream to endpoint(s) in: Butte Creek (39.1990, −121.9286); Butte Slough (39.1987, −121.9285); Nelson Slough (38.8956, −121.6180); Sacramento Slough (38.7844, −121.6544); Sutter Bypass (39.1586, −121.8747).

(iii) Butte Basin Hydrologic Sub-area 552040. Outlet(s) = Butte Creek (Lat 39.1990, Long −121.9286); Sacramento River (39.4141, −122.0087) upstream to endpoint(s) in: Butte Creek (39.1949, −121.9361); Colusa Bypass (39.2276, −121.9402); Little Chico Creek (39.7380, −121.7490); Little Dry Creek (39.6781, −121.6580).

(12) Butte Creek Hydrologic Unit 5521—*(i) Upper Butte Creek Hydrologic Sub-area 552120.* Outlet(s) = Little Chico Creek (Lat 39.7380, Long −121.7490) upstream to endpoint(s) in: Little Chico Creek (39.8680, −121.6660).

(ii) Upper Little Chico Hydrologic Sub-area 552130. Outlet(s) = Butte Creek (Lat 39.7097, Long −121.7503) upstream to endpoint(s) in: Butte Creek (39.8215, −121.6468); Little Butte Creek (39.8159, −121.5819).

(13) Ball Mountain Hydrologic Unit 5523—*Thomes Creek Hydrologic Sub-area 552310.* Outlet(s) = Thomes Creek (39.8822, −122.5527) upstream to endpoint(s) in: Doll Creek (39.8941, −122.9209); Fish Creek (40.0176, −122.8142); Snake Creek (39.9945, −122.7788); Thomes Creek (39.9455, −122.8491); Willow Creek (39.8930, −122.9051).

(14) Shasta Bally Hydrologic Unit 5524—*(i) South Fork Hydrologic Sub-area 552433.* Outlet(s) = Cold Fork Cottonwood Creek (Lat 40.2060, Long −122.6608); South Fork Cottonwood Creek (40.1578, −122.5809) upstream to endpoint(s) in: Cold Fork Cottonwood Creek (40.1881, −122.8690); South Fork Cottonwood Creek (40.1232, −122.8761).

(ii) Ono Hydrologic Sub-area 552435. Outlet(s) = North Fork Cottonwood Creek (Lat 40.4539, Long −122.5610) upstream to endpoint(s) in: North Fork Cottonwood Creek (40.5005, −122.6972).

(iii) Platina Hydrologic Sub-area 552436. Outlet(s) = Middle Fork Cottonwood Creek (Lat 40.3314, Long −122.6663) upstream to endpoint(s) in: Beegum Creek (40.3149, −122.9776): Middle Fork Cottonwood Creek (40.3512, −122.9629).

(iv) Spring Creek Hydrologic Sub-area 552440. Outlet(s) = Sacramento River (Lat 40.5943, Long −122.4343) upstream to endpoint(s) in: Middle Creek (40.5904, −121.04825); Rock Creek (40.6137, −122.5180); Sacramento River (40.6116, −122.4462); Salt Creek (40.5830, −122.4586); Unnamed Tributary (40.5734, −122.4844).

(v) Kanaka Peak Hydrologic Sub-area 552462. Outlet(s) = Clear Creek (Lat 40.5158, Long −122.5256) upstream to endpoint(s) in: Clear Creek (40.5998, 122.5399).

(15) North Valley Floor Hydrologic Unit 5531—*(i) Lower Mokelumne Hydrologic Sub-area 553120.* Outlet(s) = Mokelumne River (Lat 38.2104, Long −121.3804) upstream to endpoint(s) in: Mokelumne River (38.2263, −121.0241); Murphy Creek (38.2491, −121.0119).

(ii) Lower Calaveras Hydrologic Sub-area 553130. Outlet(s) = Calaveras River (Lat 37.9836, Long −121.3110); Mormon Slough (37.9456, −121.2907) upstream to endpoint(s) in: Calaveras River (38.1025, −120.8503); Mormon Slough (38.0532, −121.0102); Stockton Diverting Canal (37.9594, −121.2024).

(16) Upper Calaveras Hydrologic Unit 5533—*New Hogan Reservoir Hydrologic Sub-area 553310.* Outlet(s) = Calaveras River (Lat 38.1025, Long −120.8503) upstream to endpoint(s) in: Calaveras River (38.1502, −120.8143).

(17) Stanislaus River Hydrologic Unit 5534—*Table Mountain Hydrologic Sub-area 553410.* Outlet(s) = Stanislaus River (Lat 37.8355, Long −120.6513) upstream to endpoint(s) in: Stanislaus River (37.8631, −120.6298).

(18) San Joaquin Valley Floor Hydrologic Unit 5535—*(i) Riverbank Hydrologic Sub-area 553530.* Outlet(s) = Stanislaus River (Lat 37.6648, Long −121.2414) upstream to endpoint(s) in: Stanislaus River (37.8355, −120.6513).

(ii) Turlock Hydrologic Sub-area 553550. Outlet(s) = Tuolumne River (Lat 37.6059, Long −121.1739) upstream.

(iii) Montpelier Hydrologic Sub-area 553560. Outlet(s) = Tuolumne River (Lat 37.6401, Long −120.6526) upstream to endpoint(s) in: Tuolumne River (37.6721, −120.4445).

(iv) El Nido-Stevinson Hydrologic Sub-area 553570. Outlet(s) = Merced River (Lat 37.3505, Long −120.9619) upstream to endpoint(s) in: Merced River (37.3620, −120.8507).

(v) Merced Hydrologic Sub-area 553580. Outlet(s) = Merced River (Lat 37.3620, Long −120.8507) upstream to endpoint(s) in: Merced River (37.4982, −120.4612).

(vi) Fahr Creek Hydrologic Sub-area 553590. Outlet(s) = Merced River (Lat 37.4982, Long −120.4612) upstream to endpoint(s) in: Merced River (37.5081, −120.3581).

(19) Delta-Mendota Canal Hydrologic Unit 5541—*(i) Patterson Hydrologic Sub-area 554110.* Outlet(s) = San Joaquin River (Lat 37.6763, Long −121.2653) upstream to endpoint(s) in: San Joaquin River (37.3491, −120.9759).

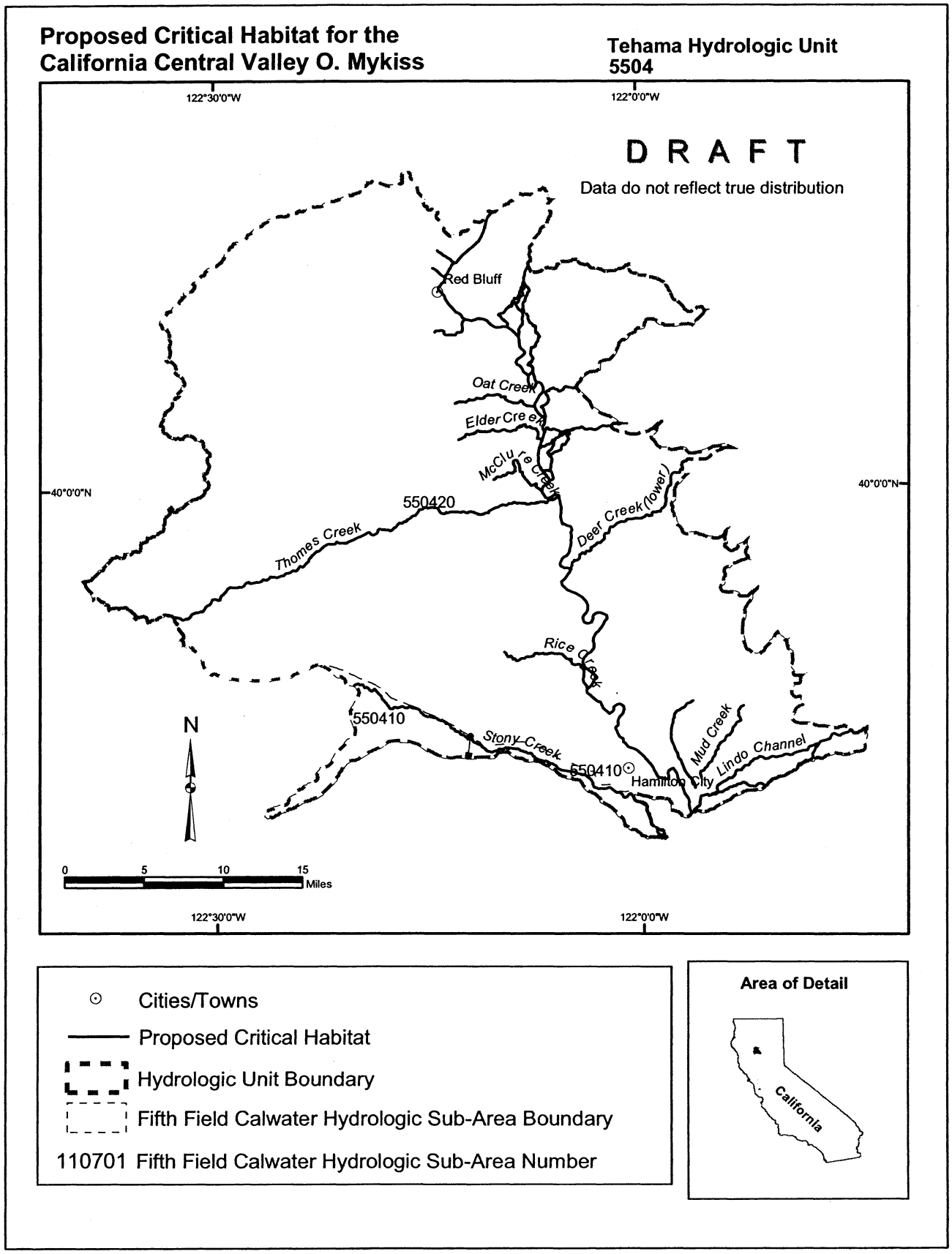
(ii) Los Banos Hydrologic Sub-area 554120. Outlet(s) = Merced River (Lat 37.3490, Long −120.9756) upstream to endpoint(s) in: Merced River (37.3505, −120.9619).

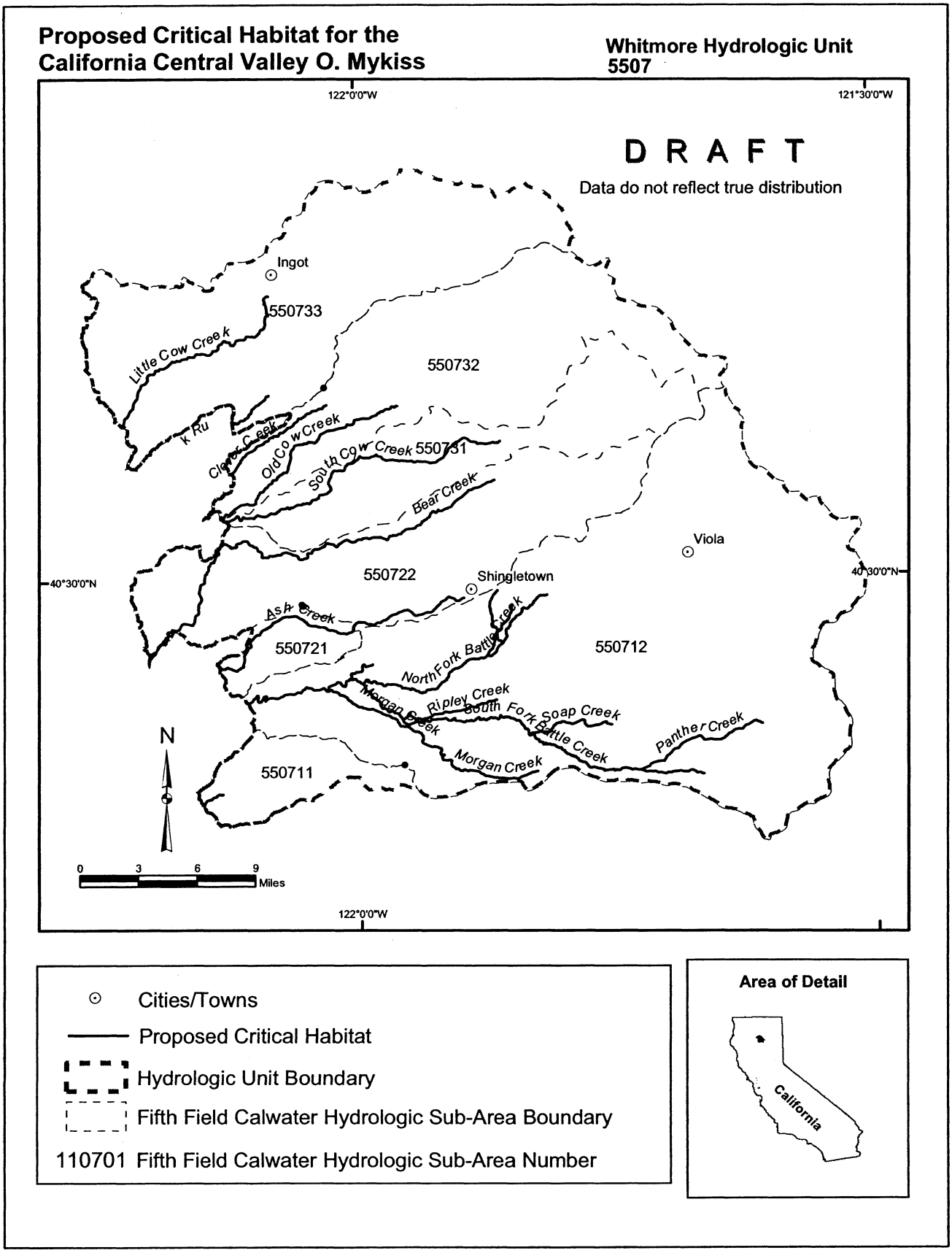
(20) San Joaquin Delta Hydrologic Unit 5544—*San Joaquin Delta Hydrologic Sub-area 554400.* Outlet(s) = San Joaquin River (Lat 38.0246, Long −121.7471) upstream to endpoint(s) in: Big Break (38.0160, −121.6849); Bishop Cut (38.0870, −121.4158); Calaveras River (37.9836, −121.3110); Cosumnes

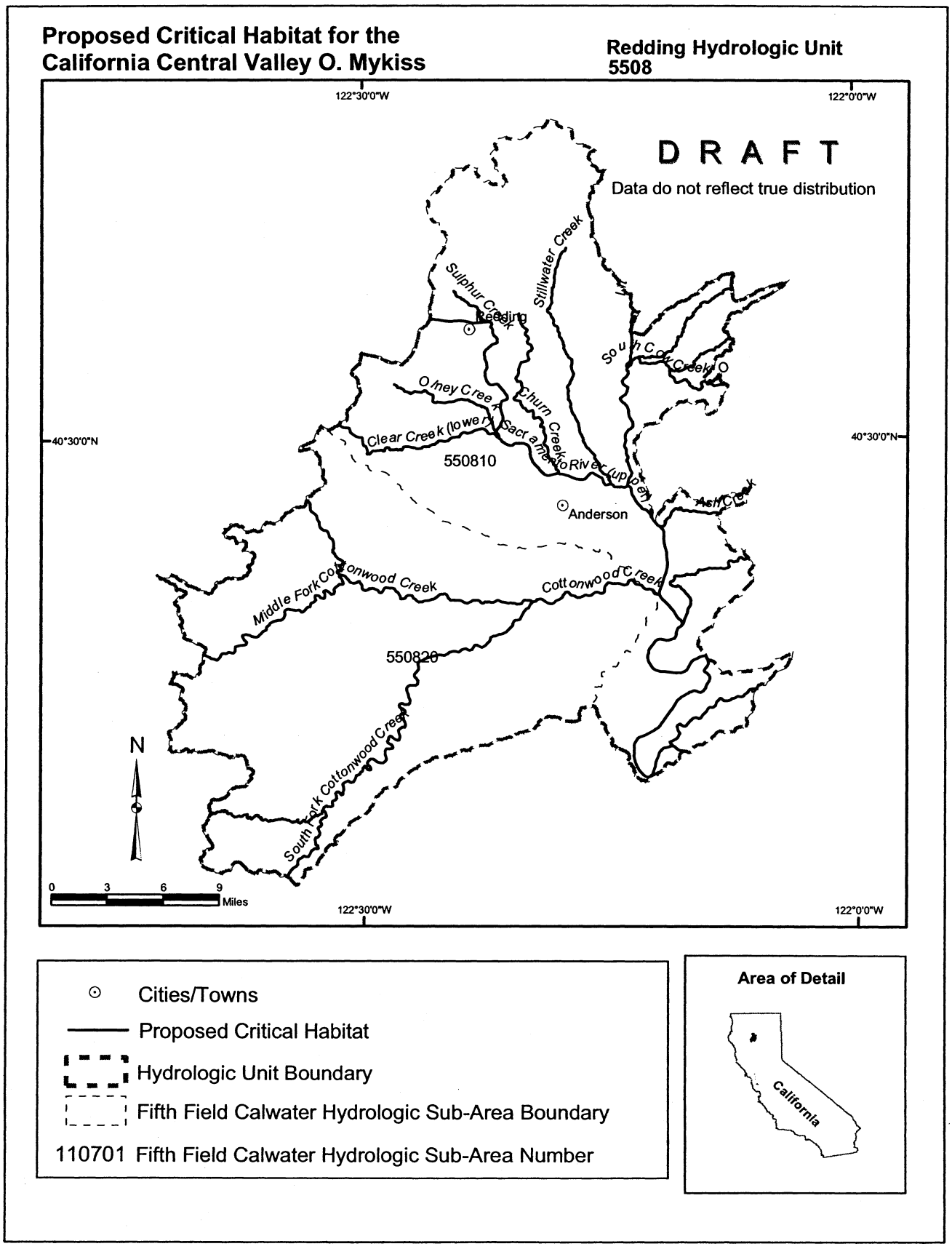
River (38.2538, −121.4074); Disappointment Slough (38.0439, −121.4201); Dutch Slough (38.0088, −121.6281); Empire Cut (37.9714, −121.4762); False River (38.0479, −121.6232); Frank's Tract (38.0220, −121.5997); Frank's Tract (38.0300, −121.5830); Holland Cut (37.9939, −121.5757); Honker Cut (38.0680, −121.4589); Kellog Creek (37.9158, −121.6051); Latham Slough (37.9716, −121.5122); Middle River (37.8216, −121.3747); Mokelumne River (38.2104, −121.3804); Mormon Slough (37.9456, −121.2907); Mosher Creek (38.0327, −121.3650); North Mokelumne River (38.2274, −121.4918); Old River (37.8086, −121.3274); Orwood Slough (37.9409, −121.5332); Paradise Cut (37.7605, −121.3085); Pixley Slough (38.0443, −121.3868); Potato Slough (38.0440, −121.4997); Rock Slough (37.9754, −121.5795); Sand Mound Slough (38.0220, −121.5997); Stockton Deep Water Channel (37.9957, −121.4201); Turner Cut (37.9972, −121.4434); Unnamed Tributary (38.1165, −121.4976); Victoria Canal (37.8891, −121.4895); White Slough (38.0818, −121.4156); Woodward Canal (37.9037, −121.4973).

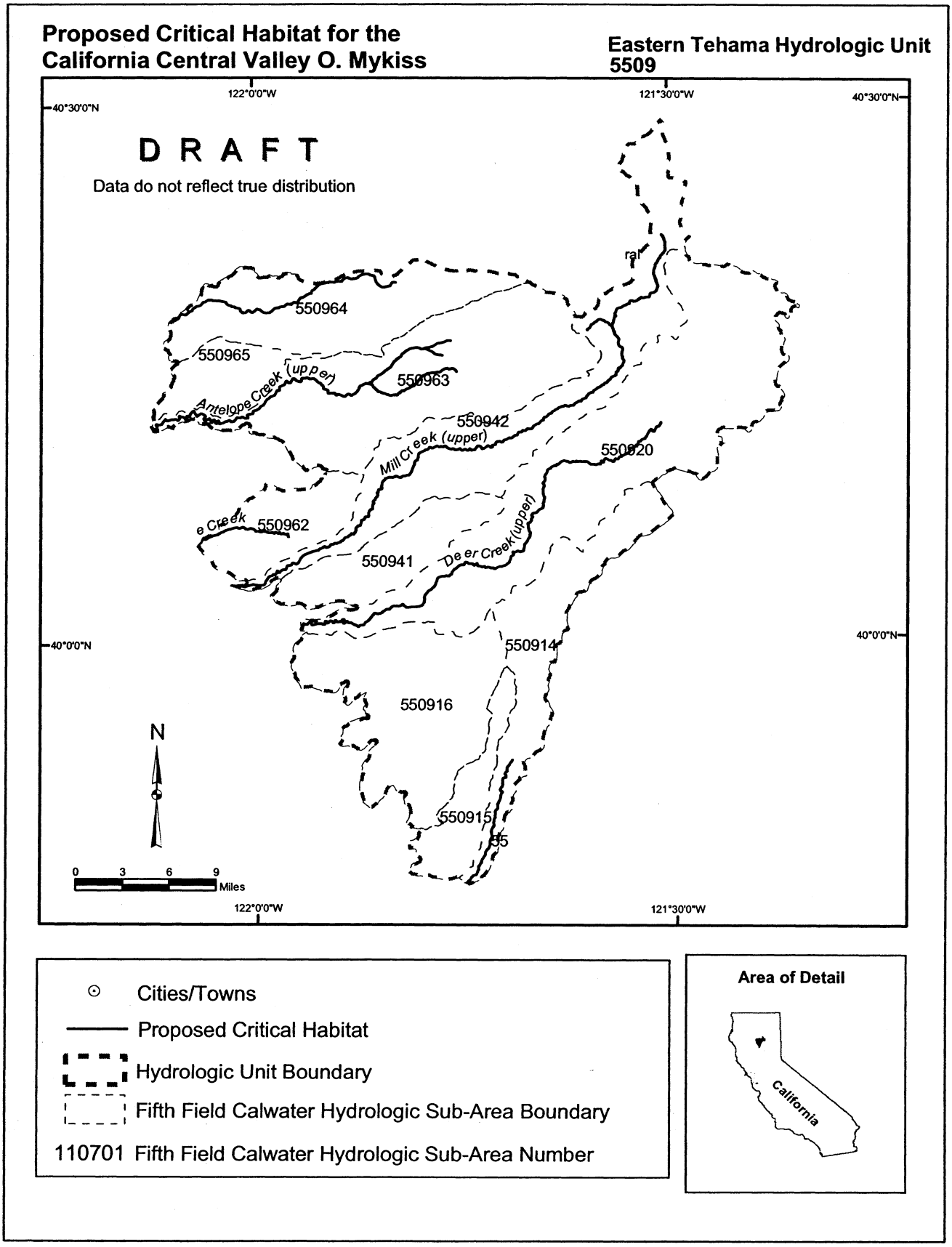
(21) Maps of the proposed critical habitat for the Central Valley *O. mykiss* ESU follow:

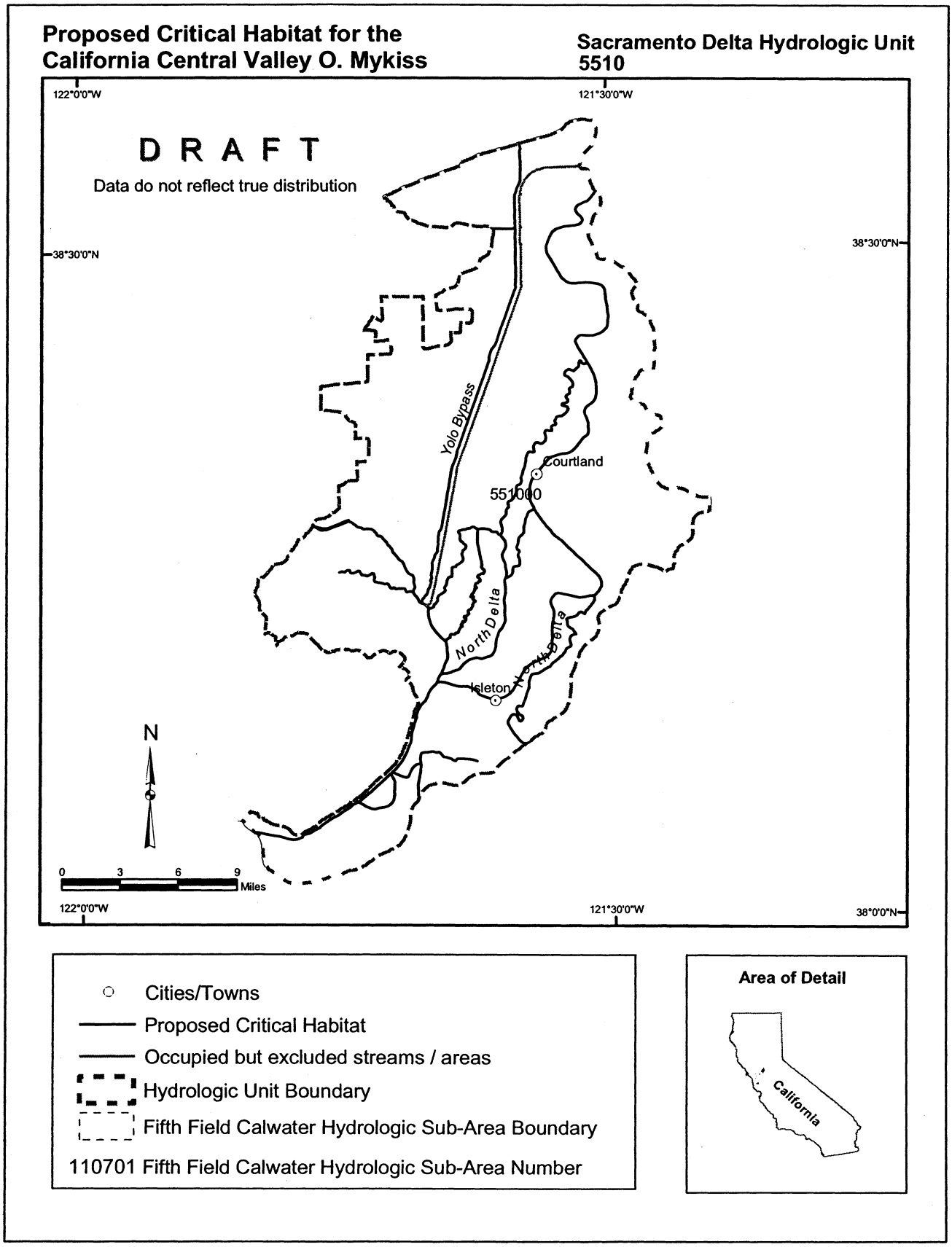
BILLING CODE 3510–22–P


Proposed Critical Habitat for the California Central Valley O. Mykiss
Tehama Hydrologic Unit 5504
122°30'0"W
122°0'0"W
DRAFT
Data do not reflect true distribution
Red Bluff
Oat Creek
Elder Creek
McClure Creek
40°0'0"N
550420
Thomes Creek
Deer Creek (lower)
Rice Creek
550410
Stony Creek
Mud Creek
Lindo Channel
Hamilton City
N
0 5 10 15
Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the California Central Valley O. Mykiss
Whitmore Hydrologic Unit 5507
122°0'0"W
121°30'0"W
DRAFT
Data do not reflect true distribution
Ingot
550733
Little Cow Creek
550732
Old Cow Creek
South Cow Creek
550731
Bear Creek
Viola
40°30'0"N
550722
Shingletown
Ash Creek
550721
550712
North Fork Battle Creek
Ripley Creek
South Fork Soap Creek
Morgan Creek
Panther Creek
Battle Creek
550711
N
0 3 6 9
Miles
122°0'0"W
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California

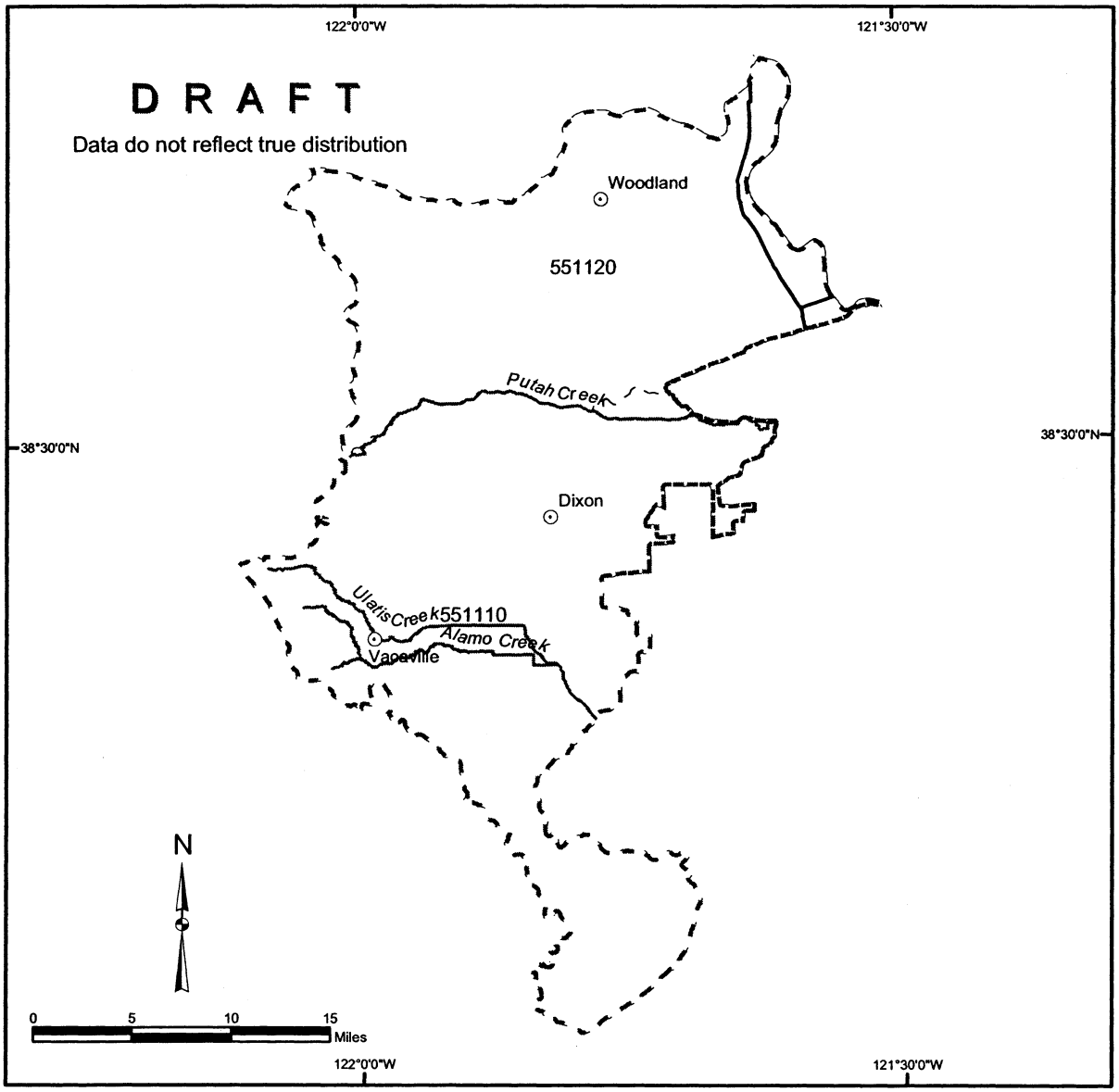

Proposed Critical Habitat for the California Central Valley O. Mykiss
Redding Hydrologic Unit 5508
122°30'0"W
122°0'0"W
DRAFT
Data do not reflect true distribution
Stillwater Creek
Sulphur Creek
Redding
South Cow Creek
Olney Creek
Churn Creek
Clear Creek (lower)
Sacramento River (upper)
40°30'0"N
550810
Anderson
Ash Creek
Middle Fork Cottonwood Creek
Cottonwood Creek
550820
South Fork Cottonwood Creek
N
0 3 6 9
Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the
California Central Valley O. Mykiss
Eastern Tehama Hydrologic Unit
5509
122°0'0"W
121°30'0"W
40°30'0"N
40°0'0"N
DRAFT
Data do not reflect true distribution
550964
550965
Antelope Creek (upper)
550963
550942
Mill Creek (upper)
550920
550962
550941
Deer Creek (upper)
550914
550916
550915
N
0 3 6 9
Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the California Central Valley O. Mykiss
Sacramento Delta Hydrologic Unit 5510
122°0'0"W
121°30'0"W
D R A F T
Data do not reflect true distribution
38°30'0"N
38°0'0"N
Yolo Bypass
Courtland
551000
North Delta
Isleton
N
0 3 6 9
Miles
Cities/Towns
Proposed Critical Habitat
Occupied but excluded streams / areas
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California

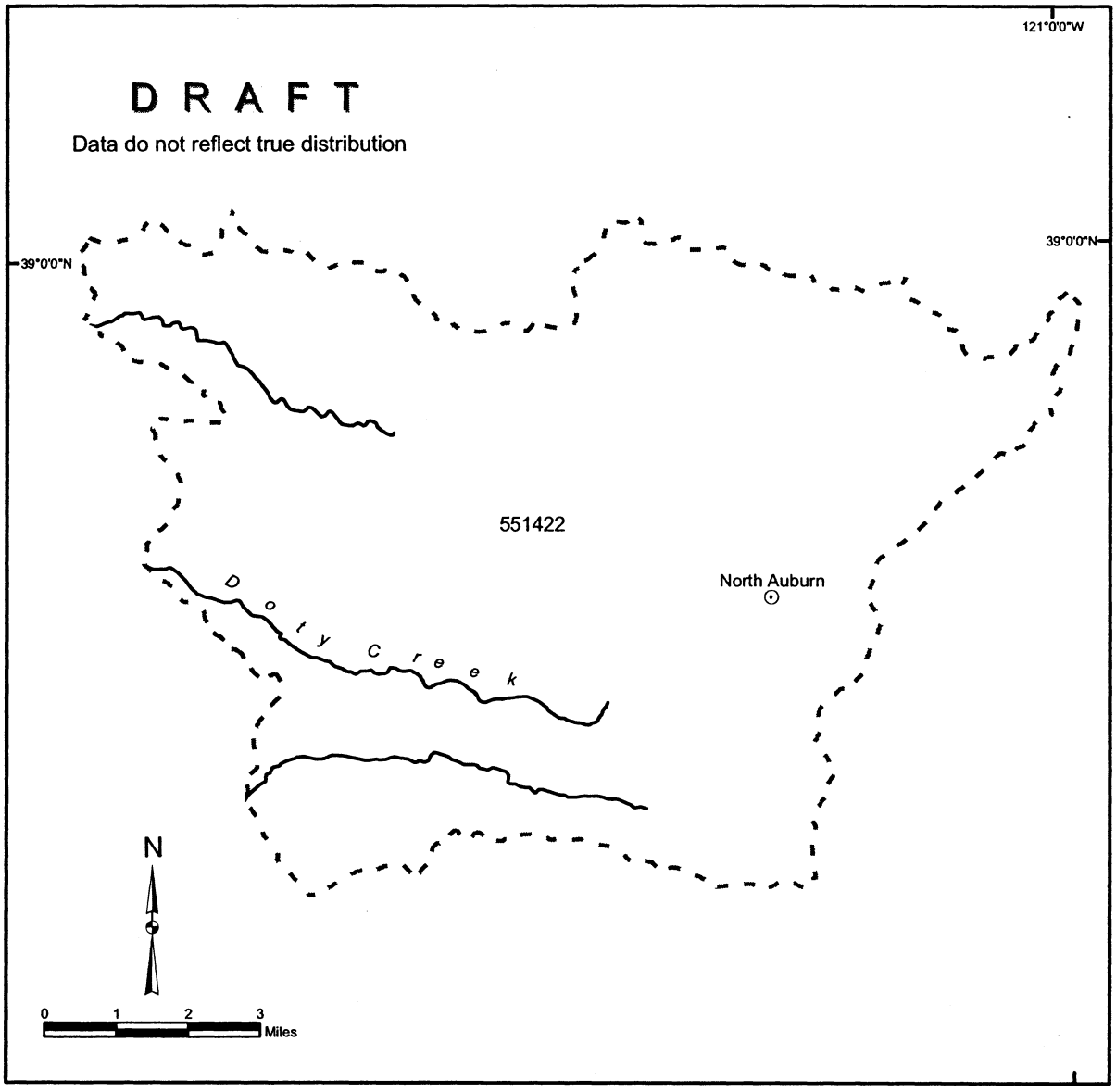
Proposed Critical Habitat for the California Central Valley O. Mykiss

Valley Putah-Cache Hydrologic Unit 5511



Proposed Critical Habitat for the California Central Valley O. Mykiss

American River Hydrologic Unit 5514



⊙ Cities/Towns

Proposed Critical Habitat

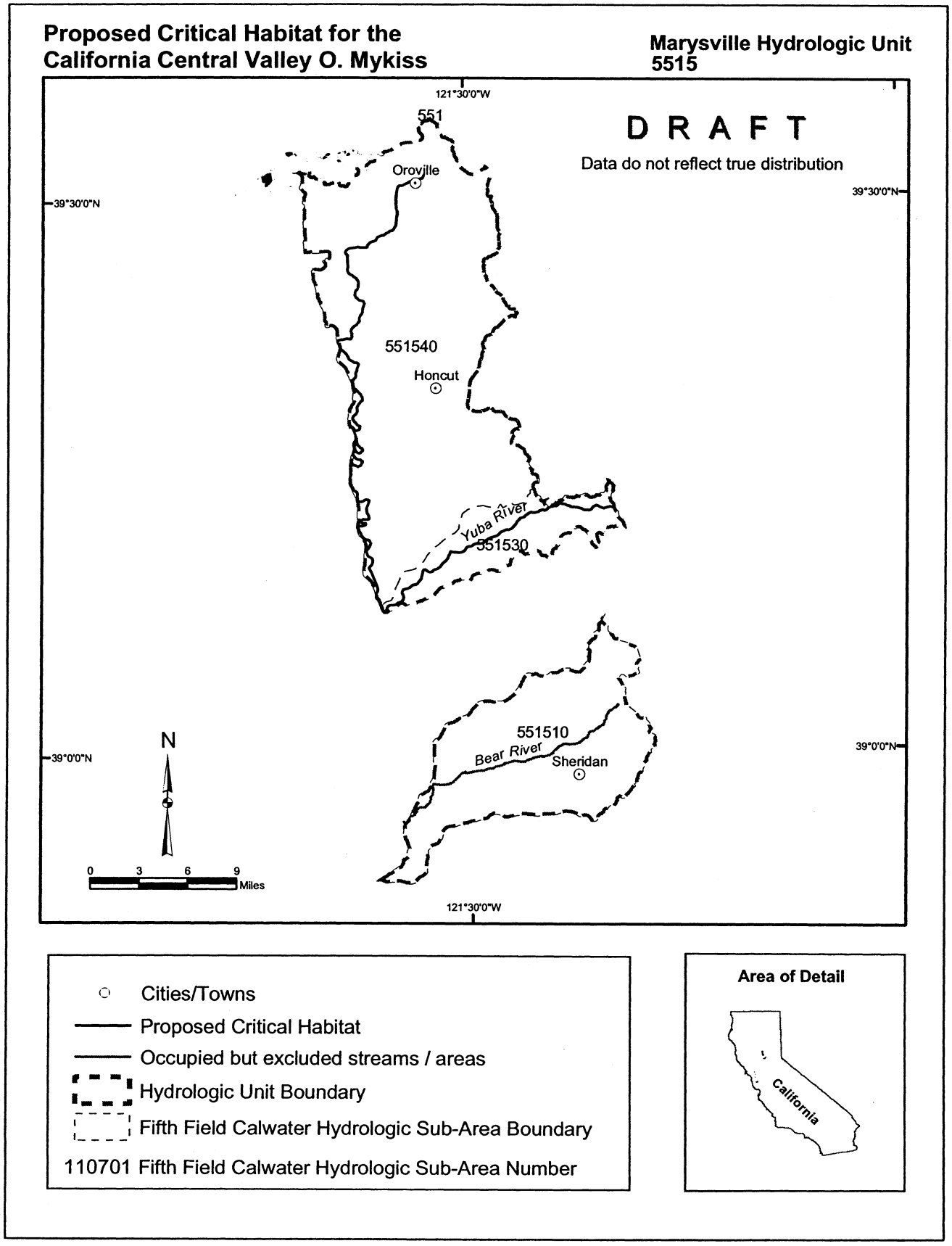
Hydrologic Unit Boundary

Fifth Field Calwater Hydrologic Sub-Area Boundary

110701 Fifth Field Calwater Hydrologic Sub-Area Number

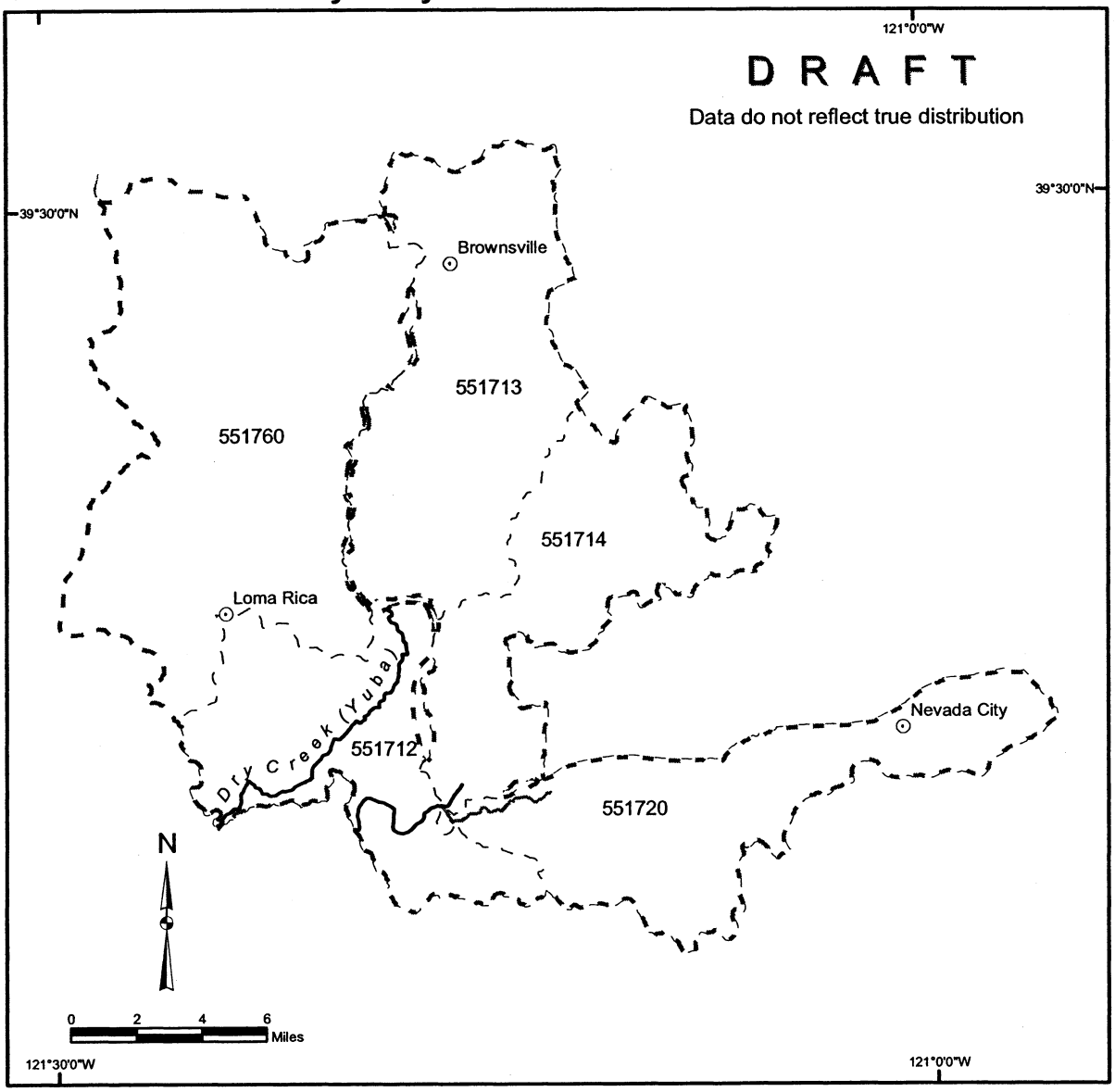
Area of Detail




Proposed Critical Habitat for the
California Central Valley O. Mykiss
Marysville Hydrologic Unit
5515
121°30'0"W
551
DRAFT
Data do not reflect true distribution
Oroville
39°30'0"N
551540
Honcut
Yuba River
551530
551510
Bear River
Sheridan
39°0'0"N
N
0 3 6 9
Miles
Cities/Towns
Proposed Critical Habitat
Occupied but excluded streams / areas
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California

Proposed Critical Habitat for the California Central Valley O. Mykiss

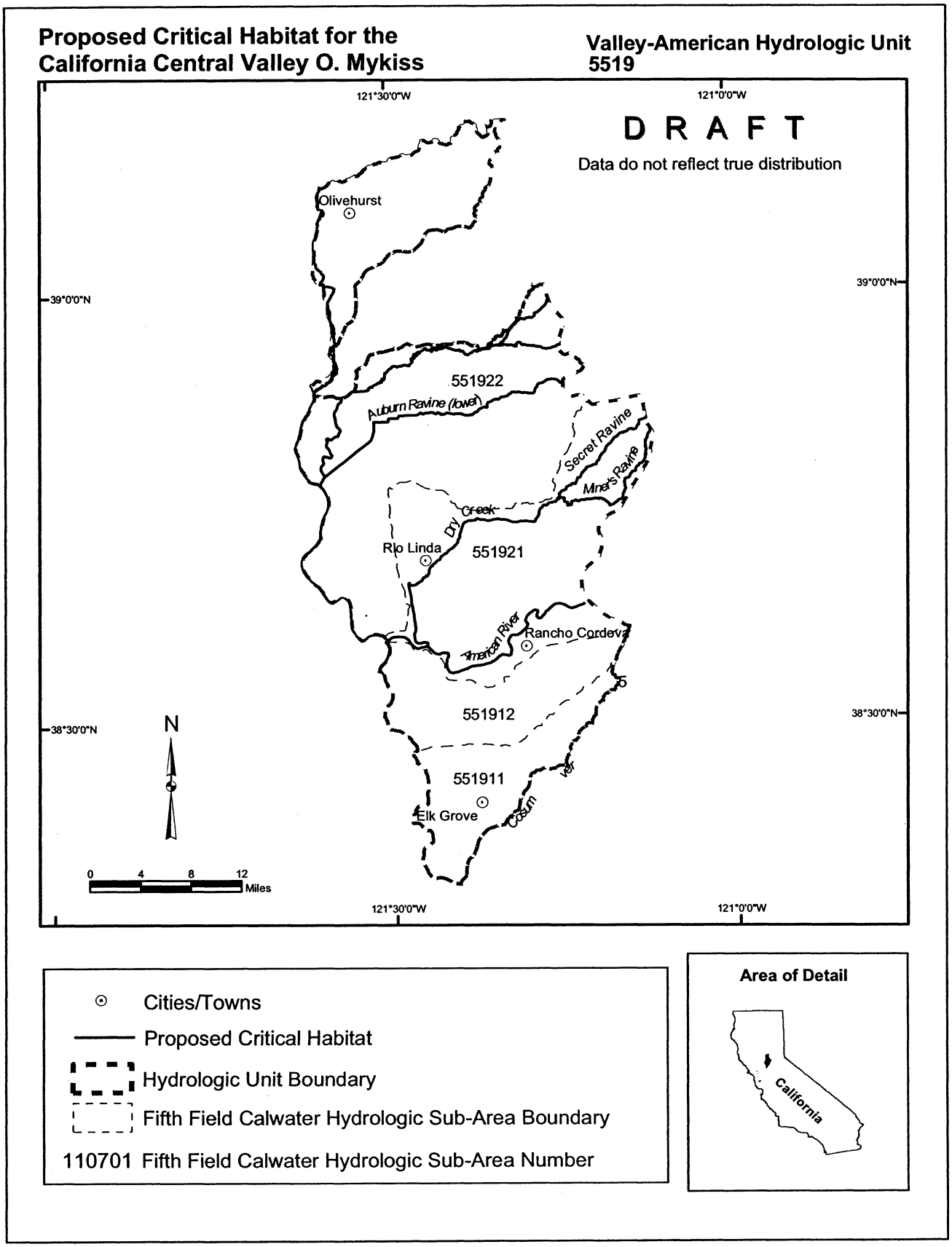
Yuba River Hydrologic Unit 5517

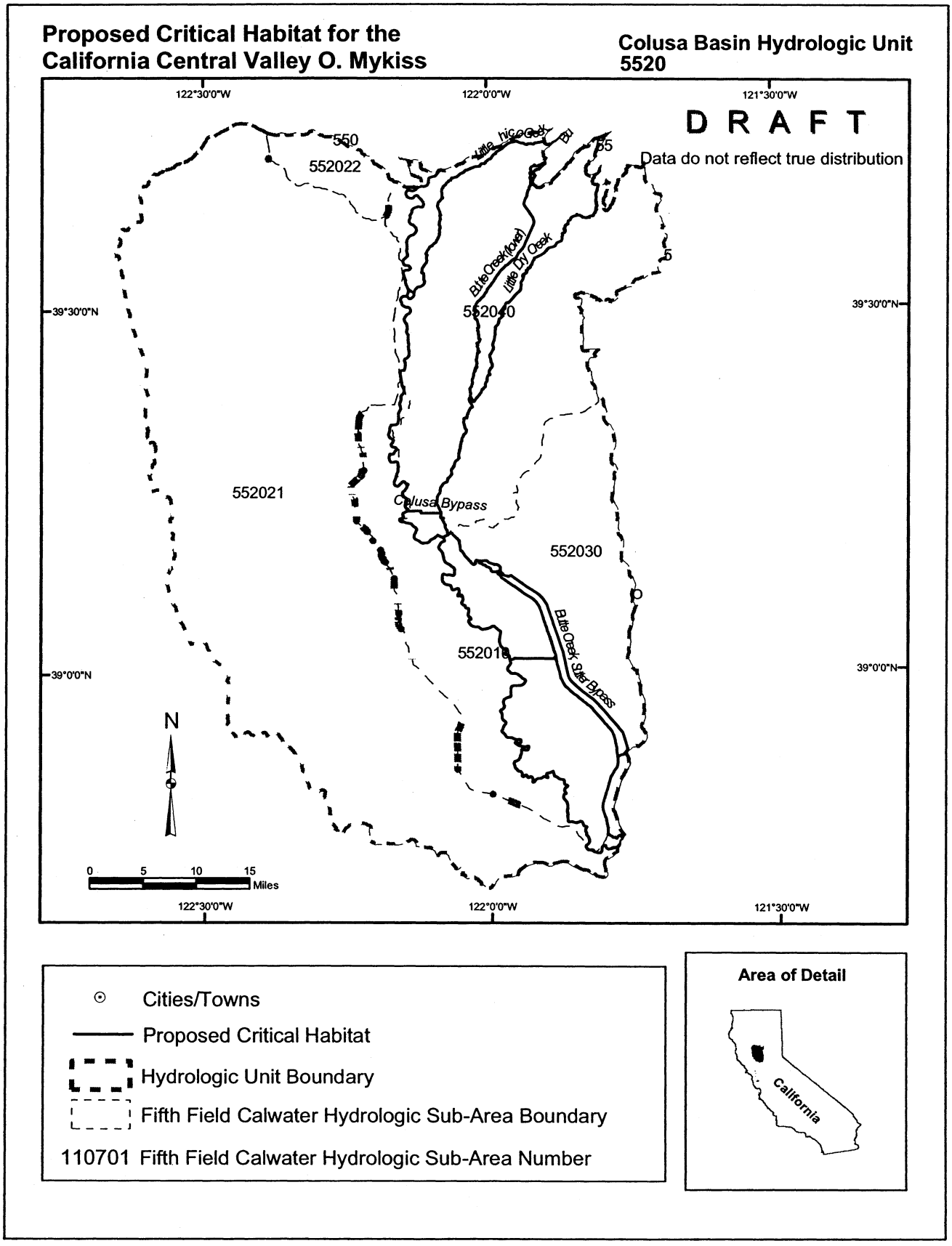


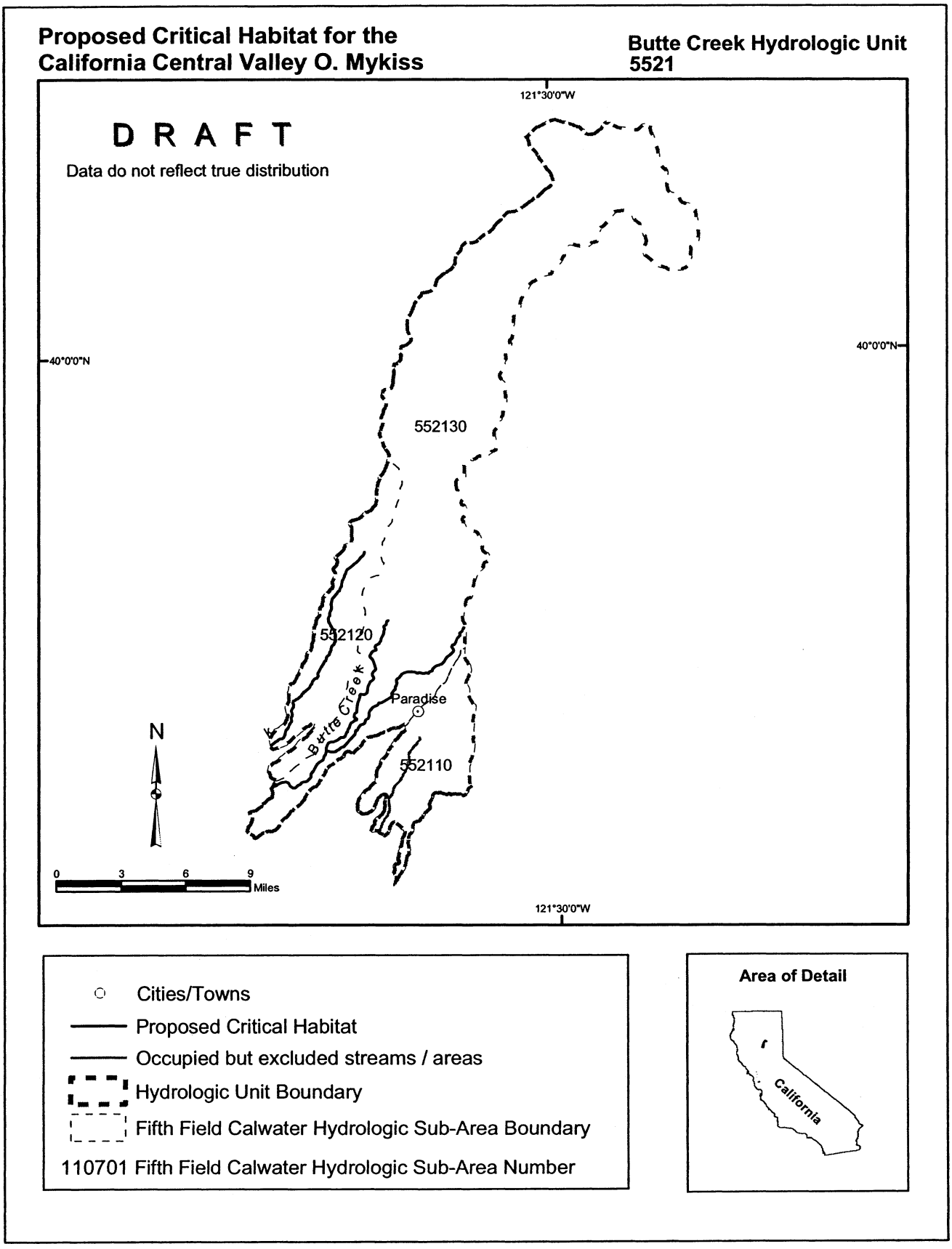
Cities/Towns
Proposed Critical Habitat
Occupied but excluded streams / areas
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number

Area of Detail



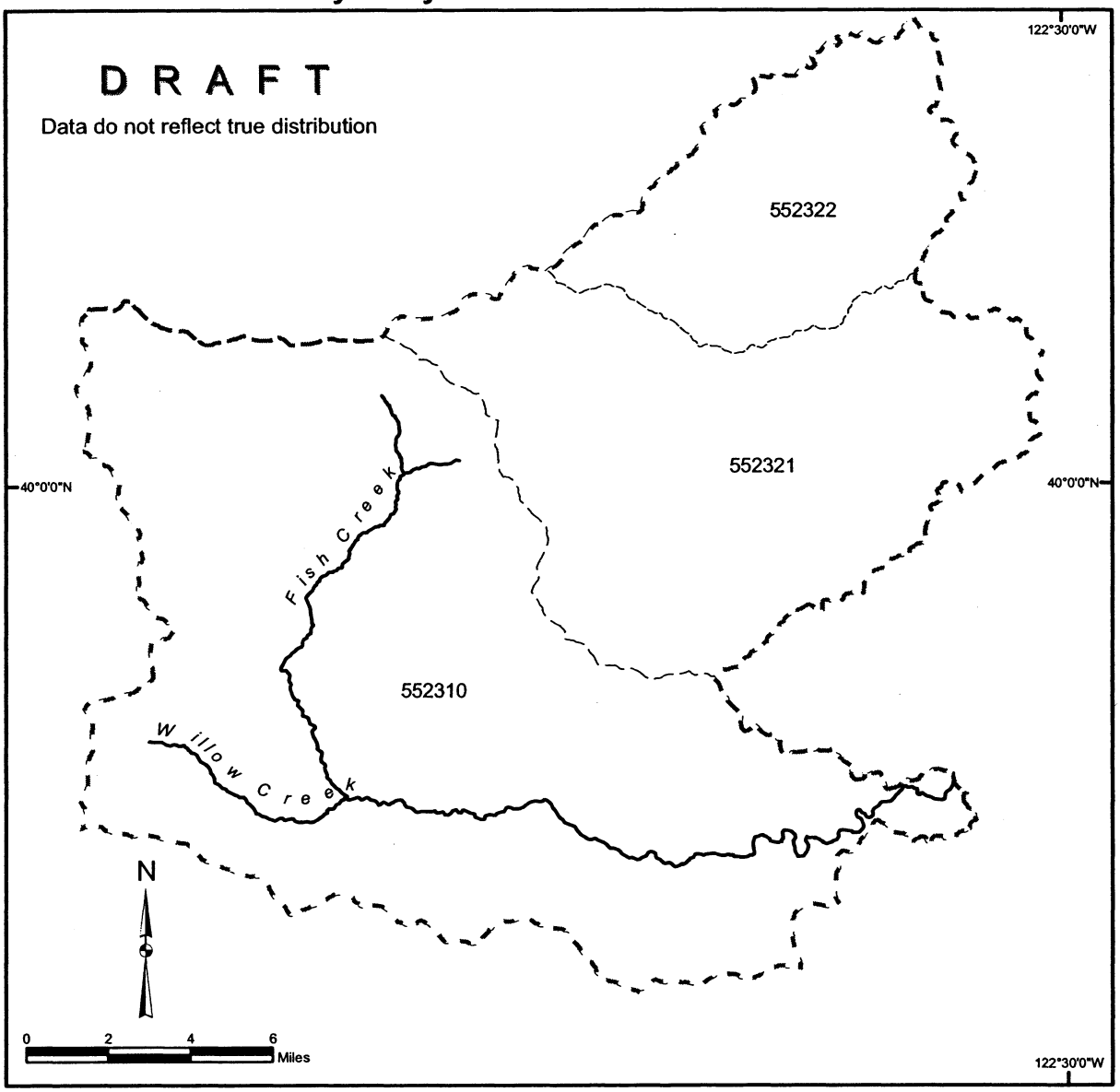

Proposed Critical Habitat for the California Central Valley O. Mykiss
Valley-American Hydrologic Unit 5519
121°30'0"W
121°0'0"W
DRAFT
Data do not reflect true distribution
Olivehurst
39°0'0"N
551922
Auburn Ravine (lower)
Secret Ravine
Miners Ravine
Dry Creek
Rio Linda
551921
American River
Rancho Cordova
38°30'0"N
551912
551911
Elk Grove
Cosumnes River
N
0 4 8 12
Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the California Central Valley O. Mykiss
Colusa Basin Hydrologic Unit 5520
DRAFT
Data do not reflect true distribution
122°30'0"W
122°0'0"W
121°30'0"W
39°30'0"N
39°0'0"N
550
552022
552021
552040
552030
552010
Little Chico Creek
Butte Creek (lower)
Little Dry Creek
Colusa Bypass
Butte Creek Side Bypass
N
0 5 10 15
Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California


Proposed Critical Habitat for the California Central Valley O. Mykiss
Butte Creek Hydrologic Unit 5521
121°30'0"W
DRAFT
Data do not reflect true distribution
40°0'0"N
552130
552120
Butte Creek
Paradise
552110
N
0 3 6 9
Miles
Cities/Towns
Proposed Critical Habitat
Occupied but excluded streams / areas
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California

Proposed Critical Habitat for the California Central Valley O. Mykiss

Ball Mountain Hydrologic Unit 5523



Cities/Towns

Proposed Critical Habitat

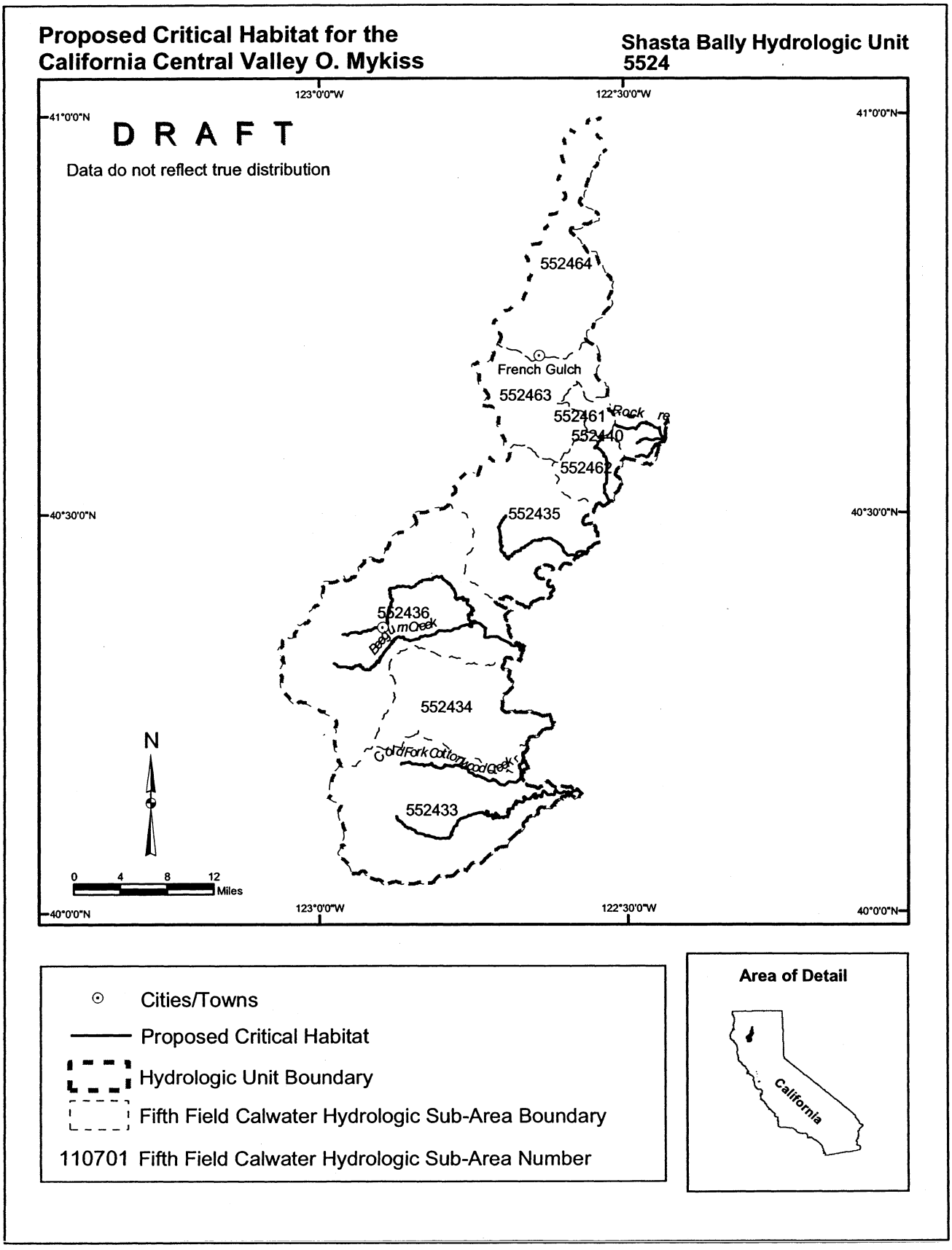
Hydrologic Unit Boundary

Fifth Field Calwater Hydrologic Sub-Area Boundary

110701 Fifth Field Calwater Hydrologic Sub-Area Number

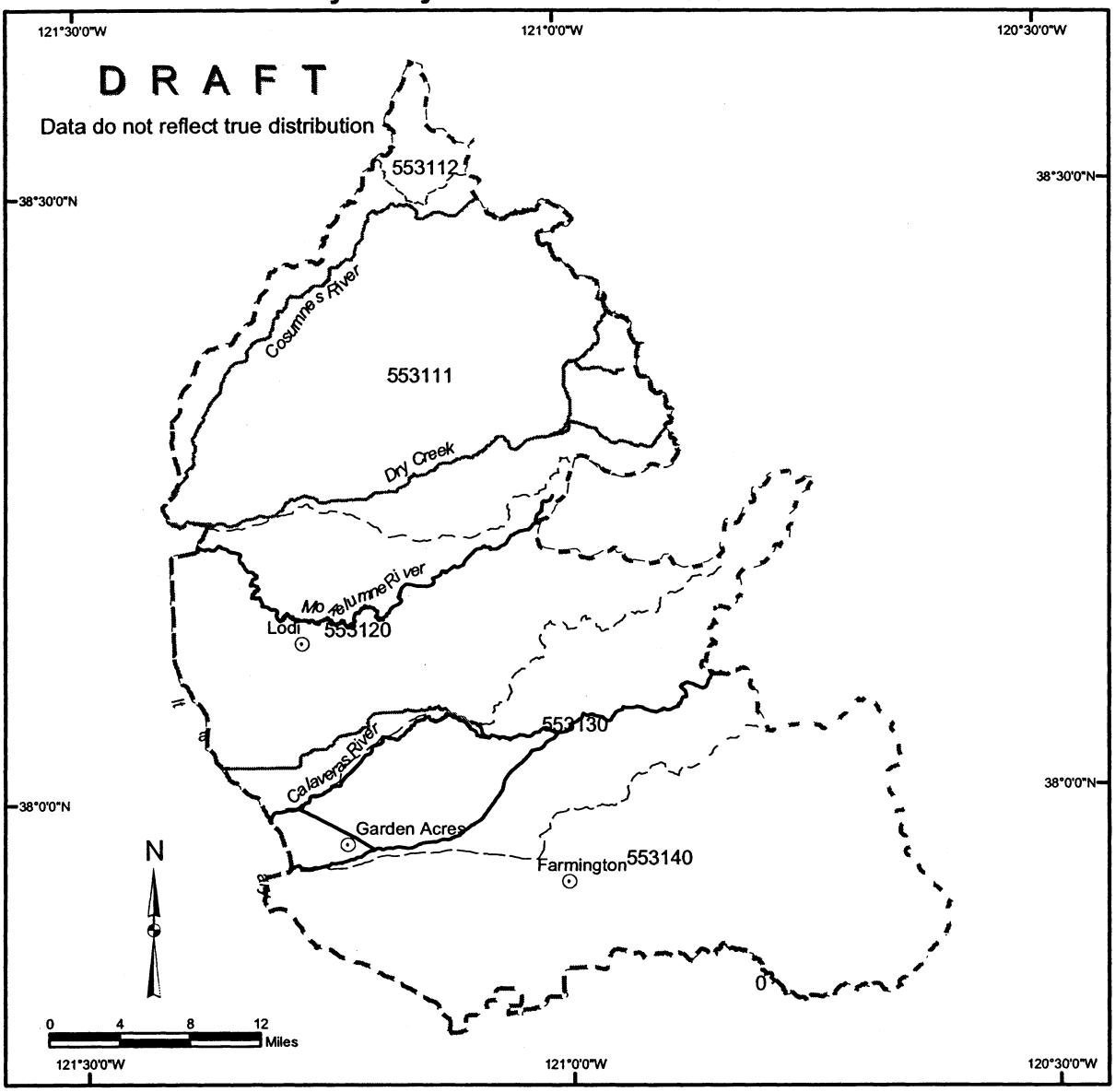
Area of Detail




Proposed Critical Habitat for the California Central Valley O. Mykiss
Shasta Bally Hydrologic Unit 5524
123°0'0"W
122°30'0"W
41°0'0"N
40°30'0"N
40°0'0"N
DRAFT
Data do not reflect true distribution
552464
French Gulch
552463
552461
552440
552462
552435
552436
552434
552433
N
0 4 8 12
Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California

Proposed Critical Habitat for the California Central Valley O. Mykiss

North Valley Floor Hydrologic Unit 5531



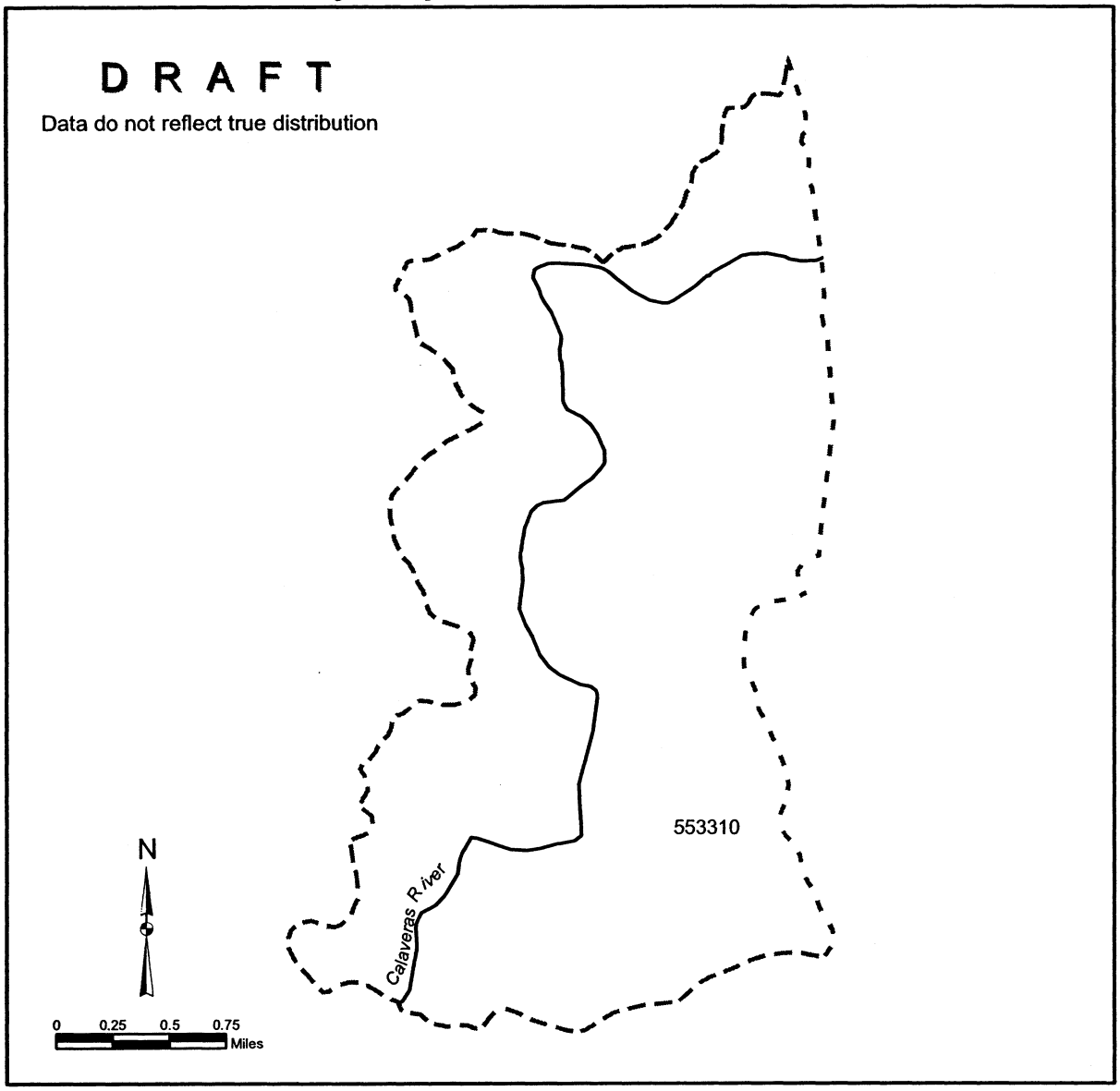
- Cities/Towns
- Proposed Critical Habitat
- Occupied but excluded streams / areas
- Hydrologic Unit Boundary
- Fifth Field Calwater Hydrologic Sub-Area Boundary
- 110701 Fifth Field Calwater Hydrologic Sub-Area Number

Area of Detail



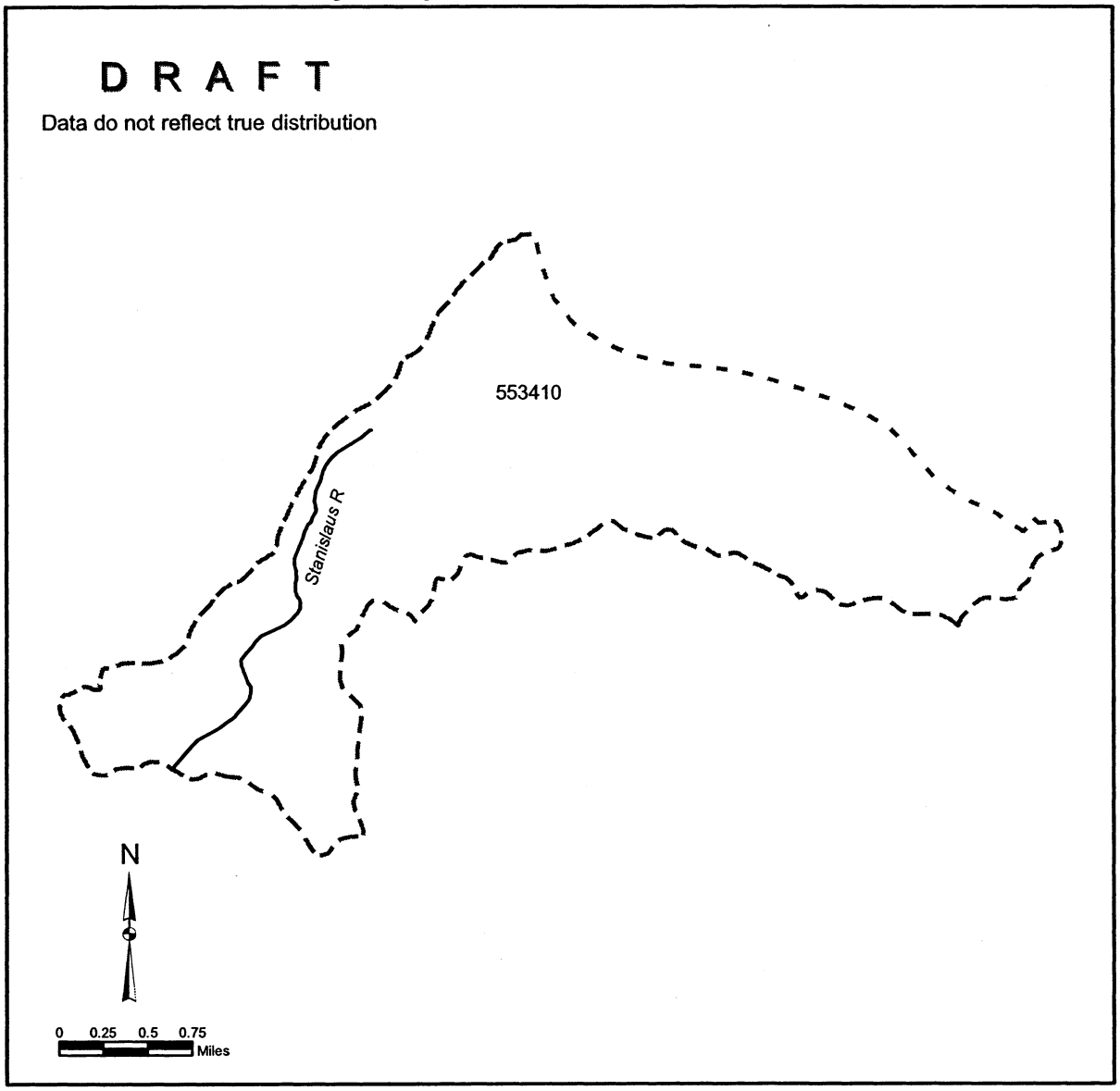
Proposed Critical Habitat for the California Central Valley O. Mykiss

Upper Calaveras Hydrologic Unit 5533



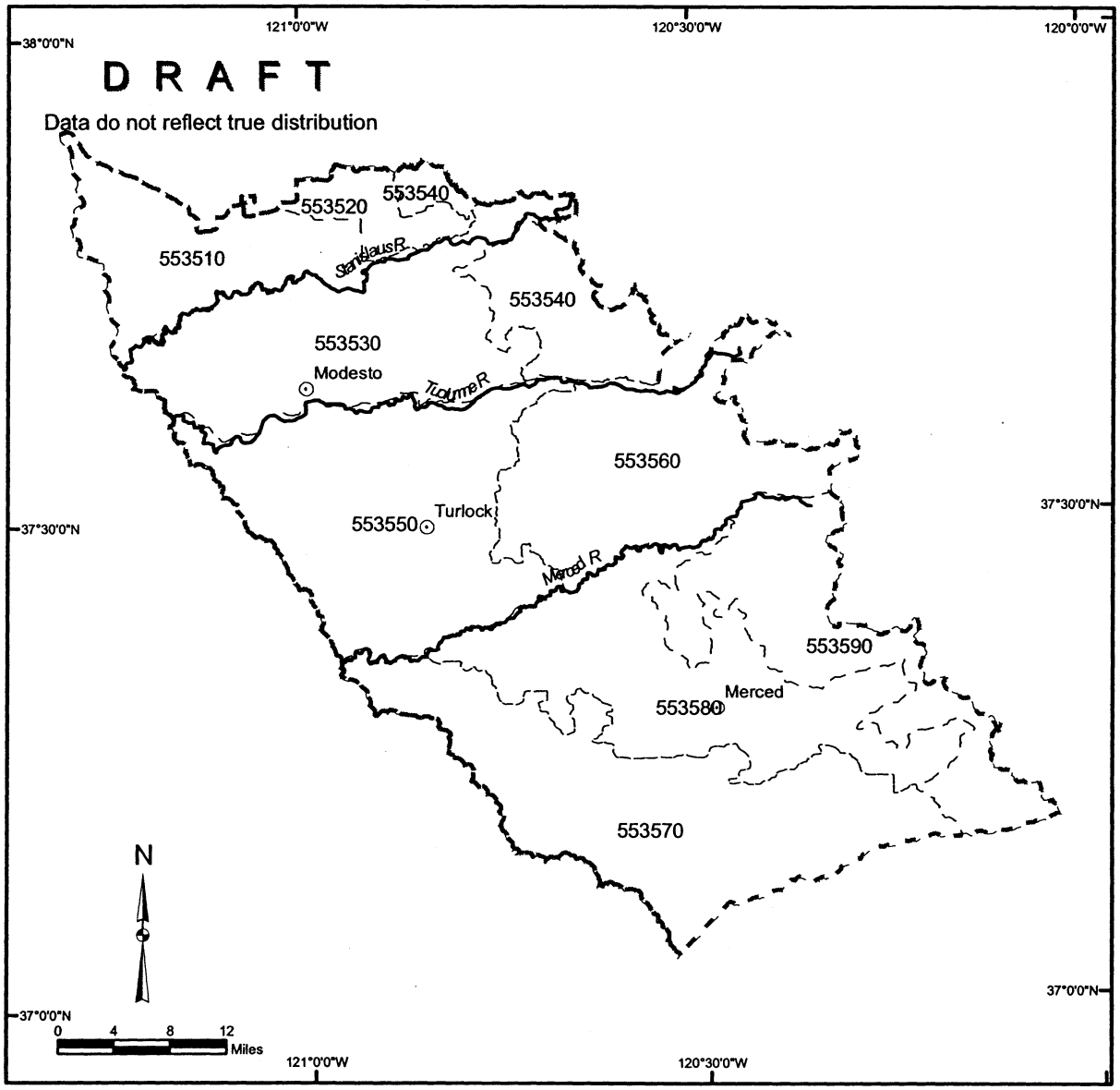
Proposed Critical Habitat for the California Central Valley O. Mykiss

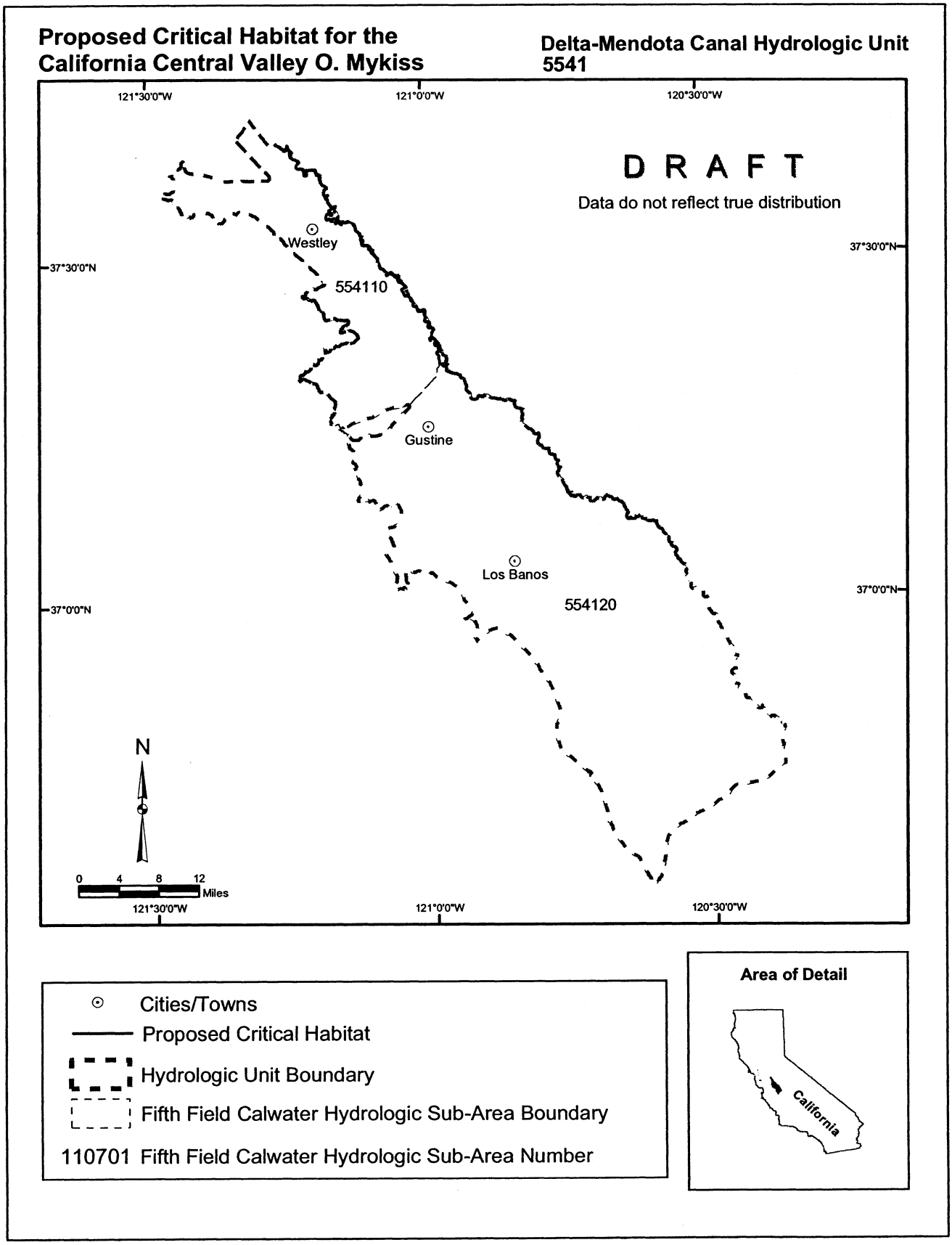
Stanislaus River Hydrologic Unit 5534

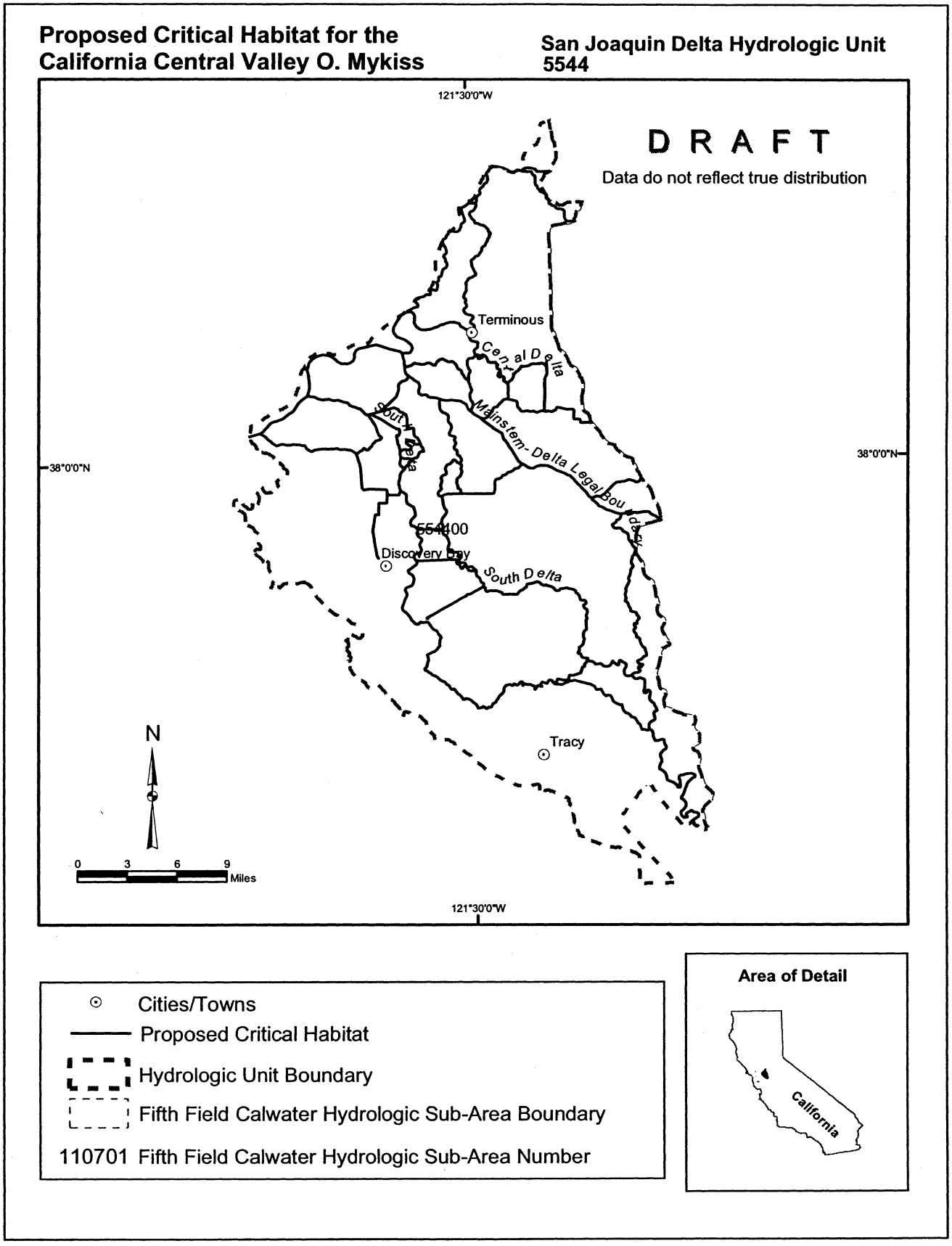


Proposed Critical Habitat for the California Central Valley O. Mykiss

San Joaquin Valley Floor Hydrologic Unit 5535




Proposed Critical Habitat for the California Central Valley O. Mykiss
Delta-Mendota Canal Hydrologic Unit 5541
121°30'0"W
121°0'0"W
120°30'0"W
D R A F T
Data do not reflect true distribution
Westley
37°30'0"N
554110
Gustine
Los Banos
37°0'0"N
554120
N
0 4 8 12
Miles
Cities/Towns
Proposed Critical Habitat
Hydrologic Unit Boundary
Fifth Field Calwater Hydrologic Sub-Area Boundary
110701 Fifth Field Calwater Hydrologic Sub-Area Number
Area of Detail
California



[FR Doc. 04–26681 Filed 12–9–04; 8:45 am]
BILLING CODE 3510–22–C

Federal Register

Friday,
December 10, 2004

Part III

Federal Communications Commission

47 CFR Parts 1, 2, et al.
Facilitating the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150–2162 and 2500–2690 MHz Bands; Final Rule and Proposed Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, 11, 15, 21, 27, 73, 74, 76, 78, 79, and 101

[WT Docket No. 03–66; RM–10586; FCC 04–135]

Facilitating the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150–2162 and 2500–2690 MHz Bands

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this rule the Federal Communications Commission (FCC) renames the Instructional Television Fixed Service (ITFS) as the Educational Broadband Service (EBS) and renames the Multichannel Multipoint Distribution Service (MMDS) and the Multipoint Distribution Service (MDS) as the Broadband Radio Service (BRS). The rules also restructure the 2500–2690 MHz band, designate the 2495–2500 MHz band for use in connection with the 2500–2690 MHz band, establish a plan to transition licenses to the restructured 2500–2690 MHz band, adopts licensing, service, and technical rules to govern licensees in the EBS and BRS, permits spectrum leasing for BRS and EBS licensees under the Commission's secondary markets leasing policies and procedures, and permits unlicensed operation in the 2655–2690 MHz band.

DATES: Effective on January 10, 2005, except for 47 CFR 27.1231(d), 27.1231(f) and 27.1235, which contain information collection modifications that have not been approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of those sections.

ADDRESSES: In addition to filing comments with the Office of the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SE., Washington, DC 20554, or via the Internet at *Judith-BHerman@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: Genevieve Ross or Nancy Zaczek at 202–418–2487.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, released on July 29, 2004, FCC 04–135, as modified by a subsequent Order, released on October 29, 2004, FCC 04–258. The proposed rule was published in the **Federal Register** on June 10, 2003 (68 FR 34560). The full text of the R&O and Order is available for inspection and copying during normal business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. The complete text may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, 202–488–5300 or 800–387–3160, e-mail at *fcc@bcpiweb.com*. The complete item is also available on the Commission's Web site at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC–04–135A1.doc*.

The complete Order modifying the Report and Order is also available on the Commission's Web site at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC–04–258A1.doc*.

I. Summary of Report and Order

1. In this *Report and Order (R&O)*, we take important steps to transform our rules and policies governing the licensing of the Instructional Television Fixed Service (ITFS), the Multipoint Distribution Service (MDS), and the Multichannel Multipoint Distribution Service (MMDS) (collectively, the Services) in the 2500–2690 MHz band. The actions taken in this order initiate a fundamental restructuring of the band that will provide both existing ITFS and MDS licensees and potential new entrants with greatly enhanced flexibility in order to encourage the highest and best use of spectrum domestically and internationally, and the growth and rapid deployment of innovative and efficient communications technologies and services. By these actions, we make significant progress towards the goal of providing all Americans with access to ubiquitous wireless broadband connections, regardless of their location.

2. A hallmark of our national communications policy is to encourage the provision of new technologies and services to the public. The actions taken herein will foster the development of the 2500–2690 MHz band by enabling licensees to migrate to more technologically and economically efficient uses of the spectrum. The record in this proceeding overwhelmingly supports our tentative conclusion that providing 2500–2690 MHz licensees with additional flexibility of use serves the public interest and allows licensees to provide new and innovative services, consistent with the requirements of Section 303(y) of the Communications Act.

3. In recent years, there has been steadily increasing demand for mobile telephone and mobile data services. In 2002, the mobile telephony sector generated more than $76 billion in revenues, increased subscribership from 128.5 million to 141.8 million (from the prior year), and produced a nationwide penetration rate of roughly forty-nine percent. Estimates of the number of mobile Internet users at the end of 2001 ranged from approximately eight to ten million, up from 2 to 2.5 million at the end of 2000. Also in recent years, the MDS industry has invested several billion dollars to develop broadband fixed wireless data systems in this band, including high-speed access to the Internet for residential customers, small and medium businesses, and educational institutions. Such systems offer a significant opportunity to provide competition to cable and digital subscriber line (DSL) services in the provision of broadband services in all areas. Additionally, these spectrum-based services will improve the ability of educators to serve America's students thereby facilitating educators' use of our national spectrum resource. This accomplishes our goal of ensuring that educational and medical institutions continue to have access to spectrum.

4. Our actions today also respond to proposals from the ITFS and MDS industries for major revision of current regulations so that these services will no longer be hindered by outdated and overly restrictive regulation. The restructured band plan we adopt will provide ITFS and MDS licensees with contiguous spectrum to deploy both existing and emerging technologies, and provides for both high and low-power operations in the band, thereby preserving the opportunity for incumbents to maintain existing operations. We also adopt a transition mechanism that will enable incumbents on a region-by-region basis to negotiate the transition to new spectrum assignments in the restructured band plan, with safeguards to ensure that all relocating incumbents are treated equitably. We also propose an alternative market-based transition mechanism that would take effect after three years for any areas where a negotiated transition has not occurred. We will be monitoring the transition closely through the proponents' filing of Initiation Plans with the Commission and notifications of the completion of the transition in given markets, as well as through reports prepared by the Wireless Telecommunications Bureau (Bureau) for the Commission.

5. In addition to the broader objectives described above, our decisions in this proceeding have also been guided by the desire to accomplish these additional spectrum management objectives: (i) Promoting availability of broadband to all Americans, including broadband technologies for educators; (ii) encouraging increased competition in wireless broadband through the creation of new opportunities for new entrants; (iii) promotion of the economic viability of services in this band by ensuring that the spectrum is as fungible, tradable, and marketable as possible; (iv) facilitating the highest valued use of radio licenses; (v) facilitating speed of transition and deployment in the band; (vi) providing incumbents with a reasonable opportunity to continue their current uses of the spectrum; and (vii) the continued promotion of spectrum-based education services.

6. In this *Report and Order*, we:

• Rename the MDS service as the ''Broadband Radio Service'' (BRS). This new designation connotes a more accurate description of the services we anticipate will develop in the band.

• Rename the ITFS service as the ''Educational Broadband Service'' (EBS), which more accurately describes the kinds of the services that we anticipate will develop in the band.

• Expand the overall bandwidth of the existing BRS–EBS band by reallocating 2495–2500 MHz to fixed and mobile except aeronautical mobile services.

• Adopt a band plan that restructures the 2500–2690 MHz band into upper and lower-band segments for low-power operations (UBS and LBS, respectively), and a mid-band segment (MBS) for high-power operations. The LBS extends from 2496–2572 MHz, and is comprised of twelve 5.5-megahertz-wide channels, one 6-megahertz-wide channel, and one 4-megahertz-wide guard band; the MBS, extends from 2572–2614 MHz, and is comprised of seven 6-megahertz wide channels; and the UBS extends from 2614–2690 MHz, and is comprised of twelve 5.5-megahertz wide channels, one 6-megahertz-wide channel, and one 4-megahertz-wide guard band. MDS channel 1 will be relocated from 2150–2156 MHz to 2496–2502 MHz, the LBS, and MDS channel 2 will be relocated from 2156–2162 MHz to 2618–2624 MHz, the UBS. By grouping high and low-power spectrum uses into separate portions of the band, this band plan creates opportunities for spectrum-based systems or devices to migrate to compatible bands based on marketplace forces, and reduces the likelihood of interference caused by incompatible uses. The new band plan also provides new incentives for the development of low-power cellularized broadband uses of the 2500–2690 MHz band, which have been thwarted by the legacy band structure.

• Make full use of the 4 megahertz of spectrum (I band) located at the end of the band at 2686–2690 MHz. The guard bands in the low-power LBS and UBS (referred to as the J and K bands, respectively) will be designated as 4-megahertz-wide. The use of 4-megahertz J and K bands is consistent with conclusions in the *3G Final Report* that 4 megahertz was sufficient to separate low-power and high-power uses. Furthermore, reducing the guard band increases the amount of spectrum available for low-power and high-power use. These changes will accommodate the relocation of incumbents to new spectrum assignments in the band that will give them substantially greater flexibility than the current band plan, while also facilitating the relocation of MDS Channels 1 and 2.

• Assign 16.5 megahertz of contiguous spectrum in either the LBS or UBS, a 6 megahertz channel in the MBS, and 1 megahertz of contiguous spectrum in either the J or K guard bands to licensees presently holding four interleaved 6 megahertz channels and four associated 0.125 megahertz response channels. A licensee presently assigned one channel in the band will receive one 5.5 megahertz channel in either the LBS or UBS or one 6 megahertz channel in the MBS. The provision of contiguous spectrum, combined with the deployment of compressed digital signals, will provide incumbents with the opportunity to maintain their current level of analog operations.

• Implement geographic area licensing for all licensees in the band. This will give licensees increased flexibility while greatly reducing administrative burdens on both licensees and the Commission. Accordingly, BRS and EBS authorization holders will be allowed to place transmitters anywhere within their defined service area without prior authorization so long as the licensee's operations comply with the applicable service rules, do not affect radio-frequency quiet zones, or require environmental review or international coordination. As part and parcel of geographic area licensing, where an existing license is canceled or forfeited, the right to operate in that area automatically reverts to the licensee that holds the corresponding BTA license, which is consistent with the approach we have taken in other wireless services.

• Require geographic area licensees to protect the operations of both EBS incumbents and BRS site-based incumbents within the incumbent's GSA as defined by this order. For incumbent BRS and EBS site-based licensees, the GSA will be based upon the licensee's current PSA as provided in §§ 21.902(d) or 74.903(d) of the Commission's rules. For BRS BTA authorization holders, the boundaries of the GSA will be exactly the same as the current PSA pursuant to § 21.933(a).

• Direct the Wireless Telecommunications Bureau to dismiss all pending applications to modify EBS or BRS stations, except for modification applications that could change an applicant's PSA, applications that seek to modify or add additional frequency assignments, or applications for facilities that would have to be separately applied for under the rules we adopt today. We see no public interest in processing modification applications that are no longer necessary in light of our new geographic area licensing scheme.

• Adopt a transition mechanism that enables incumbent licensees to develop regional plans for moving to new spectrum assignments in the restructured band plan. Under this mechanism, licensees have a three-year period during which they can initiate the transition process in their regional area and negotiate a transition plan with other regional licensees. Transition plans must conform to certain safeguards to ensure a smooth transition and equitable treatment of incumbents.

• Consolidate licensing and service rules for the Educational Broadband Service and Broadband Radio Services. This action promotes regulatory parity, and clarifies and stabilizes the regulatory treatment of similar spectrum-based services.

• Extend the rules and policies adopted in the *Secondary Markets Report and Order* to the BRS/EBS spectrum. We will allow pre-existing MDS and ITFS leases to remain in effect for up to fifteen years, consistent with our current rules. With respect to future spectrum leasing arrangements entered into pursuant to our part 27 rules for EBS, however, consistent with our treatment of other services, we limit the spectrum lease term to the length of the license term in question.

• Allow cable operators and ILECs to acquire or lease BRS/ITFS spectrum in order to provide non-video services like broadband internet access. In light of § 613(a)'s language and context we do, however, prohibit cable operators from

acquiring BRS/ITFS licenses outright for the purpose of providing MVPD service. We also retain the related ban on cable operators leasing BRS/ITFS spectrum within their franchise areas for the purpose of providing MVPD service, but allow leasing for other purposes.

- For pre-transition operations, limit the signal strength at any point along the licensee's GSA boundary to the greater of that permitted under the licensee's Commission authorizations as of the effective date of the new rules or 47 dB [mμ] V/m.
- For post-transition operations in the LBS and UBS, set the signal strength limits for the boundaries of the geographic service areas to 47 dBμV/m. We retain the current $-73.0 + 10\log(X/6)$ dBW/m^2 limit (where X is the bandwidth in MHz of the channel) for post-transition operations in the MBS. In order to efficiently serve customers or students near the border, the signal strength, when measured, shall be taken over the channel bandwidth (*i.e.*, each 5.5 MHz channel in the LBS and UBS for licensees that hold a full channel block) at 1.5 meters above ground where most handheld devices are likely to be operated. Moreover, to ensure the ubiquitous availability of broadband services, and account for the fact that many licensees will want to be able to provide service as soon as possible in order to gain a competitive advantage, in those instances where there is no neighbor licensee that is constructed and providing service to customers or students, we will allow a licensee to exceed the prescribed power limit at the GSA boundary until there is a licensee providing service that would be affected by the higher power level.
- Adopt our proposal to authorize licensees to engage in mobile operation by blanket licensing such operations under the licensees' geographical service area authorization.
- Limit all mobile and portable response stations, including CPE devices, to 2-watts EIRP assuring compliance with our rules.
- Refrain from imposing a limitation on the antenna heights of base stations located near the GSA border provided they do not cause impermissible interference.
- Require that all LBS and UBS channels emissions be attenuated below the transmitter power by at least $43 + 10\log(P)$ dB on any channel outside a licensee's spectrum once the transition has been completed.
- Require a licensee, upon receiving a documented interference complaint from an adjacent channel licensee, to further reduce its out-of-band emissions on post-transition operations by at least $67 + 10\log(P)$ dB. Additional attenuation will be required where base stations are located in close proximity, less than 1.5 km apart. Finally, we adopt a mobile station emission mask for post-transition operations which extends the attenuation from $43 + 10\log(P)$ at the channel's edge to $55 + 10\log(P)$ at 5.5 MHz away from the channel's edge.
- Allow pre-transition (and, in the MBS, post-transition) analog and digital video operations to operate pursuant to the existing out-of-band emission limitations currently in our rules.
- To protect MSS operations below 2495 MHz, MSS licensees operating in the adjacent band will be able to request additional protection under the same circumstances as adjacent-channel BRS and EBS licensees.
- Limit the EIRP of a main, booster or base station to $33 \text{ dBW} + 10\log(X/Y)$ dBW, where X is the actual channel width in MHz and Y is either (i) 6 MHz if prior to transition or the station is in the MBS following transition or (ii) 5.5 MHz if the station is in the LBS and UBS following transition. If a main or booster station sectorizes or otherwise uses one or more transmitting antennas with a non-omnidirectional horizontal plane radiation pattern, the maximum EIRP in dBW in a given direction shall be determined by the following formula: $\text{EIRP} = 33 \text{ dBW} + 10 \log(X/Y) \text{ dBW} + 10 \log(360/\text{beamwidth}) \text{ dBW}$, where X is the actual channel width in MHz, Y is either (i) 6 MHz if prior to transition or the station is in the MBS following transition or (ii) 5.5 MHz if the station is in the LBS and UBS following transition, and beamwidth is the total horizontal plane beamwidth of the individual transmitting antenna for the station or any sector measured at the half-power points.
- Restrict the transmitter output power of response stations to 2.0 watts upon completion of the transition.
- Provide licensees with the flexibility to employ the technologies of their choice in the band.
- Refrain from allowing high-power unlicensed operations in the 2500–2690 MHz band, but lift the restriction on unlicensed operation in § 15.205 of our rules and permit low-power unlicensed devices to operate on frequencies 2655–2690 MHz under our current part 15 rules.
- Consolidate the BRS and EBS procedural rules into subpart F of part 1 of the Commission's Rules, which contains the rules applicable to the processing of applications for all services in the Universal Licensing System (ULS).
- Adopt service specific rules for BRS and EBS in part 27 of the Commission's Rules, thereby providing a single reference point for these similar services, as opposed to having the rules for these services in three different rule parts.
- Adopt rules that consolidate the modification rules to determine major and minor modifications for BRS and EBS licenses under our ULS part 1 modification rules. Consequently, at the end of the six month transition period to ULS, implementation of mandatory electronic filing will begin for BRS and EBS licensees. MDS licensees currently submitting FCC Forms 304 or 331 to modify their licenses and EBS licensees currently submitting FCC Form 330 must begin using FCC Form 601 to report modifications to the Commission.
- Adopt the consolidated wireless procedures, contained in part 1 of the Commission's Rules, for amendments to BRS and EBS applications. Consequently, at the end of the transition period to mandatory electronic filing under ULS, BRS and EBS licensees will use FCC Form 601 to amend their applications.
- Require that at the end of the transition period to ULS implementation, BRS and EBS licensees must use FCC Form 603 and associated schedules to apply for consent to assignment of existing authorizations (including channel swaps), to apply for Commission consent to the transfer of control of entities holding authorizations, to notify the Commission of the consummation of assignments or transfers, and to request extensions of time for consummation of assignments or transfers. These transaction rules for BRS and EBS conform to and merge with the ULS requirements in § 1.948 of our rules.
- Permit partitioning and disaggregation of licenses for all services in the band.
- Adopt the late-filed renewal policy utilized for wireless radio services for the BRS/EBS band. Pursuant to this policy, renewal applications that are filed up to thirty days after the expiration date of the license will be granted nunc pro tunc if the application is otherwise sufficient under our rules, but the licensee may be subject to an enforcement action for untimely filing and unauthorized operation during the time between the expiration of the license and the untimely renewal filing. Applicants who file renewal applications more than thirty days after the license expiration date may also request that the license be renewed nunc pro tunc, but such requests will not be routinely granted, will be subject to stricter review, and also may be accompanied by enforcement action,

including more significant fines or forfeitures.

- Adopt our proposal to include BRS and EBS STA requests under the same ULS regulatory regime as other Wireless Services.
- Adopt our proposal to require BRS and EBS licensees to file Form 602, in lieu of Form 430, to submit ownership information as is done by our other wireless licensees under our part I ULS Rules. During the transition period, BRS and EBS licensees may continue to file the Form 430 manually.
- Permit BRS and EBS applicants to request more than one regulatory status for authorization in a single license. BRS and EBS applicants must also follow the notification procedures set forth in § 27.10(c) of the Commission's Rules.
- Eliminate our forfeiture, cancellation and discontinuance of service rules for certain licensees. BRS and EBS Licensees that choose to act as fixed common carriers or fixed carriers will be subject to § 27.66 of the Commission's Rules.
- Adopt rules for applicants requesting authorization for either common carrier or non-common carrier status to file changes in foreign ownership information pursuant to those sections.
- Eliminate the requirement that BRS operators file annual reports with the Commission.
- Adopt rules that streamline our application procedures for BRS and EBS by integrating the Services into ULS.
- Adopt the Commission's uniform rule for dismissal or return of defective applications in the Wireless Services to EBS and BRS applications along with the Bureau's procedures for complying with the Commission's uniform policy.
- Adopt rules to use the ULS forms for BRS and EBS, thereby eliminating the current MDS and ITFS forms. We adopt a six-month transition period after the effective date of the rules we have adopted today before requiring mandatory electronic filing by BRS and EBS applicants and licensees in ULS. Consistent with prior actions, WTB will release a public notice announcing the relevant commencement date for the processing of applications in the Services via ULS.
- Dismiss all applications for ITFS stations that were filed prior to adoption of the *NPRM* where: the applications are mutually exclusive, and the applicants filed settlement agreements subsequent to the release of the *NPRM*, and/or applicants filed settlement agreements prior to the release of the *NPRM*, but the settlement agreement did not comply with our rules.

In MM Docket No. 97–217, we address a minor issue concerning response stations that are not engaged in communications with their associated hubs to restrict their field strengths.

Procedural Matters

A. Paperwork Reduction Analysis

7. This document contains new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection requirements contained in this R&O as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due February 8, 2005. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

8. In this present document, we have assessed the effects of requiring licensees to file Initiation Plans and Post Transition Notification Plans, and find that these requirements will not adversely affect businesses with fewer than 25 employees. First, it is unlikely that such businesses will serve as Proponents under our new Transition Plan thereby triggering the requirement to file an Initiation Plan as we generally expect that Proponents will largely consist of larger businesses with sufficient revenue to transition an entire market. To the extent that such businesses would serve as Proponents, the filing of Initiation Plans will not constitute a burden or require significant paperwork preparation because these Proponents will meet this filing requirement, by submitting, in whole or in part, their written agreements on transition. With regard to the Post Transition Notification Plan, we do not believe that such a filing would constitute a burden to businesses with fewer than 25 employees because such notices will consist of a simple notification to the Commission that the transition has been completed. This notification is in the public interest because it will help to ensure that the BRS/EBS spectrum is properly utilized. We seek comment on these conclusions.

B. Final Regulatory Flexibility Analysis

9. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the Notice of Proposed Rule Making (NPRM) was incorporated therein. The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. No comments were submitted specifically in response to the IRFA; we nonetheless discuss certain general comments below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

C. Need for, and Objectives of, the Final Rules

10. In this Report and Order (R&O) we adopt a number of changes concerning the rules governing the 2500–2690 MHz band, for the Multipoint Distribution Service (MDS), the Multi-channel Multipoint Distribution Service (MMDS), and the Instructional Television Fixed Service (ITFS). The rules we adopt today include: revising technical rules to increase licensee flexibility; revising the band plan to eliminate the current interleaved channel scheme to provide licensees with contiguous spectrum; implementing service rules for mobile operation; retaining eligibility restrictions to preserve the ITFS service; simplifying and streamlining the licensing process; and implementing application filing and processing electronically via our Universal Licensing System with a six-month transition period after application processing in ULS begins before requiring mandatory electronic filing.

11. We believe the rules we adopt today will both encourage the enhancement of existing services using this band and promote the development of new innovative services to the public, such as providing wireless broadband services, including high-speed Internet access and mobile services. We also believe that our new rules will allow licensees to adapt quickly to changing market conditions and the marketplace, rather than to government regulation, in determining how this band can best be used.

Summary of Significant Issues Raised by Public Comments in Response to the IRFA

12. No comments were submitted specifically in response to the IRFA.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

13. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of

small entities that may be affected by the proposed rules. The RFA generally defines the term ''small entity'' as having the same meaning as the terms, ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (i) Is independently owned and operated; (ii) is not dominant in its field of operation; and (iii) satisfies any additional criteria established by the SBA. A small organization is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.''

14. In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by rules adopted pursuant to this *NPRM*. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report.

15. Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and ITFS. Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as ''wireless cable,'' transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). In connection with the 1996 MDS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that are considered small entities. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 MDS licensees that are defined as small businesses under either the SBA or the Commission's rules. Some of those 440 small business licensees may be affected by the decisions in this *R&O.*

16. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard is also applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. Thus, we estimate that at least 1,932 licensees are small businesses.

17. MDS is also heavily encumbered with licensees of stations authorized prior to the auction. The SBA has developed a definition of small entities for pay television services that includes all such companies generating $11 million or less in annual receipts. This definition includes multipoint distribution systems, and thus applies to MDS licensees and wireless cable operators that did not participate in the MDS auction. Information available to us indicates that there are [832] of these licensees and operators that do not generate revenue in excess of $11 million annually. Therefore, for purposes of this IRFA, we find there are approximately [892] small MDS providers as defined by the SBA and the Commission's auction rules, and some of these providers may take advantage of our amended rules to provide two-way MDS.

18. There are presently [2032] ITFS licensees. All but [100] of these licenses are held by educational institutions (these [100] fall in the MDS category, above). Educational institutions may be included in the definition of a small entity. ITFS is a non-profit non-broadcast service that, depending on SBA categorization, has, as small entities, entities generating either $10.5 million or less, or $11.0 million or less, in annual receipts. However, we do not collect, nor are we aware of other collections of, annual revenue data for ITFS licensees. Thus, we find that up to [1932] of these educational institutions are small entities that may take advantage of our amended rules to provide additional flexibility to ITFS.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

19. Applicants for MDS or ITFS licenses must submit license applications through the Universal Licensing System using FCC Form 601, and other appropriate forms. Licensees will also be required to apply for an individual station license by filing FCC Form 601 for those individual stations that (i) require submission of an Environmental Assessment of the facilities under § 1.1307 of our Rules; (ii) require international coordination of the application; or (iii) require coordination with the Frequency Assignment Subcommittee (FAS) of the Interdepartment Radio Advisory Committee (IRAC). While these requirements are new with respect to potential licensees in the ITFS and MDS bands, the Commission has applied these requirements to licensees in other bands. Moreover, the Commission is also eliminating many burdensome filing requirements that have previously been applied to MDS and ITFS.

Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

20. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: ''(i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (iii) the use of performance, rather than design standards; and (iv) an exemption from coverage of the rule, or any part thereof, for small entities.''

21. Regarding our decision to retain ITFS eligibility restrictions, we realize that certain entities expressed their wishes that eligibility restrictions be lifted throughout the entire ITFS spectrum. However, this concern is mitigated by the fact that even though only qualifying educational institutions can hold licenses in the band, such institutions are free to lease out excess capacity to non-educational entities. Throughout the years, this has been the dominant practice in the band, and in fact, the band is used by non-educational entities. Our decision is also mitigated by the fact that non-educational entities may also acquire

this spectrum by entering into negotiations with BRS licensees, who occupy the same spectrum.

22. Herein we have adopted a variation of the band plan recommended by the Wireless Communications Association (WCA), National Instructional Television Fixed Service (NIA) and Catholic Television Network (CTN) (collectively, the Coalition). Our preferred variation contains upper and lower band segments for low-power operations (UBS and LBS, respectively), and a mid band segment (MBS) for high-power operations. We do not anticipate that this variation will have any adverse effect on small entities. This is because the new band plan provides contiguous blocks of spectrum whereas the old band plan provided interleaved channels that prevented licensees from employing innovative technologies. Although some entities rejected the three segment plan we have adopted and argued that the Commission should adopt across-the-board power reductions instead of the three band segments which require a shuffling of channel assignments, we believe this alternative would have had a significant negative impact on ITFS and MDS licensees. This is because many of these licensees use this spectrum for high-power operations, and an across-the-board power reduction rule would result in the virtual shut down of such licensees' operations. In contrast, the approach we have adopted will accommodate both high and low-power operations.

23. Regarding our decision to adopt, with some modifications, the Coalition's plan for transitioning licensees to the new band plan, we recognize that some commenters were resistant to the Coalition transition plan criticizing it for having no deadlines and arguing that it would create daisy chains that would actually prevent the transition from being completed. However, we believe this concern is mitigated by our decision to set a three year deadline for initiating the transition process. We have also notified interested parties herein that if they do not comply with the three year deadline, we will implement another transition plan, and have sought comment on other transition plans we can implement if we later find that the one we adopt today is not successful. With regard to the possible daisy chain problem, we have modified the Coalition plan to transition to the new band plan using larger areas than the Coalition recommends.

24. Finally, licensees that must transition to the new band plan will be affected in that some will have to bear the costs of such transition. However, the record reflects that licensees unanimously agree that the band plan must be modified, and the transition costs are outweighed by the value and utility of converting the band plan into one which provides licensees with contiguous spectrum.

25. Regarding our decision to implement geographic area licensing for all licensees in the band, we do not anticipate any adverse effect on small entities. Instead, our approach here should benefit all licensees, including small entities, as it reduces the burdens associated with filing applications for new sites.

26. Regarding our decision to provide licensees with the flexibility to employ the technologies of their choice in the band, we do not anticipate any adverse effect on small entities. To the contrary, this decision will allow licensees to quickly adjust to changes in technology and market demand without seeking Commission approval.

27. Regarding our decision to refrain from allowing high-power unlicensed operations in the 2500–2690 MHz band, we recognize that some small businesses would have liked to deploy unlicensed operations in the band. However, we believe this concern is outweighed by the fact that allowing such operations would cause interference to primary operations in the band, thereby creating uncertainty for licensees and discouraging investment in the band. Furthermore, we note that part 15 of the Commission's Rules provides other opportunities for unlicensed operations in the electromagnetic spectrum. We note specifically that the Commission has initiated another rulemaking that specifically deals with unlicensed operations that may ultimately provide more opportunities for unlicensed use.

28. The regulatory burdens contained in the *R&O*, such as filing applications on appropriate forms and filing transition plans with the Commission, are necessary in order to ensure that the public receives the benefits of innovative new services, or enhanced existing services, in a prompt and efficient manner. Nonetheless, we have reduced burdens wherever possible by eliminating a number of unnecessary regulations concerning filing requirements.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

29. None.

Report to Congress

30. The Commission will send a copy of this *R&O*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office (GAO) pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of this *R&O*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this *R&O* and FRFA (or summaries thereof) will also be published in the **Federal Register**.

Ordering Clause

31. Pursuant to sections 1, 2, 4(i), 7, 10, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333 and 706 of the Communications Act of 1934, 47 U.S.C. 151, 152, 154(i), 157, 160, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333, and 706, that this *Report and Order* is hereby adopted.

32. The proceeding entitled Amendment of parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of parts 21 and 74 to Engage in Fixed Two-Way Transmissions, MM Docket No. 97–217 is terminated.

33. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *R&O*, to the Chief Counsel for Advocacy of the Small Business Administration.

34. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this NPRM, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the U.S. Small Business Administration.

List of Subjects in 47 CFR Parts 1, 2, 11, 15, 21, 27, 73, 74, 76, 78, 79, and 101

Communications common carriers, Communications equipment, Education, Equal employment opportunity, Radio, Reporting and recordkeeping requirements, Television.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1, 2, 11, 15, 21, 27, 73, 74, 76, 78, 79, and 101 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

■ 2. Section 1.65 is amended by revising paragraph (b) to read as follows:

§ 1.65 Substantial and significant changes in information furnished by applicants to the Commission.

* * * * *

(b) Applications in broadcast services subject to competitive bidding will be subject to the provisions of §§ 1.2105(b), 73.5002 and 73.3522 of this chapter regarding the modification of their applications.

* * * * *

§ 1.815 [Amended]

■ 3. Section 1.815 is amended by removing and reserving paragraph (c)(1).

■ 4. Section 1.933 is amended by adding paragraphs (c)(8) and (c)(9) to read as follows:

§ 1.933 Public notices.

* * * * *

(c) * * *

(8) Broadband Radio Service; and

(9) Educational Broadband Service.

* * * * *

■ 5. Section 1.1102 is amended by revising section (20) of the table to read as follows:

§ 1.1102 Schedule of charges for applications and other filings in the wireless telecommunication services.

* * * * *

Action	FCC Form No.	Fee amount	Payment type code	Address
20. Broadband Radio Service				
a. New Station	601 & 159	$220.00	CJM	Federal Communications Commission, Wireless Bureau Applications, P.O. Box 358155, Pittsburgh, PA 15251–5155.
b. Major Modification of License	601 &159	220.00	CJM	Federal Communications Commission, Wireless Bureau Applications, P.O. Box 358994, Pittsburgh, PA 15251–5155.
c. Certification of Commission, Completion of Construction.	601 & 159	80.00	CJM	Federal Communications Commission, Wireless Bureau Applications, P.O. Box 358155, Pittsburgh, PA 15251–5155.
d. License Renewal	601 & 159	220.00	CJM	Federal Communications Commission, Wireless Bureau Applications, P.O. Box 358155, Pittsburgh, PA 15251–5155.
e. Assignment or Transfer: (i) First Station on Application	603 & 159	80.00	CCM	Federal Communications Commission, Wireless Bureau Applications, P.O. Box 358155, Pittsburgh, PA 15251–5155.
(ii) Each Additional Station	603 & 159	50.00	CAM	Federal Communications Commission, Wireless Bureau Applications, P.O. Box 358155, Pittsburgh, PA 15251–5155.
f. Extension of Construction Authorization.	601 & 159	185.00	CHM	Federal Communications Commission, Wireless Bureau Applications, P.O. Box 358155, Pittsburgh, PA 15251–5155.
g. Special Temporary Authority or Request for Waiver of Prior Construction Authorization.	Corres & 159	100.00	CEM	Federal Communications Commission, Wireless Bureau Applications, P.O. Box 358155, Pittsburgh, PA 15251–5155.

* * * * *

■ 6. Section 1.1152 is amended by revising paragraph (8) to read as follows:

§ 1.1152 Schedule of annual regulatory fees and filing locations for wireless radio services.

Exclusive use services (per license)	Fee amount (1)	Address
* * * * *	*	*
8. Broadband Radio Service (BRS)	$265	FCC, BRS, P.O. Box 358835, Pittsburgh, PA 15251–5835.
* * * * *	*	*

■ 7. Section 1.1307 is amended by revising Table 1 to read as follows:

§ 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

* * * * *

TABLE 1.—TRANSMITTERS, FACILITIES AND OPERATIONS SUBJECT TO ROUTINE ENVIRONMENTAL EVALUATION

Service (title 47 CFR rule part)	Evaluation required if—
Broadband Radio Service and Educational Broadband Service (subpart M of part 27).	Non-building-mounted antennas: height above ground level to lowest point of antenna < 10 m and power > 1640 W EIRP.

TABLE 1.—TRANSMITTERS, FACILITIES AND OPERATIONS SUBJECT TO ROUTINE ENVIRONMENTAL EVALUATION—Continued

Service (title 47 CFR rule part)	Evaluation required if—
Wireless Communications Service (Part 27)	Building-mounted antennas: power > 1640 W EIRP. BRS and EBS licensees are required to attach a label to subscriber transceiver or transverter antennas that: (1) Provide adequate notice regarding potential radiofrequency safety hazards, *e.g.*, information regarding the safe minimum separation distance required between users and transceiver antennas; and (2) reference the applicable FCC-adopted limits for radiofrequency exposure specified in § 1.1310. (1) For the 1390–1392 MHz, 1392–1395 MHz, 1432–1435 MHz, 1670–1675 MHz and 2385–2390 MHz bands: Non-building-mounted antennas: height above ground level to lowest point of antenna <10 m and total power of all channels > 2000 W ERP (3280 W EIRP). Building-mounted antennas: total power of all channels > 2000 W ERP (3280 W EIRP). (2) For the 746–764 MHz, 776–794 MHz, 2305–2320 MHz, and 2345–2360 MHz bands. Total power of all channels >1000 W ERP (1640 W EIRP).

* * * * *

■ 8. Section 1.7001 is amended by revising paragraph (b) to read as follows:

§ 1.7001 Scope and content of filed reports.

* * * * *

(b) All commercial and government-controlled entities, including but not limited to common carriers and their affiliates (as defined in 47 U.S.C. 153(1)), cable television companies, Broadband Radio Service (BRS) ''wireless cable'' carriers, other fixed wireless providers, terrestrial and satellite mobile wireless providers, utilities and others, which are facilities-based providers and are providing at least 250 full or one-way broadband lines or wireless channels in a given State, or provide full or one-way broadband service to at least 250 end-user consumers in a given State, shall file with the Commission a completed FCC Form 477, in accordance with the Commission's rules and the instructions to the FCC Form 477, for each State in which they exceed this threshold.

* * * * *

■ 9. Section 1.9005 is amended by redesignating paragraphs (h) through (bb) as paragraphs (j) through (dd) and adding new paragraphs (h) and (i) to read as follows:

§ 1.9005 Included services.

* * * * *

(h) The Broadband Radio Service (part 27 of this chapter);

(i) The Educational Broadband Service (part 27 of this chapter);

* * * * *

■ 10. Section 1.9020 is amended by revising paragraph (d)(2)(i) to read as follows:

§ 1.9020 Spectrum manager leasing arrangements.

* * * * *

(d) * * *

(2) * * *

(i) The spectrum lessee must meet the same eligibility and qualification requirements that are applicable to the licensee under its license qualification, except that spectrum lessees entering into spectrum leasing arrangements involving licensees in the Educational Broadband Service (*see* § 27.1201 of this chapter) are not required to comply with the eligibility requirements pertaining to such licensees (*see* § 27.1201 of this chapter) so long as the spectrum lessees meet the other eligibility and qualification requirements applicable to part 27 of this chapter services (*see* § 27.12 of this chapter).

* * * * *

■ 11. Section 1.9030 is amended by revising paragraph (d)(2)(i) to read as follows:

§ 1.9030 Long-term de facto transfer leasing arrangements.

* * * * *

(d) * * *

(2) * * *

(i) The spectrum lessee must meet the same eligibility and qualification requirements that are applicable to the licensee under its license qualification, except that spectrum lessees entering into spectrum leasing arrangements involving licensees in the Educational Broadband Service (*see* § 27.1201 of this chapter) are not required to comply with the eligibility requirements pertaining to such licensees (*see* § 27.1201 of this chapter) so long as the spectrum lessees meet the other eligibility and qualification requirements applicable to part 27 of this chapter services (*see* § 27.12 of this chapter).

* * * * *

■ 12. Section 1.9047 is added to read as follows:

§ 1.9047 Special provisions relating to leases of educational broadband service spectrum.

Licensees in the Educational Broadcasting Service may enter into spectrum leasing arrangements with spectrum lessees only insofar as such arrangements comply with the applicable requirements for spectrum leasing arrangements involving spectrum in that service as set forth in § 27.1214 of this chapter.

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

■ 13. The authority citation for part 2 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

■ 14. Section 2.106, the Table of Frequency Allocations, is amended by revising pages 51, 52, and 53 to read as follows.

§ 2.106 Table of Frequency Allocations.

* * * * *

BILLING CODE 6712–01–P

2345-2655 MHz (UHF) Page 51

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
See previous page for 2300-2450 MHz			2345-2360 Fixed Mobile US339 Radiolocation G2 G120 US327	2345-2360 FIXED MOBILE US339 RADIOLOCATION BROADCASTING-SATELLITE 5.396 US327	Wireless Communications (27) Aviation (87)
			2360-2385 MOBILE US276 RADIOLOCATION G2 G120 Fixed	2360-2385 MOBILE US276	Aviation (87)
			2385-2390 US363	2385-2390 FIXED MOBILE NG174 US363	Wireless Communications (27)
			2390-2400 G122	2390-2400 AMATEUR	Amateur (97)
			2400-2402 5.150 G123	2400-2417 AMATEUR	ISM Equipment (18) Amateur (97)
			2402-2417 5.150 G122	5.150 5.282	
			2417-2450 Radiolocation G2 5.150 G124	2417-2450 Amateur 5.150 5.282	
2450-2483.5 FIXED MOBILE Radiolocation 5.150 5.397	2450-2483.5 FIXED MOBILE RADIOLOCATION 5.150 5.394		2450-2483.5 5.150 US41	2450-2483.5 FIXED MOBILE Radiolocation 5.150 US41	ISM Equipment (18) Auxiliary Broadcasting (74) Private Land Mobile (90) Fixed Microwave (101)

2483.5-2500 FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) 5.351A Radiolocation 5.150 5.371 5.397 5.398 5.399 5.400 5.402	2483.5-2500 FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) 5.351A RADIOLOCATION RADIODETERMINATION-SATELLITE (space-to-Earth) 5.398 5.150 5.402	2483.5-2500 FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) 5.351A RADIOLOCATION Radiodetermination-satellite (space-to-Earth) 5.398 5.150 5.400 5.402	2483.5-2500 MOBILE-SATELLITE (space-to-Earth) US319 US380 US391 RADIODETERMINATION-SATELLITE (space-to-Earth) 5.398 5.150 5.402 US41	2483.5-2495 MOBILE-SATELLITE (space-to-Earth) US319 US380 RADIODETERMINATION-SATELLITE (space-to-Earth) 5.398 5.150 5.402 US41 NG147	ISM Equipment (18) Satellite Communications (25)
				2495-2500 FIXED MOBILE except aeronautical mobile MOBILE-SATELLITE (space-to-Earth) US319 US380 RADIODETERMINATION-SATELLITE (space-to-Earth) 5.398 5.150 5.402 US41 US391 NG147	ISM Equipment (18) Satellite Communications (25) Wireless Communications (27)
2500-2520 FIXED 5.409 5.410 5.411 MOBILE except aeronautical mobile 5.384A MOBILE-SATELLITE (space-to-Earth) 5.403 5.351A 5.405 5.407 5.412 5.414	2500-2520 FIXED 5.409 5.411 FIXED-SATELLITE (space-to-Earth) 5.415 MOBILE except aeronautical mobile 5.384A MOBILE-SATELLITE (space-to-Earth) 5.403 5.351A 5.404 5.407 5.414 5.415A		2500-2655	2500-2655 FIXED US205 MOBILE except aeronautical mobile	Wireless Communications (27)
2520-2655 FIXED 5.409 5.410 5.411 MOBILE except aeronautical mobile 5.384A BROADCASTING-SATELLITE 5.413 5.416	2520-2655 FIXED 5.409 5.411 FIXED-SATELLITE (space-to-Earth) 5.415 MOBILE except aeronautical mobile 5.384A BROADCASTING-SATELLITE 5.413 5.416	2520-2535 FIXED 5.409 5.411 FIXED-SATELLITE (space-to-Earth) 5.415 MOBILE except aeronautical mobile 5.384A BROADCASTING-SATELLITE 5.413 5.416 5.403 5.415A			
		2535-2655 FIXED 5.409 5.411 MOBILE except aeronautical mobile 5.384A BROADCASTING-SATELLITE 5.413 5.416			
5.339 5.403 5.405 5.412 5.418 5.418B 5.418C	5.339 5.403 5.418B 5.418C	5.339 5.418 5.418A 5.418B 5.418C	5.339 US205	5.339	

2655-3700 MHz (UHF/SHF)					Page 53
International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
2655-2670 FIXED 5.409 5.410 5.411 MOBILE except aeronautical mobile 5.384A BROADCASTING SATELLITE 5.413 5.416 Earth exploration-satellite (passive) Radio astronomy Space research (passive) 5.149 5.412 5.420	2655-2670 FIXED 5.409 5.411 FIXED-SATELLITE (Earth-to-space) (space-to-Earth) 5.415 MOBILE except aeronautical mobile 5.384A BROADCASTING-SATELLITE 5.413 5.416 Earth exploration-satellite (passive) Radio astronomy Space research (passive) 5.149 5.420	2655-2670 FIXED 5.409 5.411 FIXED-SATELLITE (Earth-to-space) 5.415 MOBILE except aeronautical mobile 5.384A BROADCASTING-SATELLITE 5.413 5.416 Earth exploration-satellite (passive) Radio astronomy Space research (passive) 5.149 5.420	2655-2690 Earth exploration-satellite (passive) Radio astronomy US269 Space research (passive)	2655-2690 FIXED US205 MOBILE except aeronautical mobile Earth exploration-satellite (passive) Radio astronomy Space research (passive)	Wireless Communications (27)
2670-2690 FIXED 5.409 5.410 5.411 MOBILE except aeronautical mobile 5.384A MOBILE-SATELLITE (Earth-to-space) Earth exploration-satellite (passive) Radio astronomy Space research (passive) 5.149 5.419 5.420	2670-2690 FIXED 5.409 5.411 FIXED-SATELLITE (Earth-to-space) (space-to-Earth) 5.415 MOBILE except aeronautical mobile 5.384A MOBILE-SATELLITE (Earth-to-space) Earth exploration-satellite (passive) Radio astronomy Space research (passive) 5.149 5.419 5.420	2670-2690 FIXED 5.409 5.411 FIXED-SATELLITE (Earth-to-space) 5.415 MOBILE except aeronautical mobile 5.384A MOBILE-SATELLITE (Earth-to-space) Earth exploration-satellite (passive) Radio astronomy Space research (passive) 5.149 5.419 5.420 5.420A	US205	US269	
2690-2700 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY SPACE RESEARCH (passive) 5.340 5.421 5.422			2690-2700 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY US74 SPACE RESEARCH (passive) US246		
2700-2900 AERONAUTICAL RADIONAVIGATION 5.337 Radiolocation 5.423 5.424			2700-2900 AERONAUTICAL RADIO-NAVIGATION 5.337 METEOROLOGICAL AIDS Radiolocation G2 5.423 US18 G15	2700-2900 5.423 US18	

* * * * *

PART 11—EMERGENCY ALERT SYSTEM (EAS)

■ 15. The authority citation for part 11 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i) and (o), 303(r), 544(g), and 606, unless otherwise noted.

■ 16. Section 11.11 is amended by revising the text of paragraph (a) and paragraph A. of the table titled ''Wireless Cable System'', and paragraphs (c) introductory text and (c)(1) to read as follows:

§ 11.11 The Emergency Alert System (EAS).

(a) The EAS is composed of broadcast networks; cable networks and program suppliers; AM, FM Low-power FM (LPFM) and TV broadcast stations; Class A television (CA) stations; Low-power TV (LPTV) stations; cable systems; wireless cable systems which may consist of Broadband Radio Service (BRS), or Educational Broadband Service (EBS) stations; and other entities and industries operating on an organized basis during emergencies at the National, State and local levels. It requires that at a minimum all participants use a common EAS protocol, as defined in § 11.31, to send and receive emergency alerts in accordance with the effective dates in the following tables:

* * * * *

Wireless Cable Systems (BRS/EBS Stations)

[A. Wireless cable systems serving fewer than 5,000 subscribers from a single transmission site must either provide the National level EAS message on all programmed channels—including the required testing—by October 1, 2002, or comply with the following EAS requirements. All other wireless cable systems must comply with B.]

* * * * *

(c) For purposes of the EAS, Broadband Radio Service (BRS) and Educational Broadband Service (EBS) stations operated as part of wireless cable systems in accordance with subpart M of part 27 of this chapter are defined as follows:

(1) A ''wireless cable system'' is a collection of channels in the BRS or EBS used to provide video programming services to subscribers. The channels may be licensed to or leased by the wireless cable system operator.

* * * * *

■ 17. In § 11.31, paragraph (c) is amended by revising entry ''LLLLLLLL'' to read as follows:

§ 11.31 EAS protocol.

* * * * *

(c) * * *

LLLLLLLL—This is the identification of the broadcast station, cable system, BRS/EBS station, NWS office, etc., transmitting or retransmitting the message. These codes will be automatically affixed to all outgoing messages by the EAS encoder.

* * * * *

■ 18. Section 11.35 is amended by revising paragraph (a) to read as follows:

§ 11.35 Equipment operational readiness.

(a) Broadcast stations and cable systems and wireless cable systems are responsible for ensuring that EAS Encoders, EAS Decoders and Attention Signal generating and receiving equipment used as part of the EAS are installed so that the monitoring and transmitting functions are available during the times the stations and systems are in operation. Additionally, broadcast stations and cable systems and wireless cable systems must determine the cause of any failure to receive the required tests or activations specified in § 11.61(a)(1) and (a)(2). Appropriate entries must be made in the broadcast station log as specified in §§ 73.1820 and 73.1840 of this chapter, cable system record as specified in §§ 76.1700, 76.1708, and 76.1711 of this chapter, BRS station records, indicating reasons why any tests were not received.

* * * * *

PART 15—RADIO FREQUENCY DEVICES

■ 19. The authority citation for part 15 continues to read as follows:

Authority: 47 U.S.C. 154, 302(a), 303, 304, 307, 336, and 544(a), unless otherwise noted.

§ 15.205 [Amended]

■ 20. Section 15.205(a) is amended in the table by removing ''2655–2900 MHz'' from the third column and by adding in its place ''2690–2900 MHz.''

* * * * *

PART 21—DOMESTIC PUBLIC FIXED RADIO SERVICES

■ 21. Under the authority of 47 U.S.C. 154, amend 47 CFR chapter I by removing part 21.

PART 27—MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES

■ 22. The authority citation for part 27 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 307, 309, 332, 336 and 337 unless otherwise noted.

■ 23. Section 27.1 is amended by adding paragraph (b)(9) to read as follows:

§ 27.1 Basis and purpose.

* * * * *

(9) 2495–2690 MHz.

* * * * *

§ 27.3 [Amended]

■ 24. Section 27.3 is amended by removing paragraph (h) and by redesignating paragraphs (i) through (q) as (h) through (p) to read as follows:

■ 25. Section 27.4 is amended by adding in alphabetical order the following definitions to read as follows:

§ 27.4 Terms and definitions.

* * * * *

Attended operation. Operation of a station by a designated person on duty at the place where the transmitting apparatus is located with the transmitter in the person's plain view.

* * * * *

Booster service area. A geographic area to be designated by an applicant for a booster station, within which the booster station shall be entitled to protection against interference as set forth in this part. The booster service area must be specified by the applicant so as not to overlap the booster service area of any other booster authorized to or proposed by the applicant. However, a booster station may provide service to receive sites outside of its booster service area, at the licensee's risk of interference. The booster station must be capable of providing substantial service within the designated booster service area.

Broadband Radio Service (BRS). A radio service using certain frequencies in the 2150–2162 and 2496–2690 MHz bands which can be used to provide fixed and mobile services, except for aeronautical services.

* * * * *

Documented complaint. A complaint that a party is suffering from non-consensual interference. A documented complaint must contain a certification that the complainant has contacted the operator of the allegedly offending facility and tried to resolve the situation prior to filing. The complaint must then specify the nature of the interference, whether the interference is constant or

intermittent, when the interference began and the site(s) most likely to be causing the interference. The complaint should be accompanied by a videotape or other evidence showing the effects of the interference. The complaint must contain a motion for a temporary order to have the interfering station cease transmitting. The complaint must be filed with the Secretary's office and served on the allegedly offending party.

Educational Broadband Service (EBS). A fixed or mobile service, the licensees of which are educational institutions or non-profit educational organizations, and intended primarily for video, data, or voice transmissions of instructional, cultural, and other types of educational material to one or more receiving locations.

* * * * *

Lower Band Segment (LBS). Segment of the BRS/EBS band consisting of channels in the frequencies 2496–2572 MHz.

Middle Band Segment (MBS). Segment of the BRS/EBS band consisting of channels in the frequencies 2572–2614 MHz.

* * * * *

Point-to-point Broadband station. A Broadband station that transmits a highly directional signal from a fixed transmitter location to a fixed receive location.

* * * * *

Remote control. Operation of a station by a designated person at a control position from which the transmitter is not visible but where suitable control and telemetering circuits are provided which allow the performance of the essential functions that could be performed at the transmitter.

* * * * *

Sectorization. The use of an antenna system at an broadband station, booster station and/or response station hub that is capable of simultaneously transmitting multiple signals over the same frequencies to different portions of the service area and/or simultaneously receiving multiple signals over the same frequencies from different portions of the service area.

Studio to transmitter link (STL). A directional path used to transmit a signal from a station's studio to its transmitter.

Temporary fixed broadband station. A broadband station used for the transmission of material from temporary unspecified points to a broadband station.

* * * * *

Unattended operation. Operation of a station by automatic means whereby the transmitter is turned on and off and performs its functions without attention by a designated person.

* * * * *

Upper Band Segment (UBS). Segment of the BRS/EBS band consisting of channels in the frequencies 2614–2690 MHz

* * * * *

■ 26. Section 27.5 is amended by adding paragraph (i) to read as follows:

§ 27.5 Frequencies.

* * * * *

(i) *Frequency assignments for the BRS/EBS band.*

(1) Pre-transition frequency assignments.

BRS Channel 1: 2150–2156 MHz
BRS Channel 2: 2156–2162 MHz
BRS Channel 2A: 2156–2160 MHz
EBS Channel A1: 2500–2506 MHz
EBS Channel B1: 2506–2512 MHz
EBS Channel A2: 2512–2518 MHz
EBS Channel B2: 2518–2524 MHz
EBS Channel A3: 2524–2530 MHz
EBS Channel B3: 2530–2536 MHz
EBS Channel A4: 2536–2542 MHz
EBS Channel B4: 2542–2548 MHz
EBS Channel C1: 2548–2554 MHz
EBS Channel D1: 2554–2560 MHz
EBS Channel C2: 2560–2566 MHz
EBS Channel D2: 2566–2572 MHz
EBS Channel C3: 2572–2578 MHz
EBS Channel D3: 2578–2584 MHz
EBS Channel C4: 2584–2590 MHz
EBS Channel D4: 2590–2596 MHz
BRS Channel E1: 2596–2602 MHz
BRS Channel F1: 2602–2608 MHz
BRS Channel E2: 2608–2614 MHz
BRS Channel F2: 2614–2620 MHz
BRS Channel E3: 2620–2626 MHz
BRS Channel F3: 2626–2632 MHz
BRS Channel E4: 2632–2638 MHz
BRS Channel F4: 2638–2644 MHz
EBS Channel G1: 2644–2650 MHz
BRS Channel H1: 2650–2656 MHz
EBS Channel G1: 2656–2662 MHz
BRS Channel H1: 2662–2668 MHz
EBS Channel G1: 2668–2674 MHz
BRS Channel H1: 2674–2680 MHz
EBS Channel G1: 2680–2686 MHz
I Channels: 2686–2690 MHz

(2) *Post transition frequency assignments.* The frequencies available in the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) are listed in this section in accordance with the frequency allocations table of § 2.106 of this chapter.

(i) Lower Band Segment (LBS): The following channels shall constitute the Lower Band Segment:

BRS Channel 1: 2496–2502 MHz
EBS Channel A1: 2502–2507.5 MHz
EBS Channel A2: 2507.5–2513 MHz
EBS Channel A3: 2513–2518.5 MHz
EBS Channel B1: 2518.5–2524 MHz
EBS Channel B2: 2524–2529.5 MHz
EBS Channel B3: 2529.5–2535 MHz
EBS Channel C1: 2535–2540.5 MHz
EBS Channel C2: 2540.5–2546 MHz
EBS Channel C3: 2546–2551.5 MHz
EBS Channel D1: 2551.5–2557 MHz
EBS Channel D2: 2557–2562.5 MHz
EBS Channel D3: 2562.5–2568 MHz
EBS Channel JA1: 2568.00000–2568.33333 MHz
EBS Channel JA2: 2568.33333–2568.66666 MHz
EBS Channel JA3: 2568.66666–2569.00000 MHz
EBS Channel JB1: 2569.00000–2569.33333 MHz
EBS Channel JB2: 2569.33333–2569.66666 MHz
EBS Channel JB3: 2569.66666–2570.00000 MHz
EBS Channel JC1: 2570.00000–2570.33333 MHz
EBS Channel JC2: 2570.33333–2570.66666 MHz
EBS Channel JC3: 2570.66666–2571.00000 MHz
EBS Channel JD1: 2571.00000–2571.33333 MHz
EBS Channel JD2: 2571.33333–2571.66666 MHz
EBS Channel JD3: 2571.66666–2572.00000 MHz

(ii) Middle Band Segment (MBS): The following channels shall constitute the Middle Band Segment:

EBS Channel A4: 2572–2578 MHz
EBS Channel B4: 2578–2584 MHz
EBS Channel C4: 2584–2590 MHz
EBS Channel D4: 2590–2596 MHz
EBS Channel G4: 2596–2602 MHz
BRS Channel F4: 2602–2608 MHz
BRS Channel E4: 2608–2614 MHz

(iii) Upper Band Segment (UBS): The following channels shall constitute the Upper Band Segment:

BRS Channel KH1: 2614.00000–2614.33333 MHz
BRS Channel KH2: 2614.33333–2614.66666 MHz
BRS Channel KH3: 2614.66666–2615.00000 MHz
EBS Channel KG1: 2615.00000–2615.33333 MHz
EBS Channel KG2: 2615.33333–2616.66666 MHz
EBS Channel KG3: 2615.66666–2616.00000 MHz
BRS Channel KF1: 2616.00000–2616.33333 MHz
BRS Channel KF2: 2616.33333–2616.66666 MHz
BRS Channel KF3: 2616.66666–2617.00000 MHz
BRS Channel KE1: 2617.00000–2617.33333 MHz
BRS Channel KE2: 2617.33333–2617.66666 MHz
BRS Channel KE3: 2617.66666–2618.00000 MHz
BRS Channel 2: 2618–2624 MHz
BRS Channel E1: 2624–2629.5 MHz
BRS Channel E2: 2629.5–2635 MHz
BRS Channel E3: 2635–2640.5 MHz
EBS Channel F1: 2640.5–2646 MHz
EBS Channel F2: 2646–2651.5 MHz
EBS Channel F3: 2651.5–2657 MHz
BRS Channel H1: 2657–2662.5 MHz

BRS Channel H2: 2662.5–2668 MHz
BRS Channel H3: 2668–2673.5 MHz
BRS Channel G1: 2673.5–2679 MHz
BRS Channel G2: 2679–2684.5 MHz
BRS Channel G3: 2684.5–2690 MHz

Note to paragraph (i)(2): No 125 kHz channels are provided for channels in operation in this service. The 125 kHz channels previously associated with these channels have been reallocated to Channel H3 in the upper band segment.

(3) Frequencies will be assigned as follows:

(i) An EBS licensee is limited to the assignment of no more than one 6 MHz channel in the MBS and three channels in the LBS or UBS for use in a single area of operation. Applicants shall not apply for more channels than they intend to construct within a reasonable time, simply for the purpose of reserving additional channels. The number of channels authorized to an applicant will be based on the demonstration of need for the number of channels requested. The Commission will take into consideration such factors as the amount of use of any currently assigned channels and the amount of proposed use of each channel requested, the amount of, and justification for, any repetition in the schedules, and the overall demand and availability of broadband channels in the community. For those applicant organizations formed for the purpose of serving accredited institutional or governmental organizations, evaluation of the need will only consider service to those specified receive sites which submitted supporting documentation.

(ii) An applicant leasing excess capacity and proposing a schedule which complies in all respects with the requirements of § 1.9047 will have presumptively demonstrated need for no more than four channels. This presumption is rebuttable by demonstrating that the application does not propose to comport with our educational usage requirements as defined in § 27.1203, and to transmit the requisite minimum educational usage of § 1.9047 of this chapter for genuinely educational purposes.

(4) A temporary fixed broadband station may use any available broadband channel on a secondary basis, except that operation of temporary fixed broadband stations is not allowed within 56.3 km (35 miles) of Canada.

(5)(i) A point-to-point EBS station on the E and F-channel frequencies, may be involuntarily displaced by a BRS applicant or licensee, provided that suitable alternative spectrum is available and that the BRS entity bears the expenses of the migration. Suitability of spectrum will be determined on a case-by-base basis; at a minimum, the alternative spectrum must be licensable by broadband operators on a primary basis (although it need not be specifically allocated to the broadband service), and must provide a signal that is equivalent to the prior signal in picture quality and reliability, unless the broadband licensee will accept an inferior signal. Potential expansion of the BRS licensee may be considered in determining whether alternative available spectrum is suitable.

(ii) If suitable alternative spectrum is located pursuant to paragraph (h)(6)(i) of this section, the initiating party must prepare and file the appropriate application for the new spectrum, and must simultaneously serve a copy of the application on the EBS licensee to be moved. The initiating party will be responsible for all costs connected with the migration, including purchasing, testing and installing new equipment, labor costs, reconfiguration of existing equipment, administrative costs, legal and engineering expenses necessary to prepare and file the migration application, and other reasonable documented costs. The initiating party must secure a bond or establish an escrow account to cover reasonable incremental increase in ongoing expenses that may fall upon the migrated licensee. The bond or escrow account should also account for the possibility that the initiating party subsequently becomes bankrupt. If it becomes necessary for the Commission to assess the sufficiency of a bond or escrow amount, it will take into account such factors as projected incremental increase in electricity or maintenance expenses, or relocation expenses, as relevant in each case.

(iii) The EBS licensee to be moved will have a 60-day period in which to oppose the involuntary migration. The broadband party should state its opposition to the migration with specificity, including engineering and other challenges, and a comparison of the present site and the proposed new site. If involuntary migration is granted, the new facilities must be operational before the initiating party will be permitted to begin its new or modified operations. The migration must not disrupt the broadband licensee's provision of service, and the broadband licensee has the right to inspect the construction or installation work.

■ 27. Section 27.12 is revised to read as follows:

§ 27.12 Eligibility.

Except as provided in §§ 27.604, 27.1201, and 27.1202, any entity other than those precluded by section 310 of the Communications Act of 1934, as amended, 47 U.S.C. 310, is eligible to hold a license under this part.

■ 28. Section 27.50 is amended by redesignating paragraph (h) as (i) and adding a new paragraph (h) to read as follows:

§ 27.50 Power limits.

* * * * *

(h) The following power limits shall apply in the BRS and EBS:

(1) *Main, booster and base stations.*

(i) The maximum EIRP of a main, booster or base station shall not exceed 33 dBW + 10log(X/Y) dBW, where X is the actual channel width in MHz and Y is either 6 MHz if prior to transition or the station is in the MBS following transition or 5.5 MHz if the station is in the LBS and UBS following transition, except as provided in paragraph (h)(1)(ii) of this section.

(ii) If a main or booster station sectorizes or otherwise uses one or more transmitting antennas with a non-omnidirectional horizontal plane radiation pattern, the maximum EIRP in dBW in a given direction shall be determined by the following formula: EIRP = 33 dBW + 10 log(X/Y) dBW + 10 log(360/beamwidth) dBW, where X is the actual channel width in MHz, Y is either (i) 6 MHz if prior to transition or the station is in the MBS following transition or (ii) 5.5 MHz if the station is in the LBS and UBS following transition, and beamwidth is the total horizontal plane beamwidth of the individual transmitting antenna for the station or any sector measured at the half-power points.

(2) *Mobile and other user stations.* Mobile stations are limited to 2.0 watts EIRP. All user stations are limited to 2.0 watts transmitter output power.

* * * * *

■ 29. Section 27.53 is amended by redesignating paragraph (l) as paragraph (m) and by adding a new paragraph (l) to read as follows:

§ 27.53 Emission limits.

* * * * *

(l) For BRS and EBS stations, the power of any emissions outside the licensee's frequency bands of operation shall be attenuated below the transmitter power (P) measured in watts.

(1) Prior to the transition, and thereafter, solely within the MBS, for analog operations with an EIRP in excess of −9 dBW, the signal shall be attenuated at the channel edges by at least 38 dB relative to the peak visual carrier, then linearly sloping from that

level to at least 60 dB of attenuation at 1 MHz below the lower band edge and 0.5 MHz above the upper band edge, and attenuated at least 60 dB at all other frequencies.

(2) For fixed and temporary fixed digital stations, the attenuation shall be not less than 43 + 10 log (P) dB, unless a documented interference complaint is received from an adjacent channel licensee. Provided that the complaint cannot be mutually resolved between the parties, both licensees of existing and new systems shall reduce their out-of-band emissions by at least 67 + 10 log (P) dB measured at 3 MHz from their channel's edges for distances between stations exceeding 1.5 km. For stations separated by less than 1.5 km, the new licensee shall reduce attenuation at least 67 + 10 log (P) − 20 log(D_{km}/1.5), or when colocated, limit the undesired signal level at the affected licensee's base station receiver(s) at the colocation site to no more than −107 dBm. Mobile Service Satellite licensees operating on frequencies below 2495 MHz may also submit a documented interference complaint against BRS licensees operating on channel BRS1 on the same terms and conditions as adjacent channel BRS or EBS licensees.

(3) Prior to transition and thereafter solely within the MBS, and notwithstanding paragraph (l)(2) of this section, the maximum out-of-band power of a digital transmitter operating on a single 6 MHz channel with an EIRP in excess of −9 dBW employing digital modulation for the primary purpose of transmitting video programming shall be attenuated at the 6 MHz channel edges at least 25 dB relative to the licensed average 6 MHz channel power level, then attenuated along a linear slope to at least 40 dB at 250 kHz beyond the nearest channel edge, then attenuated along a linear slope from that level to at least 60 dB at 3 MHz above the upper and below the lower licensed channel edges, and attenuated at least 60 dB at all other frequencies.

(4) For mobile digital stations, the attenuation factor shall be not less than 43 + 10 log (P) dB at the channel edge and 55 + 10 log (P) dB at 5.5 MHz from the channel edges. Mobile Service Satellite licensees operating on frequencies below 2495 MHz may also submit a documented interference complaint against BRS licensees operating on channel BRS1 on the same terms and conditions as adjacent channel BRS or EBS licensees.

(5) Notwithstanding the provisions of paragraphs (l)(2) and (l)(4) of this section, prior to transition, a licensee may continue to operate facilities deployed as of January 10, 2005 provided that such facilities operate in compliance with the emission mask applicable to those services prior to January 10, 2005.

* * * * *

■ 30. Section 27.55 is amended by adding paragraph (a)(4) to read as follows:

§ 27.55 Signal strength limits.

(a) * * *

(4) BRS and EBS: The predicted or measured median field strength at any location on the geographical border of a licensee's service area shall not exceed the value specified unless the adjacent affected service area licensee(s) agree(s) to a different field strength. This value applies to both the initially offered services areas and to partitioned services areas. Licensees may exceed this signal level where there is no affected licensee that is constructed and providing service. Once the affected licensee is providing service, the original licensee will be required to take whatever steps necessary to comply with the applicable power level at its GSA boundary, absent consent from the affected licensee.

(i) Prior to transition, the signal strength at any point along the licensee's GSA boundary does not exceed the greater of that permitted under the licensee's Commission authorizations as of January 10, 2005 or 47 dB [mμ] V/m.

(ii) Following transition, for stations in the LBS and UBS, the signal strength at any point along the licensee's GSA boundary must not exceed 47 dB [mμ] V/m. This field strength is to be measured at 1.5 meters above the ground over the channel bandwidth (*i.e.*, each 5.5 MHz channel for licensees that hold a full channel block, and for the 5.5 MHz channel for licensees that hold individual channels).

(iii) Following transition, for stations in the MBS, the signal strength at any point along the licensee's GSA boundary must not exceed −73.0 + 10log(X/6) dBW/m², where X is the bandwidth in MHz of the channel.

* * * * *

■ 31. Section 27.58 is amended by revising the section heading and paragraphs (a), (d) and (e) to read as follows:

§ 27.58 Interference to BRS/EBS Receivers.

(a) WCS licensees shall bear full financial obligation to remedy interference to BRS/EBS block downconverters if all of the following conditions are met:

(1) The complaint is received by the WCS licensee prior to February 20, 2002;

(2) The BRS/EBS downconverter was installed prior to August 20, 1998;

(3) The WCS fixed or land station transmits at 50 or more watts peak EIRP;

(4) The BRS/EBS downconverter is located within a WCS transmitter's free space power flux density contour of −34 dBW/m²; and

(5) The BRS/EBS customer or licensee has informed the WCS licensee of the interference within one year from the initial operation of the WCS transmitter or within one year from any subsequent power increases at the WCS station.

* * * * *

(d) If the WCS licensee cannot otherwise eliminate interference caused to BRS/EBS reception, then that licensee must cease operations from the offending WCS facility.

(e) At least 30 days prior to commencing operations from any new WCS transmission site or with increased power from any existing WCS transmission site, a WCS licensee shall notify all BRS/EBS licensees in or through whose licensed service areas they intend to operate of the technical parameters of the WCS transmission facility. WCS and BRS/EBS licensees are expected to coordinate voluntarily and in good faith to avoid interference problems and to allow the greatest operational flexibility in each other's operations.

■ 32. Part 27 is amended by adding subpart M to read as follows:

Subpart M—Broadband Radio Service and Educational Broadband Service

27.1200 Change to BRS and EBS.
27.1201 EBS eligibility.
27.1202 Cable/BRS cross-ownership.
27.1203 EBS programming requirements.
27.1206 Geographic service area.
27.1207 BTA license authorization.
27.1208 Service areas.
27.1209 Conversion of incumbent EBS and BRS stations to geographic area licensing.
27.1210 Remote control operation.
27.1211 Unattended operation.
27.1212 License term.
27.1213 Designated entity provisions for BRS in Commission auctions commencing prior to January 1, 2004.
27.1214 EBS spectrum leasing arrangements and grandfathered leases.
27.1215 BRS grandfathered leases.

Technical Standards

27.1220 Transmission standards.
27.1221 Interference protection.
27.1222 Operations in the 2568–2572 and 2614–2618 bands.

Policies Governing the Transition of the 2500–2690 MHz Band for BRS and EBS

27.1230 Conversion of the 2500–2690 MHz band.
27.1231 Initiating the transition.
27.1232 Planning the transition.
27.1233 Reimbursement costs of transitioning.
27.1234 Terminating existing operations in transitioned markets.
27.1235 Post-transition notification.

Subpart M—Broadband Radio Service and Educational Broadband Service

§ 27.1200 Change to BRS and EBS.

(a) As of January 10, 2005, licensees assigned to the Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS) shall be reassigned to the Broadband Radio Service (BRS) and licensees in the Instructional Television Fixed Service (ITFS) shall be reassigned to the Educational Broadband Service (EBS).

§ 27.1201 EBS eligibility.

(a) With certain limited exceptions set forth in paragraph (c) of this section, a license for an Educational Broadband Service station will be issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations, and which is otherwise qualified under the statutory provisions of the Communications Act of 1934, as amended.

(1) A publicly supported educational institution must be accredited by the appropriate State department of education.

(2) A privately controlled educational institution must be accredited by the appropriate State department of education or the recognized regional and national accrediting organizations.

(3) Those applicant organizations whose eligibility is established by service to accredited institutional or governmental organizations must submit documentation from proposed receive sites demonstrating that they will receive and use the applicant's educational usage. In place of this documentation, a state educational television (ETV) commission may demonstrate that the public schools it proposes to serve are required to use its proposed educational usage. Documentation from proposed receive sites which are to establish the eligibility of an entity not serving its own enrolled students for credit should be in letter form, written and signed by an administrator or authority who is responsible for the receive site's curriculum planning. No receive site more than 35 miles from the transmitter site shall be used to establish basic eligibility. The administrator must indicate that the applicant's program offerings have been viewed and that such programming will be incorporated in the site's curriculum. The letter should discuss the types of programming and hours per week of formal and informal programming expected to be used and the site's involvement in the planning, scheduling and production of programming. If other levels of authority must be obtained before a firm commitment to utilize the service can be made, the nature and extent of such additional authorization(s) must be provided.

(4) Nonlocal applicants, in addition to submitting letters from proposed receive sites, must demonstrate the establishment of a local program committee in each community where they apply. Letters submitted on behalf of a nonlocal entity must confirm that a member of the receive site's staff will serve on the local program committee and demonstrate a recognition of the composition and power of the committee. The letter should show that the staff member will aid in the selection, scheduling and production of the programming received over the system.

(b) No numerical limit is placed on the number of stations which may be licensed to a single licensee. A single license may be issued for more than one transmitter if they are to be located at a common site and operated by the same licensee. Applicants are expected to accomplish the proposed operation by the use of the smallest number of channels required to provide the needed service.

(c)(1) Notwithstanding paragraph (a) of this section, a wireless cable entity may be licensed on EBS frequencies in areas where at least eight other EBS channels remain available in the community for future EBS use. Channels will be considered available for future EBS use if there are no co-channel operators or applicants within 80.5 km (50 miles) of the transmitter site of the proposed wireless cable operation, and if the transmitter site remains available for use at reasonable terms by new EBS applicants on those channels within three years of commencing operation.

(2) No more than eight EBS channels per community may be licensed to wireless cable entities.

(3) To be licensed on EBS channels, a wireless cable applicant must hold a license or a lease, or must have filed an unopposed application for at least four BRS channels to be used in conjunction with the facilities proposed on the EBS frequencies. An unopposed application is one that faces no competing application(s) or petition(s) to deny. Applicants will be required to confirm their unopposed status after the period for filing competing applications and petitions to deny has passed. If a BRS application is opposed, the companion EBS application will be returned.

(4) To be licensed on EBS channels, a wireless cable applicant must show that there are no BRS channels available for application, purchase or lease that could be used in lieu of the EBS frequencies applied for. A wireless cable entity may apply for EBS channels at the same time it applies for the related BRS frequencies, but if that BRS application is opposed by a timely filed mutually exclusive application or petition to deny, the application for EBS facilities will be returned.

(5) If an EBS application and a wireless cable application for available EBS facilities are mutually exclusive, the EBS application will be granted if the applicant is qualified. An EBS applicant may not file an application mutually exclusive with a wireless cable application if there are other EBS channels available for the proposed EBS facility.

(6)(i) An educational institution or entity that would be eligible for EBS channels that are licensed to a wireless cable entity may be entitled to access to those channels. Requests for access may be made by filing a request with the Commission. A cover letter must clearly indicate that the application is for EBS access to a wireless cable entity's facilities on EBS channels.

(ii) An EBS entity determined by the Commission to have right of access to wireless cable licensed facilities may have access to a maximum of 40 hours per channel per week. The EBS entity has the right to designate 20 of those hours as follows: 3 hours of the EBS entity's choice each day, Monday through Friday, between 8 a.m. and 10 p.m., excluding weekends, holidays and school vacations; and the remaining five hours any time of the EBS entity's choice between 8 a.m. and 10 p.m., Monday through Saturday.

(iii) No time-of-day and day-of-week obligations will be imposed on either party with respect to the other 20 hours of access time.

(iv) The EBS user must provide the wireless cable licensee with its planned schedule of use four months in advance.

No minimum amount of programming will be required of an EBS operator seeking access to one channel; for access to a second channel, the EBS user must use at least 20 hours per week on the first channel from 8 a.m. to 10 p.m., Monday through Saturday; for access to a third channel, the EBS entity must use at least 20 hours per week on the first channel and on the second channel during the hours prescribed above, and so on. Only one educational institution or entity per wireless cable licensed channel will be entitled to access from the wireless cable entity. Access will not be granted to a single entity for more than four channels, unless it can satisfy the waiver provisions of § 27.5(i)(3).

(v) When an EBS entity is granted access to an EBS channel of a wireless cable licensee, the wireless cable licensee will be required to pay half of the cost of five standard receive sites on that channel. The wireless cable entity may, at its option, pay the costs of an application and facility construction for such EBS entity on other available EBS channels, including half of the cost of five receive sites per channel.

(vi) After three years of operation, a wireless cable entity licensed to use EBS channels will not be required to grant new or additional access to such EBS channels, or provide any alternative facilities to any EBS entity seeking access to its facilities, if there are suitable EBS frequencies available for the EBS entity to build its own system.

(vii) The parties may mutually agree to modify any requirements or obligations imposed by these provisions, except for the requirement that an educational entity use at least 20 hours per week on a channel of a wireless cable licensee before requesting access to an additional channel.

§ 27.1202 Cable/BRS cross-ownership.

(a) Initial or modified authorizations for BRS stations may not be granted to a cable operator if a portion of the BRS station's protected services area is within the portion of the franchise area actually served by the cable operator's cable system and the cable operator will be using the BRS station as a multichannel video programming distributor (as defined in § 76.64(d) of this chapter). No cable operator may acquire such authorization either directly, or indirectly through an affiliate owned, operated, or controlled by or under common control with a cable operator if the cable operator will use the BRS station as a multichannel video programming distributor.

(b) No licensee of a station in this service may lease transmission time or capacity to a cable operator either directly, or indirectly through an affiliate owned, operated, controlled by, or under common control with a cable operator, if a portion of the BRS station's protected services area is within the portion of the franchise area actually served by the cable operator's cable system the cable operator will use the BRS station as a multichannel video programming distributor.

(c) Applications for new stations, station modifications, assignments or transfers of control by cable operators of BRS stations shall include a showing that no portion of the PSA of the BRS station is within the portion of the franchise area actually served by the cable operator's cable system, or of any entity indirectly affiliated, owned, operated, controlled by, or under common control with the cable operator. Alternatively, the cable operator may certify that it will not use the BRS station to distribute multichannel video programming.

(d) In applying the provisions of this section, ownership and other interests in BRS licensees or cable television systems will be attributed to their holders and deemed cognizable pursuant to the following criteria:

(1) Except as otherwise provided herein, partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate BRS licensee or cable television system will be cognizable;

(2) Investment companies, as defined in 15 U.S.C. 80a–3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 20% or more of the outstanding voting stock of a corporate BRS licensee or cable television system, or if any of the officers or directors of the BRS licensee or cable television system are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

(3) Attribution of ownership interests in a BRS licensee or cable television system that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. For purposes of paragraph (d)(9) of this section, attribution of ownership interests in a BRS licensee or cable television system that are held indirectly by any party through one or more intervening organizations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, and the ownership percentage for any link in the chain that exceeds 50% shall be included for purposes of this multiplication. For example, except for purposes of paragraph (d)(9) of this section, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of ''Licensee,'' then X's interest in ''Licensee'' would be 25% (the same as Y's interest because X's interest in Y exceeds 50%), and A's interest in ''Licensee'' would be 2.5% (0.1×0.25). Under the 5% attribution benchmark, X's interest in ''Licensee'' would be cognizable, while A's interest would not be cognizable. For purposes of paragraph (d)(9) of this section, X's interest in ''Licensee'' would be 15% (0.6×0.25) and A's interest in ''Licensee'' would be 1.5% ($0.1 \times 0.6 \times 0.25$). Neither interest would be attributed under paragraph (d)(9) of this section.

(4) Voting stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust. An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant BRS licensee or cable television system are subject to said trust.

(5) Subject to paragraph (d)(9) of this section, holders of non-voting stock shall not be attributed an interest in the issuing entity. Subject to paragraph (d)(9) of this section, holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

(6)(i) A limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the BRS or cable television activities of the partnership and the licensee or system so certifies. An interest in a Limited Liability Company (''LLC'') or Registered Limited Liability Partnership (''RLLP'') shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the BRS or cable television activities of the partnership and the licensee or system so certifies.

(ii) For a licensee or system that is a limited partnership to make the certification set forth in paragraph (d)(6)(i) of this section, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the BRS or cable television activities of the partnership. For a licensee or system that is an LLC or RLLP to make the certification set forth in paragraph (d)(6)(i) of this section, it must verify that the organizational document, with respect to the particular interest holder exempt from attribution, establishes that the exempt interest holder has no material involvement, directly or indirectly, in the management or operation of the BRS or cable television activities of the LLC or RLLP. Irrespective of the terms of the certificate of limited partnership or partnership agreement, or other organizational document in the case of an LLC or RLLP, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners, or other interest holders in the case of an LLC or RLLP, in the management or operation of the BRS or cable television businesses of the partnership or LLC or RLLP.

(iii) In the case of an LLC or RLLP, the licensee or system seeking installation shall certify, in addition, that the relevant state statute authorizing LLCs permits an LLC member to insulate itself as required by our criteria.

(7) Officers and directors of a BRS licensee or cable television system are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in businesses in addition to its primary business of BRS or cable television service, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to its primary business. The officers and directors of a parent company of a BRS licensee or cable television system, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the BRS licensee or cable television system subsidiary, and a statement properly documenting this fact is submitted to the Commission. The officers and directors of a sister corporation of a BRS licensee or cable television system shall not be attributed with ownership of these entities by virtue of such status.

(8) Discrete ownership interests will be aggregated in determining whether or not an interest is cognizable under this section. An individual or entity will be deemed to have a cognizable investment if:

(i) The sum of the interests held by or through ''passive investors'' is equal to or exceeds 20 percent; or

(ii) The sum of the interests other than those held by or through ''passive investors'' is equal to or exceeds 5 percent; or

(iii) The sum of the interests computed under paragraph (d)(8)(i) of this section plus the sum of the interests computed under paragraph (d)(8)(ii) of this section equal to or exceeds 20 percent.

(9) Notwithstanding paragraphs (d)(5) and (d)(6) of this section, the holder of an equity or debt interest or interests in a BRS licensee or cable television system subject to the BRS/cable cross-ownership rule (''interest holder'') shall have that interest attributed if:

(i) The equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value (all equity plus all debt) of that BRS licensee or cable television system; and

(ii) The interest holder also holds an interest in a BRS licensee or cable television system that is attributable under this section (other than this paragraph) and which operates in any portion of the franchise area served by that cable operator's cable system.

(10) The term ''area served by a cable system'' means any area actually passed by the cable operator's cable system and which can be connected for a standard connection fee.

(11) As used in this section ''cable operator'' shall have the same definition as in § 76.5 of this chapter.

(e) The Commission will entertain requests to waive the restrictions in paragraph (a) of this section where necessary to ensure that all significant portions of the franchise area are able to obtain multichannel video service.

(f) The provisions of paragraphs (a) through (e) of this section will not apply to one BRS channel used to provide locally-produced programming to cable headends. Locally-produced programming is programming produced in or near the cable operator's franchise area and not broadcast on a television station available within that franchise area. A cable operator will be permitted one BRS channel for this purpose, and no more than one BRS channel may be used by a cable television company or its affiliate or lessor pursuant to this paragraph. The licensee for a cable operator providing local programming pursuant to a lease must include in a notice filed with the Wireless Telecommunications Bureau a cover letter explicitly identifying itself or its lessees as a local cable operator and stating that the lease was executed to facilitate the provision of local programming. The first application or the first lease notification in an area filed with the Commission will be entitled to the exemption. The limitations on one BRS channel per party and per area include any cable/BRS operations or cable/EBS operations. The cable operator must demonstrate in its BRS application that the proposed local programming will be provided within one year from the date its application is granted. Local programming service pursuant to a lease must be provided within one year of the date of the lease or one year of grant of the licensee's application for the leased channel, whichever is later. If a BRS license for these purposes is granted and the programming is subsequently discontinued, the license will be automatically forfeited the day after local programming service is discontinued.

(g) Applications filed by cable television companies, or affiliates, for BRS channels prior to February 8, 1990, will not be subject to the prohibitions of this section. Applications filed on February 8, 1990, or thereafter will be returned. Lease arrangements between cable and BRS entities for which a lease or a firm agreement was signed prior to February 8, 1990, will also not be subject to the prohibitions of this section. Leases between cable television companies, or affiliates, and BRS station licensees, conditional licensees, or

applicants executed on February 8, 1990, or thereafter, are invalid.

(1) Applications filed by cable operators, or affiliates, for BRS channels prior to February 8, 1990, will not be subject to the prohibitions of this section. Except as provided in paragraph (g)(2)of this section, applications filed on February 8, 1990, or thereafter will be returned. Lease arrangements between cable and BRS entities for which a lease or a firm agreement was signed prior to February 8, 1990, will also not be subject to the prohibitions of this section. Except as provided in paragraph (g)(2) of this section, leases between cable operators, or affiliates, and BRS/EBS station licensees, conditional licensees, or applicants executed on or before February 8, 1990, or thereafter are invalid.

(2) Applications filed by cable operators, or affiliates for BRS channels after February 8, 1990, and prior to October 5, 1992, will not be subject to the prohibition of this section, if, pursuant to the then existing overbuild or rural exceptions, the applications were allowed under the then existing cable/BRS cross-ownership prohibitions. Lease arrangements between cable operators and BRS entities for which a lease or firm agreement was signed after February 8, 1990, and prior to October 5, 1992, will not be subject to the prohibitions of this section, if, pursuant to the then existing rural and overbuild exceptions, the lease arrangements were allowed.

(3) The limitations on cable television ownership in this section do not apply to any cable operator in any franchise area in which a cable operator is subject to effective competition as determined under section 623(l) of the Communications Act.

§ 27.1203 EBS programming requirements.

(a) Except as provided in paragraphs (b), (c), and (d) of this section, BRS and EBS licensees are authorized to provide fixed or mobile service, except aeronautical mobile service, subject to the technical requirements of subparts C and M of this part.

(b) Educational Broadband Service stations are intended primarily through video, data, or voice transmissions to further the educational mission of accredited public and private schools, colleges and universities providing a formal educational and cultural development to enrolled students. Authorized educational broadband channels must be used to further the educational mission of accredited schools offering formal educational courses to enrolled students, with limited exceptions as set forth in § 27.1201(c).

(c) In furtherance of the educational mission of accredited schools, Educational Broadband Service stations may be used for:

(1) In-service training and instruction in special skills and safety programs, extension of professional training, informing persons and groups engaged in professional and technical activities of current developments in their particular fields, and other similar endeavors;

(2) Transmission of material directly related to the administrative activities of the licensee, such as the holding of conferences with personnel, distribution of reports and assignments, exchange of data and statistics, and other similar uses.

(d) Stations, including high-power EBS signal booster stations, may be licensed in the EBS as originating or relay stations to interconnect educational broadband fixed stations in adjacent areas, to deliver instructional and cultural material to, and obtain such material from, commercial and noncommercial educational television broadcast stations for use on the educational broadband system, and to deliver instructional and cultural material to, and obtain such material from, nearby terminals or connection points of closed circuit educational television systems employing wired distribution systems or radio facilities authorized under other parts of this chapter, or to deliver instructional and cultural material to any cable television system serving a receiving site or sites which would be eligible for direct reception of EBS signals under the provisions of § 27.1201.

§ 27.1206 Geographic Service Area.

(a) The Geographic Service Area (GSA) is either:

(1) The area for incumbent site-based licensees that is bounded by a circle having a 35 mile radius and centered at the station's reference coordinates, which was the previous PSA entitled to incumbent licensees prior to January 10, 2005, and is bounded by the chord(s) drawn between intersection points of the licensee's previous 35 mile PSA and those of respective adjacent market, co-channel licensees; or:

(2) The BTA that is licensed to the respective BRS BTA authorization holder subject to the exclusion of overlapping, co-channel incumbent GSAs as described in paragraph (a)(1) of this section.

(b) If the license for an incumbent BRS station cancels or is forfeited, the GSA area of the incumbent station shall dissolve and the right to operate in that area automatically reverts to the GSA licensee that held the corresponding BTA.

§ 27.1207 BTA license authorization.

(a) Winning bidders must file an application (FCC Form 601) for an initial authorization in each market and frequency block.

(b) Blanket licenses are granted for each market and frequency block. Blanket licenses cover all mobile and response stations. Blanket licenses also cover all fixed stations anywhere within the authorized service area, except as follows:

(1) A station would be required to be individually licensed if

(i) International agreements require coordination;

(ii) Submission of an Environmental Assessment is required under § 1.1307 of this chapter;

(iii) The station would affect the radio quiet zones under § 1.924 of this chapter.

(2) Any antenna structure that requires notification to the Federal Aviation Administration (FAA) must be registered with the Commission prior to construction under § 17.4 of this chapter.

§ 27.1208 Service areas.

Most BRS/EBS service areas are Basic Trading Areas (BTAs). BTAs are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38–39. The following are additional BRS or EBS service areas in places where Rand McNally has not defined BTAs: American Samoa; Guam; Northern Mariana Islands; Mayaguez/Aguadilla-Ponce, Puerto Rico; San Juan, Puerto Rico; and the United States Virgin Islands. The Mayaguez/Aguadilla-Ponce, PR, service area consists of the following municipios: Adjuntas, Aguada, Aguadilla, Anasco, Arroyo, Cabo Rojo, Coamo, Guanica, Guayama, Guayanilla, Hormigueros, Isabela, Jayuya, Juana Diaz, Lajas, Las Marias, Maricao, Maunabo, Mayaguez, Moca, Patillas, Penuelas, Ponce, Quebradillas, Rincón, Sabana Grande, Salinas, San German, Santa Isabel, Villalba and Yauco. The San Juan service area consists of all other municipios in Puerto Rico.

§ 27.1209 Conversion of incumbent EBS and BRS stations to geographic area licensing.

(a) Any EBS or BRS station licensed by the Commission, other than BTA authorizations and facilities authorized pursuant to BTA authorizations, shall be considered an incumbent station.

(b) As of January 10, 2005, all incumbent EBS and BRS licenses shall be converted to a geographic area license. Pursuant to that geographic area license, such incumbent licensees may modify their systems provided the modified system complies with the applicable rules. The blanket license covers all fixed stations anywhere within the authorized service area, except as follows:

(1) A station would be required to be individually licensed if

(i) International agreements require coordination;

(ii) Submission of an Environmental Assessment is required under § 1.1307 of this chapter;

(iii) The station would affect the radio quiet zones under § 1.924 of this chapter.

(2) Any antenna structure that requires notification to the Federal Aviation Administration (FAA) must be registered with the Commission prior to construction under § 17.4 of this chapter.

(c) The frequencies associated with incumbent authorizations that have been cancelled automatically or otherwise been recovered by the Commission will automatically revert to the applicable BTA licensee.

§ 27.1210 Remote control operation.

Licensed BRS/EBS stations may be operated by remote control without further authority.

§ 27.1211 Unattended operation.

Unattended operation of licensed BRS/EBS stations is permitted without further authority. An unattended relay station may be employed to receive and retransmit signals of another station provided that the transmitter is equipped with circuits which permit it to radiate only when the signal intended to be retransmitted is present at the receiver input terminals.

§ 27.1212 License term.

(a) BRS/EBS licenses shall be issued for a period of 10 years beginning with the date of grant.

(b) An initial BTA authorization shall be issued for a period of ten years from the date the Commission declared bidding closed in the MDS auction.

§ 27.1213 Designated entity provisions for BRS in Commission auctions commencing prior to January 1, 2004.

(a) *Eligibility for small business provisions.* For purposes of Commission auctions commencing prior to January 1, 2004 for BRS licenses, a small business is an entity that together with its affiliates has average annual gross revenues that are not more than $40 million for the preceding three calendar years.

(b) *Designated entities.* As specified in this section, designated entities that are winning bidders in Commission auctions commencing prior to January 1, 2004 for BTA service areas are eligible for special incentives in the auction process. See 47 CFR 1.2110.

(c) *Installment payments.* Small businesses and small business consortia may elect to pay the full amount of their winning bids in Commission auctions commencing prior to January 1, 2004 for BTA service areas in installments over a ten (10) year period running from the date that their BTA authorizations are issued.

(1) Upon issuance of a BTA authorization to a winning bidder in a Commission auction commencing prior to January 1, 2004 that is eligible for installment payments, the Commission will notify such eligible BTA authorization holder of the terms of its installment payment plan. For BRS, such installment payment plans will:

(i) Impose interest based on the rate of ten (10) year U.S. Treasury obligations at the time of issuance of the BTA authorization, plus two and one half (2.5) percent;

(ii) Allow installment payments for a ten (10) year period running from the date that the BTA authorization is issued;

(iii) Begin with interest-only payments for the first two (2) years; and

(iv) Amortize principal and interest over the remaining years of the ten (10) year period running from the date that the BTA authorization is issued.

(2) *Conditions and obligations.* See § 1.2110(f)(4) of this chapter.

(3) *Unjust enrichment.* If an eligible BTA authorization holder that utilizes installment financing under this subsection seeks to partition, pursuant to applicable rules, a portion of its BTA containing one-third or more of the population of the area within its control in the licensed BTA to an entity not meeting the eligibility standards for installment payments, the holder must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of partition as a condition of approval.

(d) *Reduced upfront payments.* For purposes of Commission auctions commencing prior to January 1, 2004 for BRS licenses, a prospective bidder that qualifies as a small business, or as a small business consortia, is eligible for a twenty-five (25) percent reduction in the amount of the upfront payment otherwise required. To be eligible to bid on a particular BTA, a small business will be required to submit an upfront payment equal to seventy-five (75) percent of the upfront payment amount specified for that BTA in the public notice listing the upfront payment amounts corresponding to each BTA service area being auctioned.

(e) *Bidding credits.* For purposes of Commission auctions commencing prior to January 1, 2004 for BRS licenses, a winning bidder that qualifies as a small business, or as a small business consortia, may use a bidding credit of fifteen (15) percent to lower the cost of its winning bid on any of the BTA authorizations awarded in the Commission BRS auctions commencing prior to January 1, 2004.

(f) Short-form application certification; Long-form application or statement of intention disclosure. A BRS applicant in a Commission auction commencing prior to January 1, 2004 claiming designated entity status shall certify on its short-form application that it is eligible for the incentives claimed. A designated entity that is a winning bidder for a BTA service area(s) shall, in addition to information otherwise required, file an exhibit to either its initial long-form application for a BRS station license, or to its statement of intention with regard to the BTA, which discloses the gross revenues for each of the past three years of the winning bidder and its affiliates. This exhibit shall describe how the winning bidder claiming status as a designated entity satisfies the designated entity eligibility requirements, and must list and summarize all agreements that affect designated entity status, such as partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both de facto and de jure control of the entity. See 47 CFR 1.2110(i).

(g) *Records maintenance.* All holders of BTA authorizations acquired in a Commission auction commencing prior to January 1, 2004 that claim designated entity status shall maintain, at their principal place of business or with their designated agent, an updated documentary file of ownership and revenue information necessary to establish their status. Holders of BTA authorizations or their successors in interest shall maintain such files for a ten (10) year period running from the date that their BTA authorizations are issued. The files must be made available to the Commission upon request.

§ 27.1214 EBS spectrum leasing arrangements and grandfathered leases.

(a) A licensee in the EBS that is solely utilizing analog transmissions may enter

into a spectrum leasing arrangement to transmit material other than the educational programming defined in § 27.1203(b) and (c) subject to the following conditions:

(1) Before entering into a spectrum leasing arrangement involving material other than educational programming on any one channel, the licensee must provide at least 20 hours per week of EBS educational programming (as defined in § 27.1203(b) and (c)) on that channel, except as provided in paragraphs (a)(2) and (a)(3) of this section. An additional 20 hours per week per channel must be strictly reserved for EBS use and not used for non-EBS purposes, or reserved for recapture by the EBS licensee for its EBS educational usage, subject to one year's advance, written notification by the EBS licensee to its lessee and accounting for all recapture already exercised, with no economic or operational detriment to the licensee. These hours of recapture are not restricted as to time of day or day of the week, but may be established by negotiations between the EBS licensee and the lessee. The 20 hours per channel per week EBS educational usage requirement and the recapture and/or reservation requirement of an additional 20 hours per channel per week shall apply spectrally over the licensee's whole actual service area.

(2) For the first two years of operation, an EBS entity may enter into a spectrum leasing arrangement involving material other than educational programming if it provides EBS educational usage for at least 12 hours per channel per week, provided that the entity does not employ channel loading technology.

(3) The licensee may shift its requisite EBS educational usage onto fewer than its authorized number of channels, via channel mapping or channel loading technology, so that it can enter into a spectrum leasing arrangement involving full-time channel capacity on its EBS station and/or associated EBS booster stations, subject to the condition that it provide a total average of at least 20 hours per channel per week of EBS educational usage on its authorized channels. The use of channel mapping or channel loading consistent with the Rules shall not be considered adversely to the EBS licensee in seeking a license renewal. The licensee also retains the unabridgeable right to recapture, subject to six months' advance written notification by the EBS licensee to the spectrum lessee, an average of an additional 20 hours per channel per week, accounting for all recapture already exercised. Regardless of whether the licensee has educational receive sites within its GSA, the licensee may lease booster stations in the entire GSA, provided that the licensee maintains the unabridgeable right to ready recapture at least 40 hours per channel per week for EBS educational usage. The licensee may agree to the transmission of this recapture time on channels not authorized to it, but which are included in the wireless system of which it is a part. A licensee under this paragraph which enters into a spectrum leasing arrangement on any one of its channels to an operator may ''channel shift'' pursuant to and under the conditions of paragraph (d)(2) of this section.

(b) A licensee utilizing digital transmissions on any of its licensed channels may enter into a spectrum leasing arrangement to transmit material other than the educational programming defined in § 27.1203(b) and (c), subject to the following conditions:

(1) The licensee must reserve a minimum of 5% of the capacity of its channels for instructional purposes only, and may not enter into a spectrum leasing arrangement involving this reserved capacity. In addition, before leasing excess capacity, the licensee must provide at least 20 hours per licensed channel per week of EBS educational usage. This 5% reservation and this 20 hours per licensed channel per week EBS educational usage requirement shall apply spectrally over the licensee's whole actual service area. However, regardless of whether the licensee has an educational receive site within its GSA served by a booster, the licensee may lease excess capacity without making at least 20 hours per licensed channel per week of EBS educational usage, provided that the licensee maintains the unabridgeable right to recapture on one months' advance notice such capacity as it requires over and above the 5% reservation to make at least 20 hours per channel per week of EBS educational usage.

(2) The licensee may shift its requisite EBS educational usage onto fewer than its authorized number of channels, via channel mapping or channel loading technology, and may shift its requisite EBS educational usage onto channels not authorized to it, but which are included in the wireless system of which it is a part (''channel shifting''), so that it can enter into a spectrum leasing arrangement involving full-time channel capacity on its EBS station, associated EBS booster stations, and/or EBS response stations and associated response station hubs, subject to the condition that it provide a total average of at least 20 hours per licensed channel per week of EBS educational usage. The use of channel mapping, channel loading, and/or channel shifting consistent with the Rules shall not be considered adversely to the EBS licensee in seeking a license renewal. In addition, an EBS entity receiving interference protection will continue to receive such protection if it elects to swap channels with another EBS or BRS station.

(c) All spectrum leasing arrangements involving EBS spectrum must afford the EBS licensee an opportunity to purchase or to lease EBS equipment in the event that the spectrum leasing arrangement is terminated as a result of action by the spectrum lessee.

(d) All leases of current EBS spectrum entered into prior to January 10, 2005 and in compliance with leasing rules formerly contained in part 74 of this chapter may continue in force and effect, notwithstanding any inconsistency between such leases and the rules applicable to spectrum leasing arrangements set forth in this chapter. Such leases entered into pursuant to the former part 74 rules of this chapter may be renewed and assigned in accordance with the terms of such lease. All spectrum leasing arrangements leases entered into after January 10, 2005, pursuant to the rules set forth in part 1 and part 27 of this chapter, must comply with the rules in those parts.

§ 27.1215 BRS grandfathered leases.

(a) All leases of current BRS spectrum entered into prior to January 10, 2005 and in compliance with rules formerly contained in part 21 of this chapter may continue in force and effect, notwithstanding any inconsistency between such leases and the rules applicable to spectrum leasing arrangements set forth in this chapter. Such leases entered into pursuant to the former part 21 of this chapter may be renewed and assigned in accordance with the terms of such lease. All spectrum leasing arrangements leases entered into after January 10, 2005, pursuant to the rules set forth in part 1 and part 27 of this chapter must comply with the rules in those parts.

Technical Standards

§ 27.1220 Transmission standards.

The width of a channel in the LBS and UBS is 5.5 MHz, with the exception of BRS channels 1 and 2 which are 6.0 MHz. The width of all channels in the MBS is 6 MHz. However, the licensee may subchannelize its authorized bandwidth, provided that digital modulation is employed and the aggregate power does not exceed the authorized power for the channel. The licensee may also, jointly with other

licensees, transmit utilizing bandwidth in excess of its authorized bandwidth, provided that digital modulation is employed, all power spectral density requirements set forth in this part are met and the out-of-band emissions restrictions set forth in § 27.53 are met at the edges of the channels employed.

§ 27.1221 Interference protection.

(a) Interference protection will be afforded to BRS on a station by station basis based on the heights of the stations in the LBS and UBS and also on height benchmarking, although the heights of antennas utilized are not restricted.

(b) *Height Benchmarking.* Height benchmarking is defined for pairs of base stations, one in each of two neighboring service areas. The height benchmark for a particular station in a service area relative to a base station in an adjacent service area is the distance'squared between the station and the GSA service area boundary measured along the radial between the respective stations, divided by 17. That is, the height benchmark is $h_b = D^2/17$. Interference protection will be afforded on a station by station basis based on the actual antenna height above the radial average terrain (calculated along the straight line between the two base stations in accordance with § 24.53(b) and (c) of this chapter) and this height benchmark.

§ 27.1222 Operations in the 2568–2572 and 2614–2618 bands.

All operations in the 2568–2572 and 2614–2618 MHz bands shall be secondary to adjacent-channel operations. Stations operating in the 2568–2572 and 2614–2618 MHz must not cause interference to licensees in operation in the LBS, MBS, and UBS and must accept any interference from any station operating in the LBS, MBS, and UBS in compliance with the rules established in this subpart. Stations operating in the 2568–2572 and 2614–2618 bands may cause interference to stations in operation in the LBS, MBS, and UBS if the affected licensees consent to such interference.

Policies Governing the Transition of the 2500–2690 MHz Band for BRS and EBS

§ 27.1230 Conversion of the 2500–2690 MHz band.

BRS and EBS licensees in the 2500–2690 MHz band on the pre-transiton A–I Channels will be transitioned from the frequencies assigned to them under § 27.5(i)(1) to the frequencies assigned to them under § 27.5(i)(2). The transition, which will be undertaken by one or more proponent(s), will occur in the following five phases: initiating the transition process (see § 27.1231), planning the transition (see § 27.1232), reimbursing transition costs (see 27.1233), terminating existing operations in transitioned markets that do not comport with § 27.5(i)(2) (see § 27.1234), and filing the post-transition notification (see § 27.1235).

§ 27.1231 Initiating the transition.

(a) The transition will occur by MEA. MEAs are based on the U.S. Department of Commerce's 172 Economic Area (EAs). There are 52 MEAs composed of one or more EAs. Additionally, there are three EA-like areas: Guam and Northern Mariana Islands; Puerto Rico and the U.S. Virgin Islands; and American Samoa, which will also be transitioned to the band plan in § 27.5(i)(2). The MEA associated with the Gulf of Mexico will not be transitioned. MEAs are identified in the Table to § 27.6(a).

(b) Sections 27.1231 through 27.1235 apply only to transitions initiated by a proponent(s) within 3 years of January 10, 2005.

(c) When a proponent(s) is a Basic Trading Area (BTA) BRS licensee that is located in more than one MEA, the proponent(s) may elect to transition only one MEA or may elect to transition two or more MEAs that overlap the proponent(s)'s BTA.

(d) A proponent(s) may be an EBS or BRS licensee or an EBS lessee. To initiate a transition, a proponent(s) must submit the following information to the Commission at the Office of the Secretary in Washington, DC:

(1) A list of the MEA(s) that the proponent(s) is transitioning;

(2) A list by call sign of all of the BRS and EBS licensees in the MEA(s) that are being transitioned;

(3) A statement indicating that the engineering analysis to transition all of the BRS and EBS licensees in the MEA(s) has been completed;

(4) A statement indicating when the transition will be completed;

(5) A statement indicating that an agreement has been concluded with the proponent(s) of the adjoining or adjacent MEA(s) when the engineering analysis indicates that a licensee or licensees in an adjacent or adjoining MEA must be transitioned to avoid interference to licensees in the MEA being transitioned, or in lieu of an agreement, the proponent(s) may provide an alternative means of transitioning the licensees in an adjacent or adjoining MEA;

(6) A statement indicating that an agreement has been concluded with another proponent(s) on how a MEA will be transitioned when there are two or more proponents seeking to transition the same MEA and a statement that identifies the specific portion of the MEA each proponent will be responsible for transitioning; and

(7) A certification that it has the funds available to pay the reasonable expected costs of the transition based on the information contained in the Pre-Transition Data Request (see paragraph (f) of this section).

(e) A proponent(s) may, at it own discretion, withdraw from transitioning a MEA(s) by amending the information submitted to the Commission under paragraph (d) of this section and notifying all affected BRS and EBS licensees in the MEA(s).

(f) *Pre-transition data request.* To assist a potential proponent(s) in assessing whether to transition a MEA(s), a proponent(s) must send a Pre-transition data request to each EBS and BRS licensee in the MEA the proponent(s) seeks to transition. The proponent(s) shall include its full name, postal mailing address, contact person, e-mail address, and phone and fax numbers. The proponent(s) must request EBS and BRS licensees within a MEA to provide the following information to the potential proponent(s):

(1) The location (by street address and by geographic coordinates) of every constructed EBS receive site that, as of the date of receipt of the Pre-Transition Data Request, is entitled to a replacement downconverter (see § 27.1233(a)). The response must:

(i) Specify whether the downconverting antenna is mounted on a structure attached to the building or on a free-standing structure;

(ii) Specify the approximate height above ground level of the downconverting antenna;

(iii) Specify, if known, the adjacent channel D/U ratio that can be tolerated by any receiver(s) at the receive site; and

(2) The number and identification of EBS video programming or data transmission tracks the EBS licensee is entitled to receive in the MBS and whether the EBS licensee will accept fewer tracks in the MBS (see § 27.1233(b)).

(g) *The Transition notice.* The proponent(s) must send a Transition Notice to all BRS and EBS licensees in the MEA(s) being transitioned. The proponent(s) must include the following information in the Transition Notice:

(1) The proponent(s)'s full name; postal mailing address, contact person, e-mail address, and phone and fax numbers;

(2) The identification of the BRS and EBS licensees that will be transitioned;

(3) Copies of the most recent response to the Pre-Transition Data Request for each participant in the process; and

(4) A certification that the proponent(s) has the funds available to pay the reasonably expected costs of the transition based on the information in the Pre-Transition Data Request.

§ 27.1232 Planning the transition.

(a) *The Transition planning period.* The Transition Planning Period is a 90-day period that commences on the day after the proponent(s) file the Initiation Plan with the Commission.

(b) *The Transition plan.* The proponent(s) must provide to each BRS and EBS licensee within an MEA, a Transition Plan no later than 30 days prior to the conclusion of the Transition Planning Period.

(1) The Transition Plan must:

(i) Identify the call signs of the stations that are transitioning;

(ii) Identify the specific channels that each licensee will receive following the transition;

(iii) Identify the receive sites at which replacement downconverters will be installed (see § 27.1233(a));

(iv) Identify the video programming and data transmission tracks that will be migrated to the MBS and provide for the MBS channels to be authorized to operate with transmission parameters that are substantially similar to those of the licensee's operation prior to transition (see § 27.1233(b));

(v) Identify the technical configuration of the MBS facilities;

(vi) Identify the approximate time line for effectuating the transition, which, unless dispute resolution procedures are used, may not exceed 18 months from the conclusion of the Transition Planning Period;

(vii) Provide for the establishment of an escrow or other appropriate mechanism for ensuring completion of the transition in accordance with the Transition Plan.

(2) The Transition Plan may provide for interruptions of EBS transmissions, so long as those interruptions are limited to a period of less than seven days at any reception site. The proponent(s) must coordinate with each EBS licensee to minimize the extent of any disruption.

(3) The Transition Plan may provide for the shifting of an EBS licensee's program to alternative channels. Such shifting may not be considered an interruption, if the EBS licensee's receive sites are equipped to receive and internally distribute the channel to which the programming is shifted.

(4) The Transition Plan may provide for the installation of an appropriate filter on an MBS transmitter if the proponent(s) determines that the installation of a filter will mitigate interference from transmissions in the MBS to operations outside the MBS.

(c) *Counterproposals.* No later than 10 days before the conclusion of the Transition Planning Period, affected BRS and EBS licensees may submit a counterproposal to the proponent(s) if they believe that the Transition Plan is unreasonable. The proponent(s) may:

(1) Accept the counterproposal, modify the Transition Plan accordingly, and send the modified Transition Plan to all EBS and BRS licensees in the MEA;

(2) Invoke dispute resolution procedures for a determination of whether the Transition Plan is reasonable and take no action until a determination of reasonableness is made; or

(3) Invoke dispute resolution procedures for a determination of whether the Transition Plan is reasonable, but may implement the transition immediately.

(d) *Safe harbors.* An offer by a proponent(s) shall be reasonable if it meets one of the following safe harbors:

(1) *Safe harbor #1.* This safe harbor applies when the default high-power channel assigned to each channel group is authorized to operate after the transition with the same transmission parameters (coordinates, antenna pattern, height of center radiation, EIRP) as the downstream facilities before the transition. If the proponent(s) does not propose a change in the geographic coordinates of the facilities (other than as necessary to conform the actual location with the Commission's Antenna Survey Branch database), the proponent may also propose the following to the extent consistent with this subpart:

(i) An increase in the height of the center of radiation of the transmission antenna or a decrease in such height of no more than 8 meters (provided that such change does not result in an increase in antenna support structure lease costs to the EBS licensee and the consent of the owner of the antenna support structure is obtained).

(ii) A change in the EIRP of the transmission system of up to 1.5 dB in any direction.

(iii) Digitization, precision frequency offset, or other upgrades to the EBS transmission or reception systems that allow the proponent(s) to invoke more advantageous interference protection requirements applicable to upgraded systems.

(2) *Safe harbor #2.* This safe harbor applies when an EBS licensee has channel-shifted its single video programming or data transmission track to spectrum licensed to another licensee. Under § 27.5(i)(2), that track must be on the high-power channel licensed to the EBS licensee upon completion of the transition. For example, before the transition, an A Group licensee might have shifted its EBS video programming to channel C1. If one of the pre-transition A Group channels is licensed with technical parameters substantially similar to those of pre-transition channel C1, the Transition Plan may provide for high-power channel A4 to be licensed with the same technical parameters as the pre-transition channel C1. However, if the pre-transition A Group channels are licensed to operate with technical parameters materially different from those of pre-transition channel C1, the proponent(s) may:

(i) Arrange a channel swap with the licensee of the C Group so that the A Group licensee will receive high-power channel C4 (which will automatically be licensed with the same transmission parameters as the pre-transition channel C1) in exchange for channel A4.

(ii) Arrange for high-power channel A4 to operate with transmission parameters substantially similar to those of the pre-transition channel C1 (*see* paragraph (d)(1) of this section).

§ 27.1233 Reimbursement costs of transitioning.

(a) *Replacement downconverters.* The proponent(s) must install at every eligible EBS receive site a downconverter designed to minimize the reception of signals from outside the MBS.

(1) An EBS receive site is eligible to be replaced if:

(i) A reception system was installed at that site on or before the date the EBS licensee receives its Pre-Transition Data Request (*see* § 27.1231(f));

(ii) The reception system was installed by or at the direction of the EBS licensee;

(iii) The reception system receives EBS programming under § 27.1203(b) and (c) or is located at a cable television system headend and the cable system relays educational or instructional programming for an EBS licensee; and

(iv) It is within the licensee's 35-mile radius GSA.

(2) Replacement downconverters must meet the following minimum technical requirements:

(i) The downconverter's input frequency range (the ''in-band frequencies'') must be 2572 MHz to 2614 MHz and output frequency range must be 294 MHz to 336 MHz;

(ii) The downconversion process must not invert frequencies;

(iii) The nominal gain of the downconverter must be 32 dB, or greater;

(iv) The downconverter must include filtering prior to the first amplifier that attenuates frequencies below 2500 MHz and above 2705 MHz by at least 25 dB;

(v) The downconverter must have an out-of-band input 3rd order intercept point (input IP3) of at least +9 dBm, where out-of-band is defined as all frequencies below 2566 MHz and all frequencies above 2620 MHz;

(vi) The downconverter must have a typical noise figure of no greater than 3.5 dB and a worst case noise figure of no greater than 4.5 dB across all in-band frequencies and across its entire intended operating temperature range;

(vii) The downconverter must not introduce a delta group delay of more than 20 nanoseconds for digital operations or 100 nanoseconds for analog operations over any individual six megahertz MBS channel.

(b) *Migration of Video Programming and Data Transmission Track.* (1) The proponent(s) must provide, at its cost, to each EBS licensee that intends to continue downstream high-power, high-site educational video programming or data transmission services, with one programming track on the MBS channels for each EBS video or data transmission track the licensee is transmitting on a simultaneous basis before the transition.

(i) To be eligible for migration, a program track must contain EBS programming that complies with § 27.1203 (b) and (c).

(ii) The proponent(s) must pay only the costs of migrating programming tracks being transmitted on December 31, 2002 or within six months prior thereto.

(2) The proponent(s) must migrate each eligible programming track to spectrum in the MBS that will be licensed to the affected licensee at the conclusion of the transition.

(3) After the transition, the desired-to-undesired signal level ratio at each of the receive sites securing a replacement downconverter must satisfy the following criteria:

(i) *Cochannel D/U Ratio.* (A) When the post-transition desired signal is transmitted using analog modulation, the actual cochannel D/U ratio measured at the output of the reception antenna must be at least the lesser of 45 dB or the actual pre-transmission D/U ratio less 1.5 dB.

(B) When the post-transition desired signal will be transmitted using digital modulation, the actual cochannel D/U ratio measured at the output of the reception antenna must be at least the lesser of 32 dB or the pre-transition D/U ratio less 1.5 dB.

(C) Where in implementing the Transition Plan, the proponent(s) deploys precise frequency offset in an analog system, the minimum cochannel D/U ratio is reduced to 38 dB, provided that the transmitters have or are upgraded pursuant to the Transition Plan to have the appropriate ''plus,'' ''zero,'' or ''minus'' 10,010 Hertz precision frequency offset with a ±3 Hertz (or better) stability.

(ii) *Adjacent Channel D/U Ratio.* The actual adjacent channel D/U must equal or exceed the lesser of 0 dB or the actual pre-transmission D/U ratio. However, in the event that the receive site uses receivers or is upgraded by the proponent(s) as part of the Transition Plan to use receivers that can tolerate negative adjacent channel D/U ratios, the actual adjacent channel D/U ratio at such receive site must equal or exceed such negative adjacent channel D/U ratio.

(c) *BRS costs.* BRS licensees must pay their own transition costs. BRS licensees in the LBS or UBS must reimburse the proponent(s) a pro rata share of the cost of transitioning the facilities they use to provide commercial service, either directly or through a lease agreement with an EBS licensee.

§ 27.1234 Terminating existing operations in transitioned markets.

Licensees may discontinue operations during the transition.

§ 27.1235 Post-transition notification.

The proponent(s) and all affected licensees must jointly notify the Commission at the Office of the Secretary, Washington DC, that the Transition Plan has been fully implemented.

(a) The notification must provide the identification of the licensees that have transitioned to the band plan in § 27.5(i)(2) and the specific frequencies on which each licensee is operating.

(b) For each station in the MBS, the notification must provide the following information:

(1) The station coordinates,

(2) The make and model of each antenna,

(3) The horizontal and vertical pattern of the antenna;

(4) EIRP of the main lobe;

(5) Orientation;

(6) Height of antenna center of radiation;

(7) Transmitter output power;

(8) All line and combiner losses.

(c) The proponent(s) must provide copies of the post-transition notice to all parties of the transition.

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.1010 [Amended]

■ 34. Section 73.1010 is amended by removing paragraph (e)(7) and redesignating paragraph (e)(8) as paragraph (e)(7).

§ 73.3500 [Amended]

■ 35. In the table in § 73.3500 (a) remove the entries for Form numbers 330, 330–L, and 330–R.

§ 73.3533 [Amended]

■ 36. Section 73.3533 is amended by removing paragraph (a)(4) and redesignating paragraphs (a)(5) through (a)(8) as paragraphs (a)(4) through (a)(7).

§ 73.3534 [Removed and reserved]

■ 37. Section 73.3534 is removed and reserved.

§ 73.3536 [Amended]

■ 38. Section 73.3536 is amended by removing paragraph (b)(4) and redesignating paragraphs (b)(5) through (b)(7) as paragraphs (b)(4) through (b)(6).

■ 39. Section 73.5000 is amended by revising paragraph (a) to read as follows:

§ 73.5000 Services subject to competitive bidding.

(a) Mutually exclusive applications for new facilities and for major changes to existing facilities in the following broadcast services are subject to competitive bidding: AM; FM; FM translator; analog television; low-power television; television translator; and Class A television. Mutually exclusive applications for minor modifications of Class A television and television broadcast are also subject to competitive bidding. The general competitive bidding procedures set forth in part 1, subpart Q of this chapter will apply unless otherwise provided in part 73 or part 74 of this chapter.

* * * * *

■ 40. Section 73.5002 is revised to read as follows:

§ 73.5002 Application and certification procedures; return of mutually exclusive applications not subject to competitive bidding procedures; prohibition of collusion.

(a) Prior to any broadcast service auction, the Commission will issue a

public notice announcing the upcoming auction and specifying the period during which all applicants seeking to participate in an auction, and all applicants for noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6), on non-reserved channels, must file their applications for new broadcast facilities or for major changes to existing facilities. Broadcast service applications for new facilities or for major modifications will be accepted only during these specified periods. This initial and other public notices will contain information about the completion and submission of applications to participate in the broadcast auction, and applications for noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6), on non-reserved channels, as well as any materials that must accompany the applications, and any filing fee that must accompany the applications or any upfront payments that will need to be submitted. Such public notices will also, in the event mutually exclusive applications are filed for broadcast construction permits that must be resolved through competitive bidding, contain information about the method of competitive bidding to be used and more detailed instructions on submitting bids and otherwise participating in the auction. In the event applications are submitted that are not mutually exclusive with any other application in the same service, or in the event that any applications that are submitted that had been mutually exclusive with other applications in the same service are resolved as a result of the dismissal or modification of any applications, the non-mutually exclusive applications will be identified by public notice and will not be subject to auction.

(b) To participate in broadcast service auctions, or to apply for a noncommercial educational station, as described in 47 U.S.C. 397(6), on a non-reserved channel, all applicants must timely submit short-form applications (FCC Form 175), along with all required certifications, information and exhibits, pursuant to the provisions of § 1.2105(a) of this chapter and any Commission public notices. So determinations of mutual exclusivity for auction purposes can be made, applicants for non-table broadcast services must also submit the engineering data contained in the appropriate FCC form (FCC Form 301, FCC Form 346, or FCC Form 349). Beginning January 1, 1999, all short-form applications must be filed electronically. If any application for a noncommercial educational broadcast station, as described in 47 U.S.C. 397(6), is mutually exclusive with applications for commercial broadcast stations, and the applicants that have the opportunity to resolve the mutually exclusivity pursuant to paragraphs (c) and (d) of this section fail to do so, the application for noncommercial educational broadcast station, as described in 47 U.S.C. 397(6), will be returned as unacceptable for filing, and the remaining applications for commercial broadcast stations will be processed in accordance with competitive bidding procedures.

(c) Applicants in all broadcast service auctions, and applicants for noncommercial educational stations, as described in 47 U.S.C. 397(6), on non-reserved channels will be subject to the provisions of § 1.2105(b) of this chapter regarding the modification and dismissal of their short-form applications. Notwithstanding the general applicability of § 1.2105(b) of this chapter to broadcast auctions, and applicants for noncommercial educational stations, as described in 47 U.S.C. 397(6), on non-reserved channels, the following applicants will be permitted to resolve their mutual exclusivities by making amendments to their engineering submissions following the filing of their short-form applications:

(1) Applicants for all broadcast services who file major modification applications that are mutually exclusive with each other;

(2) Applicants for all broadcast services who file major modification and new station applications that are mutually exclusive with each other; or

(3) Applicants for the secondary broadcast services who file applications for new stations that are mutually exclusive with each other.

(d) The prohibition of collusion set forth in § 1.2105(c) of this chapter, which becomes effective upon the filing of short-form applications, shall apply to all broadcast service auctions. Notwithstanding the general applicability of § 1.2105(c) of this chapter to broadcast auctions, the following applicants will be permitted to resolve their mutual exclusivities by means of engineering solutions or settlements during a limited period after the filing of short-form applications, as further specified by Commission public notices:

(1) Applicants for all broadcast services who file major modification applications that are mutually exclusive with each other;

(2) Applicants for all broadcast services who file major modification and new station applications that are mutually exclusive with each other; or

(3) Applicants for the secondary broadcast services who file applications for new stations that are mutually exclusive with each other.

■ 41. Section 73.5003 is revised to read as follows:

§ 73.5003 Submission of full payments.

If a winning bidder fails to pay the balance of its winning bid in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five (5) percent of the amount due. Broadcast construction permits licenses will be granted by the Commission following the receipt of full payment.

■ 42. Section 73.5005 is amended by revising paragraph (a) to read as follows:

§ 73.5005 Filing of long-form applications.

(a) Within thirty (30) days following the close of bidding and notification to the winning bidders, each winning bidder must submit an appropriate long-form application (FCC Form 301, FCC Form 346, or FCC Form 349) for each construction permit or license for which it was the high bidder. Long-form applications filed by winning bidders shall include the exhibits required by § 1.2107(d) of this chapter (concerning any bidding consortia or joint bidding arrangements); § 1.2110(j) of this chapter (concerning designated entity status, if applicable); and § 1.2112 of this chapter (concerning disclosure of ownership and real party in interest information, and, if applicable, disclosure of gross revenue information for small business applicants).

* * * * *

■ 43. Section 73.5006 is revised to read as follows:

§ 73.5006 Filing of petitions to deny against long-form applications.

(a) As set forth in 47 CFR 1.2108, petitions to deny may be filed against the long-form applications filed by winning bidders in broadcast service auctions and against the long-form applications filed by applicants whose short-form applications were not mutually exclusive with any other applicant, or whose short-form applications were mutually exclusive only with one or more short-form applications for a noncommercial educational broadcast station, as described in 47 U.S.C. 397(6).

(b) Within ten (10) days following the issuance of a public notice announcing that a long-form application for an AM, FM or television construction permit has been accepted for filing, petitions to deny that application may be filed. Within fifteen (15) days following the issuance of a public notice announcing that a long-form application for a low-power television, television translator or FM translator construction permit has been accepted for filing, petitions to deny that application may be filed. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

(c) An applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition. Allegations of fact or denials thereof must be supported by affidavit of a person or persons with personal knowledge thereof. In the AM, FM and television broadcast services, the time for filing such oppositions shall be five (5) days from the filing date for petitions to deny, and the time for filing replies shall be five (5) days from the filing date for oppositions. In the low-power television, television translator and FM translator broadcast services, the time for filing such oppositions shall be fifteen (15) days from the filing date for petitions to deny, and the time for filing replies shall be ten (10) days from the filing date for oppositions.

(d) If the Commission denies or dismisses all petitions to deny, if any are filed, and is otherwise satisfied that an applicant is qualified, a public notice will be issued announcing that the broadcast construction permit(s) is ready to be granted, upon full payment of the balance of the winning bid(s). See 47 CFR 73.5003. Construction of broadcast stations shall not commence until the grant of such permit or license to the winning bidder.

■ 44. Section 73.5007 is amended by removing paragraph (b)(2)(vi) and revising paragraphs (b)(2)(iv) and (b)(2)(v) to read as follows:

§ 73.5007 Designated entity provisions.

* * * * *

(b) * * *

(2) * * *

(iv) Cable television system—the franchised community of a cable system; and

(v) Daily newspaper—community of publication.

* * * * *

■ 45. Section 73.5008 is amended by revising paragraph (b) to read as follows:

§ 73.5008 Definitions applicable for designated entity provisions.

* * * * *

(b) A *medium of mass communications* means a daily newspaper; a cable television system; or a license or construction permit for a television broadcast station, an AM or FM broadcast station, or a direct broadcast satellite transponder.

* * * * *

PART 74—EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCASTING AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

■ 46. The authority citation for part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 307, 336(f), 336(h) and 554.

■ 47. Section 74.1 is amended by revising paragraph (b) to read as follows:

§ 74.1 Scope.

* * * * *

(b) Rules in part 74 which apply exclusively to a particular service are contained in that service subpart, as follows: Experimental Broadcast Stations, Subpart A; Remote Pickup Broadcast Stations, Subpart D; Aural Broadcast STL and Intercity Relay Stations, Subpart E; TV Auxiliary Broadcast Stations, Subpart F; Low-power TV, TV Translator and TV Booster Stations, Subpart G; Low-power Auxiliary Stations, Subpart H; FM Broadcast Translator Stations and FM Broadcast Booster Stations, subpart L.

* * * * *

§ 74.15 [Amended]

■ 48. Section 74.15 is amended by removing paragraph (e) and redesignating paragraphs (f) and (g) as (e) and (f).

■ 49. Section 74.703 is amended by revising paragraph (d) to read as follows:

§ 74.703 Interference.

* * * * *

(d) When a low-power TV or TV translator station causes interference to a CATV system by radiations within its assigned channel at the cable headend or on the output channel of any system converter located at a receiver, the earlier user, whether cable system or low-power TV or TV translator station, will be given priority on the channel, and the later user will be responsible for correction of the interference. When a low-power TV or TV translator station causes interference to a BRS or EBS system by radiations within its assigned channel on the output channel of any system converter located at a receiver, the earlier user, whether BRS system or low-power TV or TV translator station, will be given priority on the channel, and the later user will be responsible for correction of the interference.

* * * * *

■ 50. Section 74.832 is amended by revising paragraph (a)(6) to read as follows:

§ 74.832 Licensing requirements and procedures.

(a) * * *

(6) Licensees and conditional licensees of stations in the Service and Multichannel Multipoint Distribution Service as defined in § 21.2 of this chapter, or entities that hold an executed lease agreement with an MDS or MMDS licensee or conditional licensee or with an Instructional Television Fixed Service licensee or permittee.

* * * * *

Subpart I [Removed and Reserved]

■ 51. Subpart I is removed and reserved.

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 52. The authority for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302a, 303, 303a, 307, 308, 309, 312, 317, 325, 338, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, and 573.

■ 53. Section 76.64 is amended by revising paragraph (d) to read as follows:

§ 76.64 Retransmission consent.

* * * * *

(d) A multichannel video program distributor is an entity such as, but not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, or a satellite master antenna television system operator, that makes available for purchase, by subscribers or customers, multiple channels of video programming.

* * * * *

■ 54. Section 76.71 is amended by revising paragraph (a) to read as follows:

§ 76.71 Scope of application.

(a) The provisions of this subpart shall apply to any corporation, partnership, association, joint-stock company, or trust engaged primarily in the management or operation of any cable system. Cable entities subject to these provisions include those systems

defined in § 76.5(a), all satellite master antenna television systems serving 50 or more subscribers, and any multichannel video programming distributor. For purposes of the provisions of this subpart, a multichannel video programming distributor is an entity such as, but not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, or a video dialtone program service provider, who makes available for purchase, by subscribers or customers, multiple channels of video programming, whether or not a licensee. Multichannel video programming distributors do not include any entity which lacks control over the video programming distributed. For purposes of this subpart, an entity has control over the video programming it distributes, if it selects video programming channels or programs and determines how they are presented for sale to consumers. Nothwithstanding the foregoing, the regulations in this subpart are not applicable to the owners or originators (of programs or channels of programming) that distribute six or fewer channels of commonly-owned video programming over a leased transport facility. For purposes of this subpart, programming services are ''commonly-owned'' if the same entity holds a majority of the stock (or is a general partner) of each program service.

* * * * *

■ 55. Section 76.503 is amended by revising paragraph (e) to read as follows:

§ 76.503 National Subscriber Limits.

* * * * *

(e) ''Multichannel video-programming subscribers'' means subscribers who receive multichannel video-programming from cable systems, direct broadcast satellite services, direct-to-home satellite services, BRS/EBS, local multipoint distribution services, satellite master antenna television services (as defined in § 76.5(a)(2)), and open video systems.

* * * * *

■ 56. Section 76.905 is amended by revising paragraph (d) to read as follows:

§ 76.905 Standards for identification of cable systems subject to effective competition.

* * * * *

(d) A multichannel video program distributor, for purposes of this section, is an entity such as, but not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, a video dialtone service provider, or a satellite master antenna television service provider that makes available for purchase, by subscribers or customers, multiple channels of video programming.

* * * * *

■ 57. Section 76.1000 is amended by revising paragraph (e) and the existing note to paragraph (e) shall remain unchanged to read as follows:

§ 76.1000 Definitions.

* * * * *

(e) *Multichannel video programming distributor.* The term ''multichannel video programming distributor'' means an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.

* * * * *

■ 58. Section 76.1200 is amended by revising paragraphs (a) and (b) to read as follows:

§ 76.1200 Definitions.

(a) *Multichannel video programming system.* A distribution system that makes available for purchase, by customers or subscribers, multiple channels of video programming other than an open video system as defined by § 76.1500(a). Such systems include, but are not limited to, cable television systems, BRS/EBS systems, direct broadcast satellite systems, other systems for providing direct-to-home multichannel video programming via satellite, and satellite master antenna systems.

(b) *Multichannel video programming distributor.* A person such as, but not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, or a television receive-only satellite program distributor, who owns or operates a multichannel video programming system.

* * * * *

■ 59. Section 76.1300 is amended by revising paragraph (d) to read as follows:

§ 76.1300 Definitions.

* * * * *

(d) *Multichannel video programming distributor.* The term ''multichannel video programming distributor'' means an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.

* * * * *

PART 78—CABLE TELEVISION RELAY SERVICE

■ 60. The authority for part 78 continues to read as follows:

Authority: Sections 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. 152, 153, 154, 301, 303, 307, 308, 309.

■ 61. Section 78.1 is revised to read as follows:

§ 78.1 Purpose.

The rules and regulations set forth in this part provide for the licensing and operation of fixed or mobile cable television relay service stations (CARS) used for the transmission of television and related audio signals, signals of standard and FM broadcast stations, signals of BRS/EBS fixed stations, and cablecasting from the point of reception to a terminal point from which the signals are distributed to the public by cable. In addition CARS stations may be used to transmit television and related audio signals to TV translator and low-power TV stations.

■ 62. Section 78.5 is amended by revising paragraph (j) to read as follows:

§ 78.5 Definitions.

* * * * *

(j) *Other eligible system.* A system comprised of microwave radio channels in the BRS/EBS spectrum (as defined in subpart M of part 27 of this chapter) that delivers multichannel television service over the air to subscribers.

■ 63. Section 78.11 is amended by revising paragraph (a) to read as follows:

§ 78.11 Permissible service.

(a) CARS stations are authorized to relay TV broadcast and low-power TV and related audio signals, the signals of AM and FM broadcast stations, signals of BRS/EBS fixed stations, and cablecasting intended for use by one or more cable television systems or other eligible systems. LDS stations are authorized to relay television broadcast and related audio signals, the signals of AM and FM broadcast stations, signals of BRS/EBS fixed stations, cablecasting, and such other communications as may be authorized by the Commission. Relaying includes retransmission of signals by intermediate relay stations in

the system. CARS licensees may interconnect their facilities with those of other CARS, common carrier, or television auxiliary licensees, and may also retransmit the signals of such CARS, common carrier, or television auxiliary stations, provided that the program material retransmitted meets the requirements of this paragraph.

* * * * *

■ 64. Section 78.13 is amended by removing paragraph (e), redesignating paragraph (f) as paragraph (e) and revising paragraph (d) to read as follows:

§ 78.13 Eligibility for license.

* * * * *

(d) Licensees and conditional licensees of channels in the BRS/EBS band as defined in § 27.5(i) of this chapter, or entities that hold an executed lease agreement with a BRS/EBS licensee or conditional licensee.

* * * * *

PART 79—CLOSED CAPTIONING AND VIDEO DESCRIPTION OF VIDEO PROGRAMMING

■ 65. The authority for part 79 continues to read as follows:

Authority: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 613.

■ 66. Section 79.1 is amended by revising paragraph (d)(7) to read as follows:

§ 79.1 Closed captioning of video programming.

* * * * *

(d) * * *

(7) *EBS programming.* Video programming transmitted by an Educational Broadband Service licensee pursuant to part 27 of this chapter.

* * * * *

PART 101—FIXED MICROWAVE SERVICES

■ 67. The authority citation for part 101 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 101.101 [Amended]

■ 68. Section 101.101 is amended by removing the entry of ''2150–2160 MHz'' frequency band.

§ 101.147 [Amended]

■ 69. Section 101.147 is amended by removing the entry of ''2150–2160 MHz'' frequency band in paragraph (a), and by removing and reserving paragraphs (e) and (g).

[FR Doc. 04–26830 Filed 12–9–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 27

[WT Docket No. 03–66; RM–10586; FCC 04–135]

Facilitating the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150–2162 and 2500–2690 MHz Bands

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, a Further Notice of Proposed Rulemaking (FNPRM), the Federal Communications Commission (FCC) proposes rules concerning the Broadband Radio Service (BRS) and the Educational Broadband Service (EBS) in the 2496–2690 MHz band. The FNPRM further proposes rules to govern the transition of the 2500–2690 MHz band when the transition has not occurred according to the timeframes adopted by the FCC. The NPRM seeks comment on numerous issues concerning these proposals.

DATES: Comments are due on or before January 10, 2005. Reply comments are due February 8, 2005. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before February 8, 2005.

ADDRESSES: In addition to filing comments with the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *Judith-B.Herman@fcc.gov* and to Kristy L. LaLonde, OMB Desk Officer, Room 10234 NEOB, 725 17th Street, NW., Washington, DC 20503, or via the Internet to *Kristy_L.LaLonde@omb.eop.gov*, or via fax at 202–395–5167.

FOR FURTHER INFORMATION CONTACT: Genevieve Ross or Nancy Zaczek at 202–418–2487. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Judith B. Herman at 202–418–0214, or via the Internet at *Judith-B.Herman@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's FNPRM, released on July 29, 2004, FCC 04–135. The full text of the FNRM is available for inspection and copying during normal business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. The complete text may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, 202–488–5300. The complete item is also available on the Commission's Web site at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC–04–135A1.doc.* The proposed rule was published in the **Federal Register** on June 10, 2003 (68 FR 34560).

I. Summary of Further Notice of Proposed Rulemaking

1. We seek comment on the following issues in the *Further Notice of Proposed Rulemaking (FNPRM):*

- In markets where proponents file transition plans, we propose to assign licenses for unassigned spectrum. We seek comment on the timing of such auctions, the appropriate geographic area licensing definitions for new licenses, the proper grouping of frequency blocks for new licenses, and the appropriate bidding credits for such licenses.
- We also seek comment on alternative methods to transition licensees to the extent that licensee-negotiated transitions do not occur within the three-year transition period. Specifically, we seek comment on utilizing a system whereby existing licenses would be exchanged for a modified license and a tradable instrument. Upon completion of such exchange, the entire band will be auctioned, and entities can utilize these tradable instruments in this or any other Commission auction. The tradable instruments would be divisible and transferable. Existing licensees would be able to continue operating until the new licensee certifies that it is ready to commence service. Those licensees who chose to opt-out would receive one six megahertz channel in the Middle Band Segment, and new licensees would be required to pay for the relocation of licensees that opt-out.
- We seek comment on establishing performance requirements for BRS and EBS licensees. We tentatively conclude that any performance requirements should be based on a ''substantial service'' standard and seek comment on appropriate safe harbors that licensees could rely upon to demonstrate that they have provided substantial service.
- We seek comment on modifying the respective rights of grandfathered EBS stations operating on the E and F channel groups and BRS stations operating on those channel groups.
- We seek comment on eliminating, in markets that have not yet transitioned, the rule that limits EBS licensees to four channels, from in the same channel group, in a single area of operation. We conclude that the rule will not apply in markets that have transitioned.
- We seek comment on eliminating, in markets that have not yet transitioned, the rule that allows wireless cable operators to be licensed on EBS channels under certain conditions. We conclude that the rule will not apply in markets that have transitioned. Existing licenses will be grandfathered.
- We seek comment on revising the methodology used to calculate regulatory fees for BRS or EBS licensee.
- We seek comment on issues relating to the definition of the Gulf of Mexico service area and service rules relating to that area.
- We seek comment on ways to streamline our current procedures for reviewing transactions in order to facilitate more efficient transactions.
- We also seek comment on future trends that licensees, equipment manufacturers, and other stakeholders expect for BRS and EBS.

Procedural Matters

Ex Parte Rules

2. This is a permit-but-disclose notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules.

Comment Period and Procedures

3. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, interested parties may file comments on this Notice on or before January 10, 2005, and reply comments on or before February 8, 2005. Comments and reply comments should be filed in WT Docket No. 03–66, and may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding.

4. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket

number. Parties may also submit an electronic comment by e-mail via the Internet. To obtain filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov*, and should include the following words in the body of the message: ''get form <your e-mail address>.'' A sample form and directions will be sent in reply.

5. Parties who choose to file by paper must file an original and four copies of each filing. If parties want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. All filings must be sent to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW–A325, Washington, DC 20554. Furthermore, parties are requested to provide courtesy copies for the following Commission staff: (1) Nancy Zaczek, Genevieve Ross, and Stephen Zak, Broadband Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, SW., Room 3–C124, Washington, DC 20554; and (2) William Huber and Erik Salovaara, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, SW., Room 4–A760, Washington, DC 20554. One copy of each filing (together with a diskette copy, as indicated below) should also be sent to the Commission's copy contractor, Best Copy and Printing, Inc, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, 1–800–378–3160.

6. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be attached to the original paper filing submitted to the Office of the Secretary. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Microsoft TM Word 97 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in ''read only'' mode. The diskette should be clearly labeled with the commenter's name, proceeding, type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase ''Disk Copy—Not an Original.'' Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters should send diskette copies to the Commission's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, 202–863–2893.

7. The public may view the documents filed in this proceeding during regular business hours in the FCC Reference Information Center, Federal Communications Commission, 445 12th Street, SW., Room CY–A257, Washington, DC 20554, and on the Commission's Internet Home Page: *http://www.fcc.gov*. Copies of comments and reply comments are also available through the Commission's duplicating contractor: Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, 1–800–378–3160. Accessible formats (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting Brian Millin, of the Consumer & Governmental Affairs Bureau, at (202) 418–7426, TTY (202) 418–7365, or at *bmillin@fcc.gov*.

Initial Paperwork Reduction Analysis

8. This document contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13. Public and agency comments are due on or before November 23, 2004. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Pub. L. 107–198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

OMB Control No.: 3060–XXXX.

Title: Transition of the 2500–2690 MHz band.

Form No.: N/A.

Type of Review: New Collection.

Respondents: Business or other for-profit; State, and local government; Not-for-profit institutions; Individuals or household.

Number of Respondents: 2500.

Estimated Time Per Response: 1 to 25 hours.

Frequency of Response: One time reporting requirements.

Total Annual Burden: 32,000.

Total Annual Cost: $7,000,000.

Needs and Uses: The Commission adopted on June 10, 2004 and released on July 29, 2004, rules to transition licensees in the 2500–2690 MHz band. Specifically, licensees in the Multichannel Multipoint Distribution Service (MMDS) (renamed the Broadband Radio Service (BRS)) and the Instructional Television Fixed Service (ITFS) (renamed the Educational Broadband Service (EBS)), must transition to a new band plan in the 2500–2690 MHz band. This transition is to take place by Major Economic Area (MEA). If a transition in a particular MEA is not initiated within three years of the effective date of the rules adopted by the Commission, the transition procedure adopted by the Commission will not apply and the licensees in that MEA will not be required to comply with any of the following paperwork requirements.

9. If a transition is initiated in a given MEA within three years of the effective date of the rules adopted by the Commission, the following paperwork requirements apply. First, the proponent or joint proponents (hereinafter proponent) must send a notice to every BRS and EBS licensee in the MEA seeking information. Second, the BRS and EBS licensees must respond to this request by submitting a pre-transition data request to the proponent. Third, the proponent must send a transition notice to all BRS and EBS licensees in the MEA once the proponent has decided to transition a given MEA. Fourth, the proponent must provide a transition plan to every BRS and EBS licensee in the MEA. Fifth, the proponent must submit an Initiation Plan to the Commission once it has decided to transition a given MEA. Sixth, once the transition is completed the proponent and BRS and EBS licensees in the MEA must jointly file a post-transition notification with the Commission. The purpose of collecting this information is to enable a proponent to assess whether to transition a particular MEA, to provide BRS and EBS licensees with information on how they are to be transitioned, and to inform the Commission of the status of the transition. BRS and EBS licensees will provide the Commission with technical information in the post-transition notification on FCC Form 601. The FCC Form 601 is a consolidated multi-part application or ''long form'' for market-based licensing and site-by-site

licensing in the Universal Licensing System.

Initial Regulatory Flexibility Analysis

10. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Further Notice of Proposed Rule Making (FNPRM).* Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines specified in the *FNPRM* for comments. The Commission will send a copy of this *FNPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *FNPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.

Need for, and Objectives of, the Proposed Rules

11. In this *FNPRM* we seek comments on solutions to implement in the event that the plan we adopt today for transitioning to the new band plan, set forth in section IV. A.5, *supra* does not reach a satisfactory stage of implementation within three years. A quick and efficient transition to a segmented, de-interleaved band plan is critical to ensuring that the public spectrum resource represented by the 2500–2690 MHz band does not remain underutilized. We have adopted a new band plan to further the public interest in efficient and intensive use of spectrum. To prevent undue delay in implementing the new band plan, the transition process will sunset in each major economic area where a proponent does not timely file within three years of the rules' effective date a transition proposal that has resolved, pursuant to the Commission's rules, any properly presented objections. This three year time limit will provide an incentive for existing users to develop transition proposals in a timely manner. Finally, recognizing that parties may not be able to control the timing of all aspects of the transition, we require only that the proposal be finalized, with any objections addressed, and filed within the three-year period.

12. Irrespective of how well the transition process to the new band plan is designed, it may not be possible for private parties to transition existing uses to the new band plan in a way that balances the public interest in protecting those uses with the public interest in the new band plan. There are large numbers of existing users in the band with varied and disparate interests. A proponent therefore must coordinate large numbers of substantially varying interests in order to transition to the new band plan. A proponent may not come forward in every major economic area and every proponent that comes forward may not be able to resolve all reasonable objections made to its proposal. Furthermore, the transition process may not perfectly define reasonable transition proposals or rapidly and accurately determine whether particular objections to particular transitions are reasonable. Consequently, transitions to the new band plan may not occur within one or more major economic area within the allotted time.

13. Consequently, we tentatively conclude herein that in major economic areas that are not transitioned to the new band plan pursuant to the transition process we have adopted herein, the public interest in services made possible by the new band plan will be best served by clearing existing users from the spectrum. The transition process we have adopted represents the best effort at transitioning existing use to facilities compatible with the new band plan. While new transition plans, including in areas otherwise without one, might result from refinements to the transition process, we conclude that the absence of a timely filed Initiation Plan indicates that existing uses cannot be reasonably balanced with the new band plan in the relevant area. Consequently, the public will receive the benefits of the new band plan only if existing users are cleared from the spectrum and the Commission grants new licenses to use the spectrum consistent with the new band plan. Accordingly, we propose to implement this transition process in areas where the requirements we have instituted herein are not met within the required time frame.

14. As stated in the text of the *FNPRM*, we request comment on a number of issues relating to competitive bidding procedures that could be used to assign new licenses in this band by auction. We propose to conduct any such auction in conformity with the general competitive bidding rules set forth in part 1, subpart Q, of the Commission's rules, and substantially consistent with many of the bidding procedures that have been employed in previous auctions. Specifically, we propose to employ the part 1 rules governing, among other things, competitive bidding design, designated entities, application and payment procedures, collusion issues, and unjust enrichment. Under this proposal, such rules would be subject to any modifications that the Commission may adopt in our part 1 proceeding. In addition, consistent with current practice, matters such as the appropriate competitive bidding design, as well as minimum opening bids and reserve prices, would be determined by the Wireless Telecommunications Bureau pursuant to its delegated authority. We seek comment on whether any of our part 1 rules or other auction procedures would be inappropriate or should be modified for an auction of new licenses in this band, and on whether alternative rules would more effectively serve our basic purposes.

15. We seek comment on the appropriate definition(s) of small business that should be used to determine eligibility for bidding credits in the auction. With respect to the auction of EBS licenses, we further seek comment on any special challenges associated with governmental educational institutions or non-governmental non-profit educational institutions participating in auctions.

16. In the part 1 *Third Report and Order*, we adopted a standard schedule of bidding credits for certain small business definitions, the levels of which were developed based on our auction experience. The standard schedule appears at section 1.2110(f)(2) of the Commission's rules. Are these levels of bidding credits appropriate for this band? For this proceeding, we would propose to define an entity with average annual gross revenues not exceeding $40 million for the preceding three years as a ''small business;'' an entity with average gross revenues not exceeding $15 million for the same period as a ''very small business;'' and an entity with average gross revenues not exceeding $3 million for the same period as an ''entrepreneur.'' In the event that we offer bidding credits on this basis, we propose to provide qualifying ''small businesses'' with a bidding credit of 15%, qualifying ''very small businesses'' with a bidding credit of 25%; and qualifying ''entrepreneurs'' with a bidding credit of 35%, consistent with section 1.2110(f)(2).

17. Finally, we invite comment on the effect of potentially having three small business sizes, and bidding credits, for new licenses in this band while having had only one small business size (average annual gross revenues for the preceding three years not exceeding $40 million) and one credit (15%) in the BRS service. We seek comment on this proposal.

18. We recognize that educational institutions and non-profit educational

organizations eligible to hold EBS licenses may have unique characteristics. We therefore invite comment on whether distinctive characteristics of EBS licensees require distinct rules for assessing the relative size of potential participants in an auction. How do our designated entity provisions comport with the unique challenges and status of educational institutions? Should we establish special provisions for non-profit educational institutions that may want to have access to EBS spectrum but do not have the financial capability to compete in an auction for spectrum licenses? We seek comment on whether the non-commercial character of EBS licensees requires any special procedures for determining the average annual gross revenues of such entities. For example, are our standard gross revenue attribution rules an appropriate method of evaluating the relative resources of universities and government entities? We also invite comment on whether some other criterion besides average annual gross revenues should be used for identifying small entities among EBS licensees and similar applicants.

19. Commenters proposing alternative business size standards should give careful consideration to the likely capital requirements for developing services in this spectrum. In this regard, we note that new licensees may be presented with issues and costs involved in transitioning incumbents and developing markets, technologies, and services.

20. Commenters also should consider whether the band plan and characteristics of the band suggest adoption of other small business size definitions and/or bidding credits in this instance.

21. We believe our proposals will encourage utilization of this band and the development of new innovative services to the public such as providing wireless broadband services, including high-speed Internet access and mobile services. We also believe that our proposals will provide licensees flexibility of use which will allow them to adapt quickly to changing market conditions and the marketplace.

Legal Basis

22. The proposed action is authorized under sections 1, 2, 4(i), 7, 10, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333 and 706 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 157, 160, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333, and 706.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

23. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules. The RFA generally defines the term ''small entity'' as having the same meaning as the terms, ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (i) Is independently owned and operated; (ii) is not dominant in its field of operation; and (iii) satisfies any additional criteria established by the SBA.

24. Nationwide, there are 4.44 million small business firms, according to SBA reporting data. In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by rules adopted pursuant to this *NPRM.* The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report. The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers, Paging, and Cellular and Other Wireless Telecommunications. Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

25. Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and ITFS. Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as ''wireless cable,'' transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). In connection with the 1996 MDS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard also appears applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

26. In connection with the 1996 MDS auction, the Commission defined ''small business'' as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years. The Commission established this small business definition in the context of this particular service and with the approval of SBA. The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that are considered small entities. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 MDS licensees that are defined as small businesses under either the SBA or the Commission's rules. Some of those 440 small business licensees may be affected by the proposals in this *NPRM & MO&O.*

27. Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service. Multichannel Multipoint Distribution Service (MMDS) systems,

often referred to as ''wireless cable,'' transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). In connection with the 1996 MDS auction, the Commission defined ''small business'' as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years. The SBA has approved of this standard. The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.

28. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under $10 million, and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the proposed rules and policies.

29. Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities. There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

30. Cable and Other Program Distribution. This category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating $12.5 million or less in revenue annually. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies proposed herein.

31. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions (these 100 fall in the MDS category, above). Educational institutions may be included in the definition of a small entity. ITFS is a non-profit non-broadcast service that, depending on SBA categorization, has, as small entities, entities generating either $10.5 million or less, or $11.0 million or less, in annual receipts. However, we do not collect, nor are we aware of other collections of, annual revenue data for ITFS licensees. Thus, we find that up to [1,932] of these educational institutions are small entities, some of which these providers, specifically those who have not met the requirements for transition articulated herein may be affected by our spectrum clearing proposal.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

32. There are no new reporting, recordkeeping or other compliance requirements proposed in the *FNPRM.*

Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

33. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: ''(i) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (iii) the use of performance, rather than design standards; and (iv) an exemption from coverage of the rule, or any part thereof, for small entities.''

34. In this *FNPRM,* we seek comment on a spectrum clearing proposal to ensure that the 2500–2690 MHz band does not lie fallow. Inasmuch as this proposal provides opportunities for new entrants in the band, it opens up economic opportunities to a variety of spectrum users, including small businesses. In the *R&O* portion of this document, we have adopted an alternative to this spectrum clearing proposal, which consists of transitioning current users to the new band plan also adopted. Our spectrum clearing proposal could be implemented in the event that the plan we adopt is not satisfactorily implemented within three years. Therefore, affected parties have been given an alternative to our spectrum clearing proposal, and will only be subject thereto in the event that they do not comply with our new rules in a reasonable amount of time. We also seek comment on significant alternatives commenters believe we should adopt.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

35. None

Ordering Clause

36. Pursuant to sections 1, 2, 4(i), 7, 10, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333 and 706 of the Communications Act of 1934, 47 U.S.C. 151, 152, 154(i), 157, 160, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333, and 706, that this *Further Notice of Proposed Rulemaking* is hereby adopted.

37. The proposed regulatory changes described in this *FNPRM,* and that comment is sought on these proposals.

38. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *R&O & FNPRM,* including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 1

Administrative practice and procedure, Communications common carriers, Radio, Reporting and recordkeeping requirements.

47 CFR Part 27

Communications common carriers, Radio.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

[FR Doc. 04–26831 Filed 12–9–04; 8:45 am]

BILLING CODE 6712–01–P



Federal Register

Friday,

December 10, 2004

Part IV

Securities and Exchange Commission

17 CFR Parts 275 and 279

Registration Under the Advisers Act of Certain Hedge Fund Advisers; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275 and 279

[Release No. IA–2333; File No. S7–30–04]

RIN 3235–AJ25

Registration Under the Advisers Act of Certain Hedge Fund Advisers

AGENCY: Securities and Exchange Commission (the ''Commission'' or ''SEC'').

ACTION: Final rule.

SUMMARY: The Commission is adopting a new rule and rule amendments under the Investment Advisers Act of 1940. The new rule and amendments require advisers to certain private investment pools (''hedge funds'') to register with the Commission under the Advisers Act. The rule and rule amendments are designed to provide the protections afforded by the Advisers Act to investors in hedge funds, and to enhance the Commission's ability to protect our nation's securities markets.

DATES: *Effective Dates:* February 10, 2005, except for the amendments to § 275.206(4)–2 [rule 206(4)–2] and § 279.1 [Form ADV], which will become effective January 10, 2005.

Compliance Dates: Advisers that will be required to register under the new rule and rule amendments must do so by February 1, 2006. Advisers must respond to the amended items of Form ADV in their next ADV filing after March 8, 2005. Section III of this Release contains more information on the effective and compliance dates.

FOR FURTHER INFORMATION CONTACT: Vivien Liu, Senior Counsel, Jamey Basham, Branch Chief, or Jennifer L. Sawin, Assistant Director, at 202–942–0719 or *IArules@sec.gov*, Office of Investment Adviser Regulation, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0506.

SUPPLEMENTARY INFORMATION: The Commission is adopting new rule 203(b)(3)–2 [17 CFR 275.203(b)(3)–2], amendments to rules 203(b)(3)–1 [17 CFR 275.203(b)(3)–1], 203A–3 [17 CFR 275.203A–3], 204–2 [17 CFR 275.204–2], 205–3 [17 CFR 275.205–3], 206(4)–2 [17 CFR 275.206(4)–2], and 222–2 [17 CFR 275.222–2], and Form ADV [17 CFR 279.1] under the Investment Advisers Act of 1940 [15 U.S.C. 80b] (the ''Advisers Act'' or ''Act'').

Table of Contents

I. Background
A. Growth of Hedge Funds
B. Growth in Hedge Fund Fraud
C. Broader Exposure to Hedge Funds
II. Discussion
A. Need for Commission Action
B. Matters Considered by the Commission
C. Our Legal Authority Under the Advisers Act
D. Rule 203(b)(3)–2
E. Definition of ''Private Fund''
F. Other Amendments to Rule 203(b)(3)–1
G. Amendments to Rule 204–2
H. Amendments to Rule 205–3
I. Amendments to Rule 206(4)–2
J. Amendments to Rule 222–2 and Rule 203A–3
K. Amendments to Form ADV
III. Effective and Compliance Dates
IV. Cost-Benefit Analysis
V. Effects on Commission Examination Resources
VI. Paperwork Reduction Act
VII. Effects on Competition, Efficiency and Capital Formation
VIII. Regulatory Flexibility Act
IX. Statutory Authority
Text of Rule, Rule Amendments and Form Amendments

I. Background

The Commission regulates investment advisers—persons and firms who advise others about securities—under the Investment Advisers Act of 1940. The Act contains a few basic requirements, such as registration with the Commission, maintenance of certain business records, and delivery to clients of a disclosure statement (''brochure''). Most significant is a provision of the Act that prohibits advisers from defrauding their clients, a provision that the Supreme Court has construed as imposing on advisers a fiduciary obligation to their clients.[1] This fiduciary duty requires advisers to manage their clients' portfolios in the best interest of clients, but not in any prescribed manner. A number of obligations to clients flow from this fiduciary duty, including the duty to fully disclose any material conflicts the adviser has with its clients,[2] to seek best execution for client transactions,[3] and to have a reasonable basis for client recommendations.[4] The Advisers Act does not impose a detailed regulatory regime.

Not all advisers must register with the Commission. The Act exempts an adviser from registration if it (i) has had fewer than fifteen clients during the preceding twelve months, (ii) does not hold itself out generally to the public as an investment adviser, and (iii) is not an adviser to any registered investment company.[5] Advisers taking advantage of this ''private adviser exemption'' must nonetheless comply with the Act's antifraud provisions,[6] but do not file registration forms with us identifying who they are, do not have to maintain business records in accordance with our rules, do not have to adopt or implement compliance programs or codes of ethics, and are not subject to Commission oversight. We lack authority to conduct examinations of advisers exempt from the Act's registration requirements.[7]

The private adviser exemption was not intended to exempt advisers to wealthy or sophisticated clients.[8] It appears to reflect Congress' view that there is no federal interest in regulating advisers that have only a small number of clients and whose activities are unlikely to affect national securities markets.[9] Today, however, a growing number of investment advisers take advantage of the private adviser exemption to operate large investment advisory firms without being registered with the Commission. Instead of managing client money directly, these advisers pool client assets by creating limited partnerships, business trusts or corporations in which clients invest. In 1985, we adopted a rule that permitted advisers to count each partnership, trust

[1] *See SEC* v. *Capital Gains Research Bureau, Inc., et al.*, 375 U.S. 180 (1963) (''*Capital Gains*''). *See also Transamerica Mortgage Advisors, Inc., (TAMA)* v. *Lewis*, 444 U.S. 11 (1979); *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 471, n. 11 (1977).

[2] *See Capital Gains, supra* note 1, at 191–194.

[3] *See In the Matter of Kidder, Peabody & Co., Incorporated, Edward B. Goodnow*, Investment Advisers Act Release No. 232 (Oct. 16, 1968); *In the Matter of Mark Bailey & Co., and Mark Bailey*, Investment Advisers Act Release No. 1105 (Feb. 24, 1988); *In the Matter of Jamison, Eaton & Wood, Inc.*, Investment Advisers Act Release No. 2129 (May 15, 2003).

[4] *See supra* note 3.

[5] Section 203(b)(3) [15 U.S.C. 80b–3(b)(3)]. The Act also provides several other registration exemptions, which have much more limited application. Registration exemptions are provided to advisers that have only intrastate business and do not give advice on exchange-listed securities (section 203(b)(1) [15 U.S.C. 80b–3(b)(1)]); to advisers whose only clients are insurance companies (section 203(b)(2) [15 U.S.C. 80b–3(b)(2)]); to charitable organizations and their officials (section 203(b)(4) [15 U.S.C. 80b–3(b)(4)]); to church plans (section 203(b)(5) [15 U.S.C. 80b–3(b)(5)]); and to commodity trading advisors registered with the Commodity Futures Trading Commission (''CFTC'') whose business does not consist primarily of acting as investment advisers (section 203(b)(6) [15 U.S.C. 80b–3(b)(6)]).

[6] They are also subject to antifraud provisions of other federal securities laws, including rule 10b–5 under the Securities Exchange Act of 1934 [17 CFR 240.10b–5].

[7] Section 204 of the Advisers Act [15 U.S.C. 80b–4] authorizes the Commission to conduct examinations of all records of investment advisers. Records of advisers exempted from registration pursuant to section 203(b) of the Act [15 U.S.C. 80b–3(b)] are specifically excluded from being subject to these examinations.

[8] *See* discussion, *infra*, in Section II.B.8. of this Release.

[9] *Id.; see also infra* Section II.C of this Release.

or corporation as a single client, which today permits advisers to avoid registration even though they manage large amounts of client assets and, indirectly, have a large number of clients.[10]

One significant group of these advisers provides investment advice through a type of pooled investment vehicle commonly known as a ''hedge fund.'' There is no statutory or regulatory definition of hedge fund, although many have several characteristics in common. Hedge funds are organized by professional investment managers who frequently have a significant stake in the funds they manage and receive a management fee that includes a substantial share of the performance of the fund.[11] Advisers organize and operate hedge funds in a manner that avoids regulation as investment companies under the Investment Company Act of 1940, and hedge funds do not make public offerings of their securities.[12]

Hedge funds were originally designed to invest in equity securities and use leverage and short selling to ''hedge'' the portfolio's exposure to movements of the equity markets.[13] Today, however, advisers to hedge funds utilize a wide variety of investment strategies and techniques designed to maximize the returns for investors in the hedge funds they sponsor.[14] Many are very active traders of securities.[15]

In 2002, we requested that our staff investigate the activities of hedge funds and hedge fund advisers. First, we were aware that the number and size of hedge funds were rapidly growing and that this growth could have broad consequences for the securities markets for which we are responsible. Second, we were bringing a growing number of enforcement cases in which hedge fund advisers defrauded hedge fund investors, who typically were able to recover few of their assets. Third, we were concerned that the activities of hedge funds today might affect a broader group of persons than the relatively few wealthy individuals and families who had historically invested in hedge funds.[16] We directed the staff to develop information for us on a number of related topics, and advise us whether we should exercise greater regulatory authority over the hedge fund industry.

In connection with the staff investigation, we held a Hedge Fund Roundtable on May 14 and 15, 2003, and invited a broad spectrum of hedge fund industry participants to participate. Information developed at the Roundtable, and a large number of additional submissions that we subsequently received from interested persons, contributed greatly to the staff's investigation and our understanding of hedge funds and hedge fund advisers as we developed our proposals.[17]

In September 2003, the staff published a report entitled *Implications of the Growth of Hedge Funds*.[18] The 2003 Staff Hedge Fund Report describes the operation of hedge funds and raises a number of important public policy concerns. The report focused on investor protection concerns raised by the growth of hedge funds. The 2003 Staff Hedge Fund Report confirmed and further developed several of our concerns regarding hedge funds and hedge fund advisers.

A. Growth of Hedge Funds

It is difficult to estimate precisely the size of the hedge fund industry because neither we nor any other governmental agency collects data specifically about hedge funds. It is estimated that there are now approximately $870 billion of assets [19] in approximately 7000 funds.[20] What is remarkable is the growth of the hedge funds. In the last five years alone, hedge fund assets have grown 260 percent, and in the last year, hedge fund assets have grown over 30 percent.[21] Some predict the amount of hedge fund

---

[10] *See Definition of ''Client'' of an Investment Adviser for Certain Purposes Relating to Limited Partnerships*, Investment Advisers Act Release No. 983 (July 12, 1985) [50 FR 29206 (July 18, 1985)] (''Rule 203(b)(3)–1 Adopting Release''). In 1997, we expanded the rule to cover other types of legal entities that advisers use to pool client assets. *See Rules Implementing Amendments to the Investment Advisers Act of 1940*, Investment Advisers Act Release No. 1633 (May 15, 1997) [62 FR 28112 (May 22, 1997)] (''NSMIA Implementing Release''). Under rule 203(b)(3)–1(a)(2)(i)[17 CFR 275.203(b)(3)–1(a)(2)(i)], an investment adviser may count a legal organization as a single client so long as the investment advice is provided based on the objectives of the legal organization rather than the individual investment objectives of any owner(s) of the legal organization. Rule 203(b)(3)–1(b)(3)[17 CFR 275.203(b)(3)–1(b)(3)] states that ''[a] limited partnership is a client of any general partner or other person acting as investment adviser to the partnership.'' As discussed in more detail below, *infra* note 157, until we adopted this rule there was considerable uncertainty whether advisers to unregistered investment pools were required to look through the pools to count each investor as a client, or could count each pool as a single client.

[11] *See* William Fung and David A. Hsieh, *A Primer on Hedge Funds*, 6 J. of Empirical Fin. 309–31(1999), at 310; David W. Frederick, Institute of Certified Financial Planners, *Hedge Funds: Only the Wealthy Need Apply*, Jan. 30, 1998, at *http://www.yourretirement.com/fidlquest_22.htm* (visited on Oct. 24, 2004); Roy Kouwenberg, Erasmus University Rotterdam & William T. Ziemba, Sauder School of Business, Vancouver and Swiss Banking Institute, University of Zurich, *Incentives and Risk Taking in Hedge Funds*, July 17, 2003, at *http://www.few.eur.nl/few /people/kouwenberg/incentives3.pdf* (visited on Oct. 24, 2004). *See also* Gregory Zuckerman, *Hedge Funds Grab More In Fees As Their Popularity Increases*, Wall St. J., Oct.8, 2004, at A1 (noting that some of the best-performing hedge fund advisers now receive between 30 and 50 percent of their funds' profits). Not all hedge funds, however, are managed by legitimate investment professionals. *See SEC* v. *Ryan J. Fontaine and Simpleton Holdings Corporation a/k/a Signature Investments Hedge Fund*, Litigation Release No. 18254 (July 28, 2003) (22 year-old college student purportedly acted as Signature's portfolio manager and made numerous false claims to investors and prospective investors).

[12] *See* sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(1) and 3(c)(7)].

[13] *See* Carol J. Loomis, *Hard Times Come To The Hedge Funds*, Fortune, Jan. 1970, at 10.

[14] Bernstein Wealth Management Research, *Hedge Fund Myths and Realities* (Oct. 2002) at 3 (''[H]edge funds vary in many ways, including the broad array of strategies they employ, the manager's skill at implementing those strategies and the risks they take * * *''). *See also* Citigroup Asset Management, *Strategic Thinking: What's In A Hedge Fund? Toward A Better Understanding Of Sources Of Returns* (Apr. 2004) (examining 12 hedge fund strategies and challenging the view that hedge funds are all designed to deliver absolute returns).

[15] Ted Caldwell, *Introduction: The Model for Superior Performance*, in Hedge Funds, Investment and Portfolio Strategies for the Institutional Investors, (Jess Lederman & Robert A. Klein eds., 1995); Julie Rohrer, *The Red-Hot World of Julian Robertson*, Institutional Investor, May 1986, at 86.

[16] *See* Douglas W. Hawes, *Hedge Funds—Investment Clubs for the Rich*, 23 Business Lawyer 576 (1968).

[17] Transcripts of the Roundtable participants' presentations (''Roundtable Transcript'') and comments submitted in connection with the Roundtable are available at *http://www.sec.gov/spotlight/hedgefunds.htm*. Staff of the Commodity Futures Trading Commission (''CFTC''), the Commission des Operations de Bourse of France (COB), and the Financial Services Authority of the United Kingdom (FSA), participated in our Roundtable. In addition, Commission staff met with CFTC staff, staff of the Board of Governors of the Federal Reserve, staff of the Department of the Treasury, state securities officials, and staff of the FSA to discuss issues relating to hedge funds, their advisers, and their oversight.

[18] *Implications of the Growth of Hedge Funds, Staff Report to the United States Securities and Exchange Commission* (''2003 Staff Hedge Fund Report''), available at *http://www.sec.gov/ spotlight/hedgefunds.htm*.

[19] *See, e.g., Hedge Funds Grab More In Fees As Their Popularity Increases, supra* note 11; Alistair Bair, *Pension Funds Seen Boosting Hedge-Fund Allocations,* CBS MarketWatch, Sept. 13, 2004.

[20] *See* Hennessee Group LLC, *10th Annual Manager Survey (2004).*

[21] *Id.* (Hennessee Group estimates that the 34 percent growth of hedge funds in 2003 was due to both performance (20 percent) and new capital (14 percent)). *See also* Sanford C. Bernstein & Co., *Hedge Fund Industry Update ''One Year Later, The Song Remains The Same,* Bernstein Research Call (July 28, 2004) (hedge fund assets grew globally by approximately 31 percent in calendar year 2003 with aggregate assets reaching $870 billion in March 2004) (''Bernstein 2004 Report''). Hedge fund inflows have also continued to set records. *See* Chris Clair, *Hedge Fund Inflows Set Another Record,* HedgeWorld/Inside Edge, Aug. 16, 2004 (second quarter 2004 inflows of $43.3 billion bested the record set in the first quarter); *Too Much Money Chasing Too Few Real Stars,* Financial Times, July 22, 2004 (first quarter 2004 inflows were $38.2 billion, following record 2003 inflows of $72 billion).

assets will exceed $1 trillion by the end of the year.[22] Hedge fund assets are growing faster than mutual fund assets and already equal just over one fifth of the assets of mutual funds that invest in equity securities.[23]

As a result, hedge fund advisers have become significant participants in the securities markets, both as managers of assets and traders of securities. One report estimates that hedge funds represent approximately ten to twenty percent of equity trading volume in the United States.[24] One article portrayed a single hedge fund adviser as responsible for an average of five percent of the daily trading volume of the New York Stock Exchange.[25] Another reported that hedge funds dominate the market for convertible bonds.[26]

B. Growth in Hedge Fund Fraud

The growth in hedge funds has been accompanied by a substantial and troubling growth in the number of our hedge fund fraud enforcement cases.[27] In the last five years, the Commission has brought 51 cases in which we have asserted that hedge fund advisers have defrauded hedge fund investors or used the fund to defraud others in amounts our staff estimates to exceed $1.1 billion.[28]

Although most of our hedge fund fraud cases have involved hedge fund advisers that defrauded their investors, we now too frequently see instances in which hedge funds have been used to defraud other market participants. Most disturbing is that hedge fund advisers have been key participants in the recent scandals involving late trading and inappropriate market timing of mutual fund shares.[29] Many of our enforcement cases involved hedge fund advisers that sought to exploit mutual fund investors for their funds' and their own gain. Some hedge fund advisers entered into arrangements with mutual fund advisers under which the mutual fund advisers

[22] Some estimate that hedge fund assets are already at or near $1 trillion. *See Boom Or Bust? Banks And Hedge Funds,* The Economist (Oct. 9, 2004); Daniel Kadlec, *Will Hedge Funds Take A Dive?,* Time, Oct. 4, 2004; Amey Stone, *Hedge Funds Are Everyone's Problem,* BUSINESSWEEK, Aug. 6, 2004.

[23] As of the end of August 2004, equity mutual funds' assets were $3.8 trillion. At $870 billion, hedge funds' assets were equal to 22.9 percent of this figure. *See* Investment Company Institute, *Trends in Mutual Fund Investing:* August 2004, News Release (available at http://www.ici.org, visited on Oct. 13, 2004).

[24] Sanford C. Bernstein & Co., *The Hedge Fund Industry—Products, Services, or Capabilities,* Bernstein Research Call (May 19, 2003), at 5 (''Bernstein 2003 Report'').

[25] Marcia Vickers, *The Most Powerful Trader on Wall Street You've Never Heard of,* BusinessWeek, July 21, 2003, at 66.

[26] *See* Henny Sender, *Hedge Funds Skid on Convertible Bonds,* Wall St. J., June 30, 2004, at C4 (hedge funds account for about 95% of all trading in convertible bonds).

[27] We are not alone in our concerns regarding hedge fund frauds. In a recent study, over 50 percent of respondents identified hedge funds as ''most likely to be at the centre of an investment controversy'' in the next five years. Bank of New York, RESTORING BROKEN TRUST (July 2004).

[28] This reflects five cases in addition to those we cited in *Registration Under the Advisers Act of Certain Hedge Fund Advisers,* Investment Advisers Act Release No. 2266 (July 20, 2004) [69 FR 45171 (July 28, 2004)] (''Proposing Release''). Some commenters have suggested that the cases we cited in the Proposing Release did not support the need for hedge fund adviser registration because some of the hedge funds had less than $30 million in assets and advisers with less than $30 million in assets under management are not required to register under the Act. First, while staff estimates that approximately half the advisers in these cases managed assets in excess of $30 million or were otherwise subject to registration, it was cases involving these larger advisers that comprise the bulk of the estimated losses, representing more than $1 billion of total $1.1 billion of estimated losses. Second, regardless of whether any particular adviser would be required to register with us, these cases demonstrate the increased prevalence of fraud associated with hedge funds. We note that whether a particular hedge fund adviser will be required to register with us will turn not solely on the amount of assets of a particular hedge fund it advises, but on the total amount of assets the adviser has under management, including those of other clients. See section 203A(a)(1)(A) of the Advisers Act [15 U.S. 80b-3a(a)(1)(A)].

[29] In the past year, we have sanctioned persons charged with late trading of mutual fund shares on behalf of groups of hedge funds, and mutual fund advisers or principals for permitting hedge funds' market timing. *In the Matter of Invesco Funds Group, Inc., AIM Advisors, Inc., and AIM Distributors, Inc.,* Investment Advisers Act Release No. 2311 (Oct. 8, 2004) (Commission found that mutual fund adviser entered into an undisclosed arrangement permitting hedge funds to market time the adviser's mutual funds in a manner inconsistent with the mutual funds' prospectuses); *SEC* v. *PIMCO Advisors Fund Management, LLC,* Investment Advisers Act Release No. 2292 (Sept. 13, 2004) (Commission found that mutual fund adviser entered into a market timing arrangement permitting over 100 mutual fund market timing transactions by hedge funds in exchange for hedge funds' investment in adviser's other investment vehicles; mutual fund adviser also provided hedge funds with material nonpublic portfolio information concerning four of the adviser's mutual funds); *In the Matter of Banc One Investment Advisors Corporation and Mark A. Beeson,* Investment Advisers Act Release No. 2254 (June 29, 2004) (Commission found that investment adviser permitted Canary hedge fund manager Edward Stern to time the adviser's mutual funds, contrary to the funds' prospectuses; helped arrange financing for the timing trades; failed to disclose the timing arrangements; and provided Stern with nonpublic portfolio information); *In the Matter of Pilgrim Baxter & Associates, Ltd.,* Investment Advisers Act Release No. 2251 (June 21, 2004) (Commission found that mutual fund adviser permitted a hedge fund, in which one of its executives had a substantial financial interest, to engage in repeated and prolonged short-term trading of several mutual funds and that one of its executives provided material nonpublic portfolio information to a broker-dealer, which passed it on to its hedge fund customers); *In the Matter of Strong Capital Management, Inc., et al.*, Investment Advisers Act Release No. 2239 (May 20, 2004) (Commission found that investment adviser disclosed material nonpublic information about mutual fund portfolio holdings to Canary hedge funds, and permitted Canary and the adviser's own chairman to engage in undisclosed market timing of mutual funds managed by adviser); *SEC* v. *Security Trust Co., N.A.,* Litigation Release No. 18653 (Apr. 1, 2004) (consent to judgment by trust company charged with facilitating late trades and market timing by affiliated hedge funds over at least a three-year period); *In the Matter of Stephen B. Markovitz,* Administrative Proceedings Release No. 33–8298 (Oct. 2, 2003) (Commission found that Markovitz engaged in late trading on behalf of hedge funds). *See also In the Matter of Alliance Capital Management, L.P.,* Investment Advisers Act Release No. 2205 (Dec. 18, 2003) (Commission found that investment adviser permitted known market timers, including Canary hedge funds, to market time its mutual funds, in exchange for the timers' investments in Alliance's investment vehicles); *In the Matter of James Patrick Connelly, Jr.,* Investment Advisers Act Release No. 2183 (Oct. 16, 2003) (Commission found that vice chairman of mutual fund adviser permitted market timing by known market timer, including at least one hedge fund). We have also sanctioned mutual fund advisers for permitting certain investors to engage in undisclosed market timing of their funds; hedge funds were among the market timers in these cases. *In the Matter of RS Investment Management,* Investment Advisers Act Release No. 2310 (Oct. 6, 2004); *In the Matter of Janus Capital Management, LLC,* Investment Advisers Act Release No. 2277 (Aug. 18, 2004). In addition, we have sanctioned insurance companies for facilitating undisclosed market timing of mutual funds through variable annuity products marketed and sold to market timers including hedge funds. *In the Matter of CIHC, Inc., Conseco Services, LLC, and Conseco Equity Sales, Inc.,* Investment Company Act Release No. 26526 (Aug. 9, 2004) and *In the Matter of Inviva, Inc. and Jefferson National Life Insurance Company,* Investment Company Act Release No. 26527 (Aug. 9, 2004).

We are continuing to pursue several similar cases. To date, we have instituted six enforcement actions (in addition to the 12 settled actions discussed above). See SEC v. Geek Securities, Inc., Litigation Release No. 18738 (June 4, 2004) (alleging that broker-dealer engaged in late trading of mutual funds on behalf of several hedge fund customers, and facilitated hedge funds' market timing transactions in numerous mutual funds by evading the mutual funds' attempts to restrict the transactions); SEC v. Columbia Management Advisors, Inc., Litigation Release No. 18590 (Feb. 24, 2004) (alleging mutual fund wholesaler entered into, and adviser approved, arrangements allowing hedge funds to engage in market timing transactions in nine mutual funds, including one aimed at young investors); SEC v. Mutuals.com, Inc., Litigation Release No. 18489 (Dec. 4, 2003) (alleging that dually registered broker-dealer and investment adviser, three of its executives, and two affiliated broker-dealers assisted hedge fund brokerage customers in carrying out and concealing thousands of market timing trades and illegal late trades in shares of hundreds of mutual funds); SEC v. Druffner, Litigation Release No. 18444 (Nov. 4, 2003) (alleging that five brokers, with the assistance of their branch office manager, evaded attempts to restrict their trading and assisted several hedge funds in conducting thousands of market timing trades in numerous mutual funds); *In the Matter of Theodore Charles Sihpol, III,* Securities Exchange Act Release No. 48493 (Sept. 16, 2003) (charging former broker with playing a key role in enabling Canary hedge fund to engage in late trading in mutual fund shares over a three-year period). *See also In the Matter of Paul A. Flynn,* Securities Exchange Act Release No. 49177 (Feb. 3, 2004) (alleging Flynn assisted numerous hedge funds in obtaining bank financing to fund late trading and deceptive market timing of mutual fund shares).

waived restrictions on market timing in return for receipt of the hedge fund advisers' ''sticky assets,'' *i.e.*, placement of other assets in other funds managed by the mutual fund adviser. Other hedge fund advisers sought ways to avoid detection by mutual fund personnel by conspiring with intermediaries to conceal the identity of their hedge funds. While our investigation is ongoing, the frequency with which hedge funds and their advisers appear in these cases and continue to turn up in the investigations is alarming. Our staff counts almost 400 hedge funds (and at least 87 hedge fund advisers) involved in these cases and others under investigation.[30]

C. Broader Exposure to Hedge Funds

The third development of significant concern is the growing exposure of smaller investors, pensioners, and other market participants, directly or indirectly, to hedge funds. Hedge fund investors are no longer limited to the very wealthy. We note three developments that we have observed that contribute to this concern.

First, some hedge funds today are expanding their marketing activities to attract investors who may not previously have participated in these types of risky investments.[31] Many hedge funds maintain very high minimum requirements, and many of the hedge fund participants at our Roundtable expressed no interest in attracting ''retail investors.'' Our staff observed, however, that some hedge funds'' minimum investment requirements have decreased over time.[32] In developed markets outside the United States, hedge funds have sought to market themselves to smaller investors, and we can expect similar market pressures to develop in the United States as more hedge funds enter our markets.[33]

Second, the development of ''funds of hedge funds'' has made hedge funds more broadly available to investors.[34] Today there are 52 registered funds of hedge funds that offer or plan to offer their shares publicly.[35] Most funds of hedge funds are today offered only to institutional investors, but there are no statutory limitations on the public offering of these funds. Funds of hedge funds today represent approximately twenty percent of hedge fund capital,[36] and are the fastest growing source of capital for hedge funds today.[37]

Finally, and perhaps most significantly, in the last few years, a growing number of public and private pension funds,[38] as well as universities,

---

[30] Our Proposing Release reported only 40 hedge funds involved in these cases. Our staff has continued its investigation of late trading and market timing of mutual fund shares and, at our request, conducted a more detailed review. Staff has identified 389 different hedge funds, but in light of the continuing nature of staff's investigations, this number may be incomplete. Advisers registered with the Commission advised some of the 389 hedge funds.

[31] *See* Harriet Johnson Brackey, *New Class of Hedge Funds Reaches Beyond the Wealthy,* San Jose Mercury News, Mar. 23, 2003; Pam Black, *Going Mainstream,* Registered Rep., Mar. 1, 2004; Hanna Shaw Grove and Russ Alan Prince, Let Us In, Registered Rep., Mar. 2004; Jane Bryant Quinn and Temma Ehrenfeld, *The Street's Latest Lure: Some One Is Going to Mint Money With the New Hedge Funds For Smaller Investors,* Newsweek, May 26, 2003. *See also* two recent articles discussing hedge funds in publications for physicians. John J. Grande, *Alternative Investment Strategies Can Offer Significant ROI,* Ophthalmology Times, May 15, 2002; Leslie Kane, *Where to Put Your Money: Four Experts Tell Whether You Should Expect Happy Days for Stocks, and How to Invest Your Money,* Medical Economics, Jan. 9, 2004. *See also* Jenna Gottlieb, *Hedge Fund Deal Raises Product's Bank Profile,* American Banker, Oct. 14, 2004 (one fund of hedge funds adviser stated that hedge funds are becoming mainstream and are marketed to the mass affluent).

[32] *See* 2003 Staff Hedge Fund Report, *supra* note 18, at 81.

[33] Any sales in the United States would, of course, be subject to the registration requirements of the Securities Act, and the hedge fund itself may be subject to the Investment Company Act, unless exemptions were available. See, *e.g.*, Robert Murray, Vega To Target Smaller Investors, Alternative Investment News, Aug 20, 2004 (Spanish hedge fund adviser plans to offer a fund of its hedge funds to U.S. investors). The UK recently introduced a new type of vehicle which will be available only to sophisticated investors, but will still be authorized by the FSA, as a ''half way house'' between retail funds (fully regulated) and wholly unregulated funds. See Financial Services Authority, *The CIS Sourcebook—A New Approach, Feedback on CP185 and Made Text*, Mar. 2004, available at *http://www.fsa.gov.uk/pubs/policy/04_07.pdf* (visited on Oct. 25, 2004). The media recently reported that the FSA was examining whether it should lift the ban on letting ordinary members of the public invest in hedge funds. *See FSA May Lift Ban on Hedge Fund Retail Investors*, Reuters, Sept. 29, 2004, available at *http://www.reuters.co.uk* (visited on Sept. 29, 2004). Starting Jan. 2004, funds of hedge funds may sell their shares to smaller investors in Germany subject to certain regulations and procedures. See Silvia Ascarelli and David Reilly, *Hedge Funds Are Coming to the Masses*, Wall St. J., Apr. 15, 2004; EU Financial Services Group Briefing, Wilmer, Cutler & Pickering, *Hedge Funds in Germany—German Parliament Opens the Market for Alternative Investment Products*, Dec. 5, 2003, available at *http://www.wilmer.com /pubs/results.aspx? iPractice* (visited on Oct. 25, 2004). Since April 2003, funds of hedge funds may sell their shares to smaller investors in France, subject to certain regulations and procedures. *See* Commission des Operations de Bourse (France), Regulating *Alternative Multi-Management Investments,* News Release (Apr. 1, 2003) (available in File No. S7–30–04); Alain Gauvin and Guillaume Eliet, Capital Markets Dept., Coudert Freres, *Regulating Alternative Multi-Management Investments*, 2003, available at *http://www.coudert.com* (visited on Oct. 25, 2004). In Ireland, funds of hedge funds may sell their shares to smaller investors subject to certain regulations and procedures. *See* Matheson Ormsby Prentice, *Establishing a Hedge Fund in Ireland*, 2003, available at http://www.mop.ie/fileupload/publications (visited on Oct. 25, 2004). In Asia, both Hong Kong and Singapore permit authorized hedge funds to sell their shares to investors subject to certain minimum subscription thresholds and regulations. See Donald E. Lacey, Jr., *Democratizing the Hedge Fund: Considering the Advent of Retail Hedge* Funds, Apr. 2003, (International Finance Seminar at Harvard Law School), available at *http://www.law.harvard.edu/programs/pifs/pdfs/donald_lacey.pdf* (visited on Oct. 25, 2004); Mattew Harrison, *Fund Management in Hong Kong and Singapore*, CSU Research and Policy, Jan. 6, 2003. In South Africa, regulators and trade associations recently issued a joint discussion paper to develop an acceptable regulated environment in which existing and new hedge funds can operate (including consideration of whether to permit certain hedge fund products to be marketed to the public). *See* The Financial Services Board, Association of Collective Investments and Alternative Investment Management Association, *The Regulatory Position of Hedge Funds in South Africa—A Joint Discussion Paper* (Mar. 9, 2004). See also Carla Fiford, *South African Hedge Fund Industry Grows by Stealth*, AIMA Journal, Feb. 2004. The media recently reported that in Luxembourg, changes to regulation have allowed offshore hedge funds to list in Luxembourg since September 2004. *See* Phil Davis, *Special Report* Luxembourg: Hedge Fund *Tide May Be About to Turn*, Financial Times, Oct. 18, 2004.

[34] *The Street's Latest Lure: Some One Is Going to Mint Money With the New Hedge Funds For Smaller Investors, supra* note 31; *Going Mainstream, supra note 31; Jessica Toonkel, Firms Take Pause Before Launching Hedge Funds of Funds for Mass Affluent; Hold Your Horses!* Fund Action, Apr. 21, 2003; Michael P. Malloy and Jim Strangroom, *Registered Funds of Hedge Funds*, MFA Reporter (2002); *Fool's Gold,* The Economist, Sept. 1, 2001; Kimberly Hill, *Investors Need Help With Hedge Funds,* Fundfire, May 14, 2004.

[35] An additional 51 funds of hedge funds are registered with the Commission as investment companies but can be sold only through private offerings. The Commission does not have data on the number of additional funds of hedge funds that exist but are not registered with the Commission.

[36] Bernstein 2003 Report, *supra* note 24, at 18.

[37] Hennessee Group LLC, *10th Annual Manager Survey, supra* note 20 (''funds of funds continue to be the fastest growing source of capital for hedge funds, increasing 50 percent since January 1997 (from 16 percent to 24 percent)''). *See also* Pauline Skypala, *Hedge Funds of Funds Booming,* FT.com, Sept. 26, 2004 (Morgan Stanley research estimates that over two-thirds of hedge fund inflows are coming through funds of funds).

[38] According to Greenwich Associates, about 20 percent of corporate and public plans in the United States were investing in hedge funds in 2002, up from 15 percent in 2001. Bernstein Research reports that, among the top 200 U.S. defined benefit plans, at least 15 percent have allocated a portion of their assets to hedge funds. Bernstein 2003 Report, *supra* note 24 at 13. Hennessee Group data indicate that pensions' investments in hedge funds increased from $13 billion in 1997 to $72 billion in 2004. *See* Testimony of Charles J. Gradante, Managing Principal, The Hennessee Group LLC, Before the Senate Committee on Banking, Housing and Urban Affairs, available at *http://banking/senate.gov/_files/gradante.pdf* (visited on Oct. 13, 2004); Hennessee Group LLC, *10th Annual Manager Survey, supra* note 20. *See also Hedge Funds Gaining Acceptance Among Pension Funds,* Morningstar Web Site, June 27, 2003; Chris Clair, *'Unprecedented Pressure': Public Plans Race to Embrace Hedge Funds; This Time They Are Leading, Not Following, Their Corporate Counterparts,* Pensions and Investments, July 8, 2002, at 2; *Alaska Pension Allocates to Hedge Fund,*

Continued

endowments, foundations, and other charitable organizations, have begun to invest in hedge funds or have increased their allocations to hedge funds.[39] More of these institutions have also recently begun to consider these alternative investments.[40] Institutional investments may increase in the next four years to $300 billion.[41] Investors that have not been traditional hedge fund investors, including pension plans that have millions of beneficiaries, are thus today purchasing hedge funds. As a result of the participation by these entities in hedge funds, the assets of these entities are exposed to the risks of hedge fund investing. Losses resulting from hedge fund investing and hedge fund frauds may affect the entities' ability to satisfy their obligations to their beneficiaries or pursue other intended purposes.

In response to these developments, and after extensive consultation with participants in the hedge fund industry in connection with our staff's investigation, we proposed in July of 2004 a new rule that would require hedge fund advisers to count each investor in a hedge fund, rather than only the hedge fund itself, as a client for purposes of the private adviser exemption.[42] As a result, most hedge fund advisers would have to register with the Commission and would be subject to SEC oversight. The rule and rule amendments were designed to provide the protections afforded by the Advisers Act to investors in hedge funds, and to enhance the Commission's ability to protect our nation's securities markets.[43]

We received letters from 161 commenters, including investors, hedge fund advisers, other investment advisers, trade associations, and law firms.[44] Forty-two commenters did not express a view on whether we should or should not require hedge fund advisers to register, but asked us to consider particular issues or concerns if we adopted the rule.[45] Thirty-six commenters supported the rule proposal and our efforts to improve our oversight of hedge fund advisers.[46] Several investors and other commenters hailed the proposal as an important step towards protecting investors and the overall securities markets.[47] They pointed out that while registering hedge fund advisers would not eliminate fraud, it would allow the Commission to address potential opportunities for fraud. These commenters also noted that registration may help the hedge fund industry to the extent it discourages persons intent on committing fraud from entering the industry and damaging the reputation of the legitimate managers.[48] They also cautioned that the Commission should

---

Alternative Investment News, July 1, 2004 (the Alaska State Pension Investment Board has chosen three firms to manage its first $300 million hedge fund allocation).

[39] Median strategic allocation to hedge funds by endowments and foundations was 11 percent in 2001, 10 percent in 2003 and forecast at 12.3 percent in 2005. *See* Goldman Sachs International and Russell Investment Group, *Report on Alternative Investing by Tax-Exempt Organizations 2003,* available at *http://www.russell.com/II/Research_and Resources/Informative_Articles /Goldman_ Russell_ Survey.asp* (visited on Sept. 18, 2004). Others estimate the average allocation to be 12 percent, *see* Bank of New York and Casey, Quirk & Acito, *Institutional Demand for Hedge Funds: New Opportunities and New Standards,* (Sept. 2004) (''BONY Report'') or as high as 17 percent of assets. *See* Hennessee Group, *2004 Hennessee Hedge Fund Survey of Foundations and Endowments* (reporting that an average commitment of 17 percent of assets, and a projected commitment of 19 percent by 2005) (''Hennessee Foundation and Endowment Survey''). *See also* Lewis Knox, *The Hedge Fund: Institutional Money is Swelling the Coffers of the World's Largest Hedge Fund Managers,* 28 Institutional Investor (International Edition) 53 (June 1, 2003); Dan Neel, *Michigan Preps For Hedge, Real Estate,* Investment Management Weekly, Apr. 28, 2003; *Virginia Exposure Soars to 60%,* Financial News (Daily), Apr. 27, 2003 (University of Virginia has invested 50 percent of its portfolio in hedge funds, and plans to increase its exposure to 60 percent of its total portfolio); Chris Clair, *Allocation Goal: 25%—UTIMCO Joins Billion-Dollar Hedge Fund Club,* Pensions and Investments, Apr. 14, 2003, at 3; Chidem Kurdas, *Hedge Funds Continue to Gain in Endowments' Alternative Investments,* HedgeWorld Daily News, Apr. 7, 2003; *Behind the Money Section; University of Wisconsin Searching for Hedge Funds,* 4 Alternative Investment News, Feb. 1, 2003, at 20 ($300 million University of Wisconsin endowment will allocate up to 10 percent, or $25–30 million, to a fund of funds manager); *Baylor University; Inside The Buyside; Increases Hedge Fund Activity by $20–25 Million,* 4 Alternative Investment News, Feb. 1, 2003 at 6; Susan L. Barreto, *Hedge Funds Become Saving Grace for Endowments in Tough Times,* HedgeWorld Daily News, Apr. 4, 2002.

[40] Since we issued our Proposing Release, industry observers have seen smaller foundations expressing growing interest in hedge funds. *Family Foundations Move Towards Hedge Funds,* Fundfire, Oct. 11, 2004 (family foundation consultant notes many family foundations, run by family members with limited investment knowledge, pursuing hedge fund investments). Also, in our Proposing Release, we identified a large number of pension plans that were investing or looking to invest in hedge funds. Since then, a number of additional pension plans have sought, or are seeking, hedge fund investment, according to one trade newsletter. *Cincy Fund Will Weight Alts,* Alternative Investment News, Oct. 8, 2004 (Cincinnati Retirement System will consider alternative investments in 2005); *U.S. Pensions Examine Hedge Funds,* Alternative Investment News, Oct. 8, 2004 (pension plans sponsored by the General Conference of Seventh Day Adventists, Tulare County (CA) Employees' Retirement Association, and City of Laredo (TX) Firefighters Retirement System are considering investment in hedge funds); *Colorado Guns & Hoses Makes Overlay Play,* Alternative Investment News, Oct. 1, 2004 (Colorado fire and police pension fund allocated $75 million to two hedge fund of funds managers); *Service Employees Likely To Seek Hedge Fund of Funds,* Alternative Investment News, Sept. 10, 2004 (Service Employees International Union pension fund may seek to invest up to 5 percent of its $1.5 billion in assets to hedge funds of funds); *New Hampshire Eyes Hedge Funds,* Alternative Investment News, Sept. 10, 2004 (New Hampshire Retirement System is considering allocating up to $100 million to one or more hedge fund of funds managers); *San Bernardino Pension Picks AIG, Benchmark Plus,* Alternative Investment News, Aug. 13, 2004 (San Bernardino County (CA) Employees Retirement Association allocated $100 million to each of two hedge fund of fund managers); *L.A. Water Dept. To Consider Hedge Funds,* Alternative Investment News, July 30, 2004 (defined benefit plan to consider its first allocation to hedge funds early in 2005).

[41] BONY Report, *supra* note 39, at 1. *See also* Lewis Knox, *The Hedge Fund: Institutional Money is Swelling the Coffers of the World's Largest Hedge Fund Managers, supra* note 39.

[42] Proposing Release, *supra* note 28.

[43] In 1999, the President's Working Group on Financial Markets, in the wake of the near-collapse of Long Term Capital Management, Inc., (''LTCM''), published a series of recommendations that did not include registration of hedge fund advisers under the Advisers Act. *See Hedge Funds, Leverage, and the Lessons of Long-Term Capital Management—Report of the President's Working Group on Financial Markets,* by representatives from the Commission, the Treasury Department, the Board of Governors of the Federal Reserve System and the Commodity Futures Trading Commission (Apr. 1999). The principal concerns of the President's Working Group report were the stability of financial markets and the exposure of banks and other financial institutions to the counterparty risks of dealing with highly leveraged entities such as the LTCM hedge fund. The focus of the Advisers Act is different, and includes such concerns as the prevention of frauds on investors. Since the issuance of the President's Working Group report, the size of the hedge fund industry has doubled, the exposure of investors to hedge funds has broadened, and the incidence of fraud we discover involving hedge fund advisers has increased. The Commission is the only member of the President's Working Group with responsibility for the protection of investors and the oversight of our nation's securities markets.

[44] These letters are available on the Internet at *http://www.sec.gov/rules/proposed/s73004.shtml.*

[45] *See, e.g.*, Comment Letter of Van Hedge Fund Advisors (Sept. 15, 2004) (''Van Hedge Letter'').

[46] Hennessee Group also submitted the results of a survey of foundations and endowments, Hennessee Foundation and Endowment Survey, *supra* note 39. Nearly twice as many respondents to the Hennessee Foundation and Endowment Survey favored the proposal (59 percent) as opposed it (30 percent).

[47] *See, e.g.*, Comment Letter of Ohio Public Employees Retirement System, (Aug. 6, 2004) (''Ohio PERS Letter''); Comment Letter of New Jersey State Investment Council (Sept. 17, 2004) (''New Jersey State Investment Council Letter''); Comment Letter of Pennsylvania Securities Commission (July 26, 2004) (''Pennsylvania Securities Commission Letter''); Comment Letter of CFA Institute (Sept. 30, 2004) (''CFA Institute Letter''); Comment Letter of Investment Counsel Association of America (Sept. 14, 2004) (''ICAA Letter''); Comment Letter of Alternative Investment Group Services, LP (Aug. 20, 2004) (''Alternative Investment Group Letter''); Comment Letter of Lyn Batty (July 14, 2004) (''Lyn Batty Letter'').

[48] *See, e.g.*, Comment Letter of Investment Company Institute (Sept. 15, 2004) (''ICI Letter''); Ohio PERS Letter, *supra* note 47; Comment Letter of Investment Management Consultants Association (Sept. 14, 2004) (''IMCA Letter''); Alternative Investment Group Letter, *supra* note 47; Comment Letter of David Patch (July 24, 2004) (''Patch Letter A'').

not wait until the next crisis before taking measures of protection against potential fraud.[49] Some hedge fund advisers and other advisers already registered with the SEC also welcomed the proposal. They used their own experiences to illustrate that registration would not overburden a firm's operation, and that benefits of being a registered adviser more than compensated for the costs.[50]

Eighty-three commenters, including many unregistered hedge fund advisers, their attorneys, and trade associations, however, argued strongly against the proposal. They expressed concerns about the costs of compliance under the new rule,[51] and raised questions about our effectiveness in preventing hedge fund fraud,[52] and the potential intrusiveness of our oversight of hedge fund managers.[53] Some hedge fund investors were concerned that their advisers might pass the costs of registration to them and increase management fees.[54]

[49] *See, e.g.*, Comment Letter of B. H. Bigg (July 23, 2004) (''Bigg Letter''); Comment Letter of Ralph S. Saul (Aug. 18, 2004) (''Saul Letter'').

[50] *See, e.g.*, Comment Letter of Vantis Capital Management LLC (Aug. 6, 2004) (''Vantis August Letter''); Alternative Investment Group Letter, *supra* note 47.

[51] *See, e.g.*, Comment Letter of Managed Funds Association (Sept. 15, 2004) (''MFA Letter''); Comment Letter of Madison Capital Management, LLC (Sept. 15, 2004)(''Madison Capital Letter''); Comment Letter of Proskauer Rose LLP (Aug. 31, 2004) (''Proskauer Letter''); Comment Letter of Schulte Roth & Zabel LLP (Sept. 15, 2004) (''Schulte Roth Letter''); Comment Letter of Keith Black (July 30, 2004) (''Black Letter''); Comment Letter of Guy Lander (Sept. 15, 2004) (''Lander Letter''); Comment Letter of Sidley Austin Brown & Wood, LLP (Sept. 14, 2004) (''Sidley Austin Letter''); Comment Letter of Joseph LaRocco (Aug. 26, 2004) (''LaRocco Letter); Comment Letter of Superior Capital Management LLC (Sept. 8, 2004) (''Superior Capital Letter'').

[52] *See, e.g.*, MFA Letter, *supra* note 51; Comment Letter of Chamber of Commerce of the United States of America (Sept. 15, 2004) (''Chamber of Commerce Letter''); Comment Letter of International Swaps and Derivatives Association (Sept. 15, 2004) (''ISDA Letter''); Comment Letter of David Patch (Sept. 10, 2004) (''Patch Letter B''); Comment Letter of Rodney Pitts (Sept. 15, 2004) (''Rodney Pitts Letter''); Comment Letter of Blanco Partners LP (Sept. 13, 2004) (''Blanco Partners Letter''); Comment Letter of Mark Acquino (Aug. 8, 2004)(''Acquino Letter'').

[53] *See, e.g.*, MFA Letter, *supra* note 51; Chamber of Commerce Letter, *supra* note 52; ISDA Letter, *supra* note 52; Comment Letter of Financial Services Roundtable (Sept. 9, 2004) (''Financial Services Roundtable Letter''); Black Letter, *supra* note 51; Comment Letter of Tudor Investment Corporation (Sept. 15, 2004) (''Tudor Letter''); Comment Letter of David Thayer (Sept. 15, 2004) (''David Thayer Letter''); Lander Letter, *supra* note 51.

[54] *See, e.g.*, Comment Letter of John Waller (July 31, 2004) (''John Waller Letter''); Acquino Letter, *supra* note 52; Comment Letter of Melissa Kadiri (Sept. 15, 2004) (''Melissa Kadiri Letter'').

II. Discussion

We have carefully considered all of the comments we received.[55] For the reasons discussed below and in the Proposing Release, we are adopting rule 203(b)(3)–2 and related amendments to rule 203(b)(3)–1 and Form ADV, which would require most hedge fund advisers to register with us under the Act.[56]

A. Need for Commission Action

The Commission is the federal agency with principal responsibility for the enforcement and administration of the federal securities laws and the supervision of the securities markets. The federal securities laws seek to protect investors by providing for the transparency of markets, by prohibiting fraud, and by imposing fiduciary obligations.[57] They encourage the formation and efficient allocation of capital and the participation of investors in the capital markets.[58] Our obligations under these laws as well as our commitment to protect investors require us to respond to important market developments, and the authority provided us by those laws permits us to adopt rules and interpret the statutes in order to preserve fair and honest markets.[59]

We believe that, in light of the growth of hedge funds, the broadening exposure of investors to hedge fund risk, and the growing number of instances of malfeasance by hedge fund advisers, our current regulatory program for hedge fund advisers is inadequate. We do not have an effective program that would provide us with the ability to deter or detect fraud by unregistered hedge fund advisers. We currently rely almost entirely on enforcement actions brought after fraud has occurred and investor assets are gone. We lack basic information about hedge fund advisers and the hedge fund industry, and must rely on third-party data that often conflict and may be unreliable.[60]

Requiring hedge fund advisers to register under the Advisers Act will give us the ability to oversee hedge fund advisers without imposing burdens on the legitimate investment activities of hedge funds. We understand the important role that hedge funds play in our financial markets, and we appreciate that the lack of regulatory constraints on hedge funds has been a factor in the growth and success of hedge funds. But commenters have not persuaded us that requiring hedge fund advisers to register under the Act, requiring them to develop a compliance infrastructure, or subjecting them to our examination authority will impose undue burdens on them or interfere significantly with their operations.[61]

[55] During and after the comment period, our staff has continued to have discussions in the President's Working Group with other regulators relating to hedge fund adviser regulation. *See* Letter from Congressman Richard H. Baker to John W. Snow, Secretary, U.S. Department of the Treasury (Oct. 7, 2004) (available in File S7–30–04).

[56] As discussed below, we are also adopting amendments to rules 203A–3, 204–2, 205–3, 206(4)–2, and 222–2. Unless otherwise noted, when we refer to rules 203(b)(3)–1, 203A–3, 204–2, 205–3, 206(4)–2, 222–2, or any paragraph of the rules, we are referring to 17 CFR 275.203(b)(3)–1, 275.203A–3, 275.204–2, 275.205–3, 275.206(4)–2, and 275.222–2 of the Code of Federal Regulations in which the rules are published.

[57] *See Capital Gains, supra* note 1.

[58] *See, e.g., AUSA Life Insurance Co.* v. *Ernst & Young,* 206 F.3d 202 (2nd Cir. 2000) at 217. ''During the Great Depression, Congress enacted the 1933 and 1934 [Securities] Acts to promote investor confidence in the United States securities markets and thereby to encourage the investment necessary for capital formation, economic growth, and job creation.'' Private Securities Litigation Reform Act of 1995, Pub. L. 104–67, S.Rep. No. 104–98 (June 19, 1995), reprinted in 1995 U.S.C.C.A.N. 679, 683.

[59] *See American Trucking Assns., Inc.* v. *Atchison, Topeka & Santa Fe Ry Co.,* 387 U.S. 397, 415 (1967) (''Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.'').

[60] William Fung and David Hsieh, *Measuring the Market Impact of Hedge Funds,* 7 J. of Empirical Fin. 1 (2000) (''There are varying estimates of the size of the hedge fund industry.''); *Hedg-matics: How Many Funds Exist?* Wall St. J., May 22, 2003, at C5 (''Just how big is the hedge-fund industry? This simple question has been debated because the data on hedge funds are spotty.''); *Letter from Craig S. Tyle, General Counsel of the Investment Company Institute, to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission,* July 2, 2003, available at *http://www.ici.org* (visited on Oct. 10, 2004) (''There is currently no universal database that contains records of all hedge funds, both those currently operating and those that have ceased operating.''); Gaurav S. Amin and Harry M. Kat, *Hedge Fund Performance 1990–2000: Do the ''Money Machines'' Really Add Value?,* 38 Journal of Financial and Quantitative Analysis 2 (2003) (''Due to its private nature, it is difficult to estimate the current size of the hedge fund industry.''). *See also* Bing Liang, *Hedge Funds: The Living and the Dead,* 35 Journal of Financial and Quantitative Analysis 309–326 (2000) (study of statistical inconsistencies in two major hedge fund databases, noting hedge funds ''are basically not regulated. They report their fund information only on a voluntary basis. Therefore, the reliability of hedge fund data is an open question and is critical for hedge fund research and the investment community.''); Harry M. Kat, *10 Things That Investors Should Know About Hedge Funds,* Institutional Investor (Spring 2003) (noting that hedge fund databases are of low quality, that each database covers only a subset of the hedge fund universe, that all present survivorship bias, and that researchers attempting to analyze the hedge fund industry or fund performance may perceive matters very differently depending on the database or index they use).

[61] CFA Institute agreed that the fact that many registered advisers are small firms ''argues strongly that such registration is not overly burdensome.'' CFA Institute Letter, *supra* note 47.

Indeed, the large number of hedge fund advisers currently registered under the Act—many of whom voluntarily register—provides a powerful refutation of the assertions made by commenters who opposed the rule on these grounds.[62] We presume these hedge fund advisers would take steps to avoid registration under the Act if the consequences of registration were as dire as some commenters have asserted.[63] Comments we received from hedge fund advisers that are registered under the Act provide persuasive testimonials that confirm our conclusion.[64]

The Act does not require an adviser to follow or avoid any particular investment strategies, nor does it require or prohibit specific investments. Its most significant provision, which requires full disclosure of conflicts of interest and prohibits fraud against clients, applies regardless of whether the adviser is registered under the Act, and will be furthered by the registration requirement.[65] No commenter identified any provision of the Act that would provide an impediment to an adviser's successful operation of a hedge fund.[66] Arguments by some that registration would somehow inhibit hedge fund advisers' willingness to engage in complex or innovative strategies because they would be second-guessed by our examination staff are baseless. They are refuted by the experience of registered hedge fund advisers.[67] One commenter familiar with the obligations of registered advisers noted that registration would not require hedge fund advisers to reveal their trading strategies or disclose their portfolio holdings, and would not interfere with their ability to leverage their portfolios, and that our proposal would not restrict the ability of hedge funds to provide liquidity to the markets.[68]

We are not aware of any evidence that suggests that registration under the Advisers Act has impeded investment advisers' performance, and commenters did not suggest that registration would have such an effect. Moreover, a recent study, while not conclusive, found that there were no significant differences between performance of hedge funds managed by registered advisers and those managed by unregistered advisers.[69] Five of the ten largest (and presumably most successful) hedge fund advisers are today registered with us under the Advisers Act.[70]

The bare assertions of adverse consequences of registration under the Advisers Act offered by many commenters opposed to our proposed rule, and the anecdotal evidence offered by others, simply do not stand up to scrutiny. There has been no suggestion that hedge funds managed by registered advisers play a diminished role in the financial markets compared to hedge funds managed by unregistered advisers. The empirical evidence we have seen, and the information collected informally by our staff,[71] suggests that registration under the Advisers Act has no adverse effect on the legitimate market activities of hedge funds.

More than 8,500 advisory firms that collectively manage over $23 trillion dollars of assets are today registered under the Advisers Act. We have seen no credible evidence that the Act has in any way impeded their ability to employ successful investment strategies, or to effectively compete with other financial institutions that manage securities portfolios here or abroad.

Some commenters also expressed concerns about what the Commission *might* in the future do that could adversely affect the operation of hedge funds.[72] Such inchoate fears, however, do not provide reason for our not going forward with this important rulemaking. Our record of 64 years of administering the Advisers Act provides no basis for such fears.[73] Our regulatory efforts to

---

[62] We estimated, in the Proposing Release, that 40–50 percent of hedge fund advisers are registered under the Act. *See* Section V. of the Proposing Release. *See also* Hennessee Group LLC, *10th Annual Manager Survey, supra* note 20 (39 percent of hedge fund managers surveyed were registered under the Advisers Act).

[63] Moreover, many hedge fund advisers that are not registered with us have indicated that they conform their operations to those of registered advisers. *See* 2003 Staff Hedge Fund Report, supra note 18, at 314.

[64] *See* Vantis August Letter, *supra* note 50 (''While there are incremental costs associated with registration [under the Advisers Act], the burdens are not excessive for any serious investment firm, which is committed to timely and accurate reporting.'') and Alternative Investment Group Letter, *supra* note 47 (''We believe that the compliance costs will be minimal to the well-managed advisor.'').

[65] The antifraud prohibitions of section 206 [15 U.S.C. 80b–6], including provisions restricting an adviser's ability to engage in principal trades and agency cross-transactions with clients, apply to any investment adviser that makes use of the mails or any means of interstate commerce. In contrast, section 204 [15 U.S.C. 80b–4] (authorizing the Commission to require advisers to issue reports and maintain books and records) applies to all advisers other than those specifically exempted from registration by section 203(b) of the Act. Thus, although unregistered advisers are subject to the antifraud provisions of the Act, our ability to enforce those provisions is hampered because in the absence of a registration requirement we cannot identify and examine these advisers.

[66] In the past, hedge fund industry participants cited the restrictions on registered advisers charging performance-based compensation in section 205(a)(1) of the Act [15 U.S.C. 80b–5(a)(1)] as being incompatible with the operation of hedge funds. *See Hard Times Come to the Hedge Funds, supra* note 13; Lawrence J. Berkowitz, *Regulation of Hedge Funds,* 2 Rev. of Securities Reg. (1969). In 1998, however, the Commission eliminated this concern by adopting amendments to rule 205–3. *Exemption to Allow Investment Advisers to Charge Fees Based Upon a Share of Capital Gains Upon or Capital Appreciation of a Client's Account,* Investment Advisers Act Release No. 1731 (July 15, 1998) [63 FR 39022 (July 21, 1998)]. Further, we proposed to grandfather hedge fund advisers' existing investors that would otherwise not qualify to pay performance fees. *See* Section II.G. of the Proposing Release. No hedge fund industry participant with whom our staff spoke during their year-long investigation indicated that section 205 or the qualified client criteria in rule 205–3 would present any concerns to hedge funds.

[67] *See, e.g.*, ICI Letter, *supra* note 48 (''Many of our investment adviser members—all of whom are registered with the Commission—currently operate hedge funds and have found that registration is not overly burdensome and does not interfere with their investment activities.'').

[68] *Id.* Nor does the Act restrict the ability of advisers to engage in short-selling. Moreover, nothing in the Act or our rules requires any investment adviser to disclose its securities positions. Indeed, we recently declined requests to require advisers to publicly disclose how they voted client proxies out of a concern that they would thereby divulge client securities positions. *Proxy Voting by Investment Advisers,* Investment Advisers Act Release No. 2106 (Jan. 31, 2003) [68 FR 6585 (Feb. 7, 2003)]. The Advisers Act requires us to maintain as confidential information obtained by our examiners in the course of an examination. *See* sections 210(b) and 210A of the Act [15 U.S.C. 80b–10(b) and 10a].

[69] *Bids and Offers,* Wall St. J., July 23, 2004 at C4. In the study, Hedge Fund Research, Inc., an alternative investments research and consulting firm, examined the performance of approximately 2,200 single-strategy hedge funds. *Id.* However, the extent of cross-sectional variability in hedge fund returns makes it difficult to ascertain differences in performance statistically.

[70] *See The Hedge Fund 100,* Institutional Investor, May 2004.

[71] In its investigation of hedge funds, *see supra* Section I of this Release, our staff conducted reviews of registered and unregistered hedge fund advisers, had on-site discussions with them, and met or spoke with a variety of experts to get their perspectives on the hedge fund industry. 2003 Staff Hedge Fund Report, *supra* note 18, at 2.

[72] *See, e.g.*, Chamber of Commerce Letter, *supra* note 52.

[73] Many of the fears concerning Commission oversight expressed by hedge fund advisers today are very similar to those expressed in 1940 by opponents to enactment of the Advisers Act. *See, e.g., Investment Trusts and Investment Companies: Hearings on S.3580 Before the Senate Comm. on Banking and Currency,* 76th Cong., 3d. Sess. (Apr. 22–23, 1940) (''1940 Senate Hearings'') (testimony of James N. White, Scudder, Stevens & Clark, (''We just feel that registration leads to investigation, and that investigation leads to regulation; and it is possible for a good deal of controversial theory on economics to creep into regulation.'')), (testimony of Dwight C. Rose, President, Investment Counsel Association of America, (''* * *all activities and recommendations of a cautious investment counselor would first have to be subjected to the question of whether or not at some time such activities or recommendations might involve difficulties for him in connection with the statute as enacted or with such future rulings as the Commission might take.'')), (testimony of Charles M. O'Hearn, Clarke, Sinsabaugh & Co., (''In addition, we should like to reaffirm our belief that

date that relate specifically to hedge fund advisers have been to modify our rules to accommodate these advisers.[74] Indeed, our proposals, and the rules we are adopting today, include additional regulatory relief to accommodate the needs of funds of hedge funds.[75]

B. Matters Considered by the Commission

In the Proposing Release, we identified a series of considerations that led us to propose rule 203(b)(3)–2. These considerations have now led us to adopt the rule. These considerations explain what we intended to achieve by the proposed rule, why we believed some alternative approaches would not be effective, and why we believed our proposed rule reflected the proper administration of the Advisers Act. Many of the commenters discussed these considerations extensively. Those supporting the proposal tended to agree with the considerations we set out; those opposing the proposal challenged them. Below, we discuss each of the considerations set out in the Proposing Release, as well as others raised by commenters. For each, we address our considerations, the principal arguments commenters made against our adoption of the rule, and why we found those arguments to be unpersuasive.[76]

1. Census Information

Registration under the Advisers Act provides the Commission with the ability to collect important information that we now lack about this growing segment of the U.S. financial system.[77] Registered advisers must file Form ADV with us, the data from which will provide us with information we need to better understand the operation of hedge fund advisers, to plan examinations, to better develop regulatory policy, and to provide data and information to members of Congress and other government agencies. This includes information about the number of hedge funds managed by advisers, the amount of assets in hedge funds, the number of employees and types of other clients these advisers have, other business activities they conduct, and the identity of persons that control or are affiliated with the firm.[78]

Currently, neither we nor any other government agency has any reliable data on even the number of hedge funds or the amount of their assets. We must rely on third-party surveys and reports, which often conflict and may be unreliable.[79] Many commenters acknowledged this as a concern, and several agreed that the Commission needs reliable, current and in-depth information about hedge fund advisers.[80] Some commenters, however, urged that, instead of registering advisers and obtaining information on Form ADV, we rely on a coordinated collection of filings and transaction reports currently made by hedge funds, their advisers, or broker-dealers with various government agencies or self-regulatory organizations.[81] We have considered this alternative, but believe that it would lead our staff to engage in a time-consuming forensic exercise to extract a composite of largely transactional information that would ultimately result in an incomplete picture of each hedge fund adviser and an incomplete picture of the hedge fund industry.[82] We still would not know, for example, how many hedge funds, or hedge fund advisers, operate in the United States or their aggregate assets. As we explained in the Proposing Release, we need information that is reliable, current, and complete, and we need it in a format reasonably susceptible of analysis by our staff.

2. Deterrence of Fraud

Registration under the Advisers Act enables us to conduct examinations of the hedge fund adviser.[83] Our examinations permit us to identify compliance problems at an early stage,[84] identify practices that may be harmful to investors, and provide a deterrent to unlawful conduct.[85] They are a key part of our investor protection program, and a key reason we are adopting rule 203(b)(3)–2.[86]

We are not suggesting that registration under the Advisers Act will result in our eliminating, or even identifying, every fraud. The prospect of a Commission examination, however, increases the risk of getting caught, and thus will deter wrongdoers.[87] This risk

---

we should be forced to take this position [against adviser registration] in the interests of our profession, even if we believed some Federal regulation was desirable, because of the broad and unqualified discretion given to the Securities and Exchange Commission to determine conditions which are vital not only to the convenience but to the very existence of our operations.'')). Registration, however, clearly has not impeded the growth of the investment advisory industry—in 1940, investment advisers managed only $4 billion (approximately $50 billion in today's dollars), but assets managed by advisers subject to registration under the Advisers Act have grown to over $23 trillion today.

[74] *See* Sections II.F. through II.H. of the Proposing Release.

[75] *See* Section II.I. of this Release.

[76] One of these considerations—imposition of minimal burdens—is discussed above.

[77] Collecting information about the nation's investment advisers has been one aim of the Advisers Act since it was enacted in 1940. Although the primary objective of the Advisers Act is the protection of advisory clients, the Act also serves as ''a continuing census of the Nation's investment advisers.'' H.R. Rep. No. 1760, at 2 (1960). Just as data on all advisers was lacking before 1940, there has been no comprehensive data on hedge fund advisers available. *See supra* note 60.

[78] Much of this information is currently collected from hedge fund advisers that are registered with the Commission. A registered adviser that is the general partner of a hedge fund must report that it advises a ''pooled vehicle'' in response to Item 5.D (6) of Part 1A of Form ADV, list each pooled vehicle on Schedule D (Section 7.B.) and disclose the amount of assets in the pooled vehicle and the minimum amount of capital investment per investor.

[79] *See* Bernstein 2004 Report, *supra* note 21, at 2 (''In general, there are very wide discrepancies in market size and performance estimates from different sources. As an example, we found that among three leading hedge fund data providers only approximately 15 percent of funds were included in all three databases.''); *see also supra* note 60.

[80] Even commenters that disagreed with our proposal to register hedge fund advisers agreed that the Commission needs information about them. *See, e.g.*, Comment Letter of Kynikos Associates LP (Sept. 15, 2004) (''Kynikos Letter'').

[81] *See, e.g.*, Chamber of Commerce Letter, *supra* note 52; MFA Letter, *supra* note 51.

[82] One commenter agreed with our concerns and the inadequacy of alternative approaches to collecting information about hedge fund managers. *See* Comment Letter of Long Trail Capital, LLC (Sept. 14, 2004) (Monitoring prime broker information is no substitute for registration of hedge fund advisers because (1) funds use multiple prime brokers, complicating efforts to monitor a fund; (2) the transactional picture is not complete since funds may hold private equity, real estate, or derivatives not cleared by the prime broker; (3) brokers have an incentive to profit from the client relationship with the fund, and not to expend resources trying to oversee its activities; fund advisers should instead be accountable to an overseer with a primary mission to protect investors.)

[83] *See supra* note 7.

[84] One registered hedge fund adviser commented that it benefits from our examination process. *See* Vantis August Letter, *supra* note 50 (''[T]he examiner provides an extra set of critical eyes to review our systems and identify any deficiencies. If we were to have deficiencies, we would want to promptly correct them.'')

[85] During an examination, our staff may review the advisory firm's internal controls and procedures; they may examine the adequacy of procedures for valuing client assets, for placing and allocating trades, and for arranging for custody of client funds and securities. Examination staff also may review the adviser's performance claims and delivery of its client disclosure brochure. Each of these operational areas presents a greater opportunity for misconduct if it is not open to examination.

[86] Other protections of the Advisers Act would also act as deterrents to unlawful conduct by serving as a check on the advisers' control of assets in funds they advise and contribute to the protection of investors in those funds. Our custody rule, for example, requires the adviser to maintain fund assets with a qualified custodian. *See* rule 206(4)–2 under the Advisers Act.

[87] The facts of the action against Stevin R. Hoover and Hoover Capital Management, Inc. are instructive on this question. *See SEC* v. *Hoover and Hoover Capital Management, Inc., (Second Amended Complaint of the SEC)*, (available at *http://www.sec.gov/litigation/complaints/complr17487.htm*). Hoover was involved in a scheme to defraud clients of his advisory firm by, among other things, misappropriating assets and

Continued

should alter hedge fund advisers' behavior by forcing them to account for the consequences of a compliance examination that, like a tax audit, may not occur with great frequency.[88] Hedge fund advisers each day make decisions based on risk analysis of alternative investments, and should be particularly sensitive to the consequences of getting caught if their conduct is unlawful. The consequences may involve paying fines, disgorgement and other penalties, including industry suspensions or bars, as well as loss of reputation. This sensitivity, which may be reflected in the strength of the opposition among some hedge fund advisers to this rulemaking, suggests that the benefits of our oversight may be substantial.

Economic theories of monitoring and deterrence based on principal-agent models have been used to examine regulatory issues related to tax fraud. *See* Jennifer F. Reinganum and Louis L. Wilde, *Income Tax Compliance in a Principal-Agent Framework*, 26 J. Pub. Econ. 1 (Feb. 1985); Jennifer F. Reinganum and Louis L. Wilde, *A Note On Enforcement Uncertainty and Taxpayer Compliance*, 103(4) Quarterly J. Econ. 793 (Nov. 1988). These papers suggest that randomized monitoring is sufficient to generate a deterrent effect. If the magnitude of deterrence is sufficient, randomized monitoring could create a net economic benefit.

Commenters opposing the rule challenged our concerns regarding fraud on two grounds. Some asserted that there was an inadequate record of fraud by hedge fund advisers to support requiring hedge fund advisers to register. They asserted that the 46 cases we cited in the Proposing Release represented only two percent of our enforcement cases over the applicable five-year period.[89] We note, however, that these cases, which have now grown to 51, represented over ten percent of our cases against investment advisers during the same period.

Some commenters cited to us a sentence from the 2003 Staff Hedge Fund Report that indicated that there was no evidence that hedge fund advisers engaged *disproportionately* in fraudulent activity.[90] The 2003 Staff Hedge Fund Report was issued before the discoveries of hedge fund involvement in late trading and inappropriate market timing of mutual fund shares.[91] In addition, implicit in these commenters' arguments is that the Commission should wait to act until hedge fund frauds do comprise a disproportionate amount of fraudulent activity. We reject such arguments. In the face of trends that we now observe, including the potential impact of hedge fund fraud on a growing and broadening number of direct and indirect investors in hedge funds, we believe that waiting would be irresponsible.

Second, some commenters asserted that the Commission would be unsuccessful at detecting fraud by hedge fund advisers, pointing to frauds that have occurred involving mutual funds.[92] Such an assertion amounts to a generalized attack on the Commission's ability to deter and detect fraud in general, and on the premise of statutes that provide us with authority to examine investment advisers.[93] This assertion is unsupported by any empirical data, and is as illogical as an assertion that because police officers are unable to prevent or detect all crime, they should be removed from their beats. Our examination staff uncovered, during routine or sweep exams, five of the eight cases we brought against registered hedge fund advisers,[94] and two of the cases involving unregistered advisers originated out of examinations of related persons that were registered with us.[95]

Finally, some commenters suggested that hedge fund advisers are different from other advisers and that our examiners would be unable to fully understand their trading strategies and investments.[96] This argument does not acknowledge that we are today responsible for the oversight of significant number of registered hedge fund advisers (not all of which are engaged in complex trading strategies), as well as many other advisers (some of which are engaged in complex trading strategies). In our experience, there is nothing unique about hedge fund advisers or the types of frauds they have committed that suggests that our examination program would not or could not play the same effective role. The fraud actions we have brought against unregistered hedge fund advisers have been similar to the types of fraud actions we have brought against other types of advisers, including misappropriation of assets,[97] portfolio

overbilling expenses. When Hoover became aware that the Commission staff was investigating his firm, he established a separate, unregistered advisory firm and perpetuated his fraud through use of a hedge fund he created and controlled.

[88] Several studies examine the impact of deterrence on the decision to commit crimes in different contexts. The seminal paper in this area is Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. Political Econ. 169 (1968). Another influential paper is Isaac Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. Political Econ. 521 (1973). The deterrence hypothesis is also discussed in Robert Cooter and Thomas Ulen, Law and Economics, ch.11–12 (1988).

[89] *See, e.g.*, MFA Letter, *supra* note 51; ISDA Letter, *supra* note 52; Chamber of Commerce Letter, *supra* note 52; Schulte Roth Letter, *supra* note 51, Black Letter, *supra* note 51, David Thayer Letter, *supra* note 53; Comment Letter of Sheila C. Bair (Sept. 15, 2004) (''Sheila Bair Letter'').

[90] 2003 Staff Hedge Fund Report, *supra* note 18, at 72.

[91] Some of these hedge fund managers may have been part of a scheme to defraud mutual fund investors and aided and abetted others in defrauding them, in violation of federal securities laws.

[92] *See, e.g.*, Comment Letter of Millrace Asset Group (Sept. 15, 2004) (''Millrace Letter'').

[93] *See* S. Rep. No. 1760, at 3 (1960) (recommending amendments to the Advisers Act that gave Commission examination authority, explaining that ''[t]he prospect of an unannounced visit of a Government inspector is an effective stimulus for honesty and bookkeeping veracity.'').

[94] Eight of the 51 cases involved registered hedge fund advisers, and routine or sweep exams were the source of five of those eight cases. *In the Matter of Alliance Capital Management, L.P., supra* note 29 (Commission found that investment adviser to hedge fund and mutual funds permitted market timing of the mutual funds in exchange for the timers' agreements to invest in the hedge fund); *In the Matter of Nevis Capital Management, LLC, David R. Wilmerding, III and Jon C. Baker,* Investment Advisers Act Release No. 2214 (Feb. 9, 2004) (charging hedge fund adviser with misallocating favorable investment opportunities); *In the Matter of Zion Capital Management LLC, and Ricky A. Lang,* Investment Advisers Act Release No. 2200 (Dec. 11, 2003) (charging hedge fund adviser with misallocating investment opportunities to the adviser's personal account); *SEC* v. *Schwendiman Partners, LLC, Gary Schwendiman, and Todd G. Schwendiman,* Investment Advisers Act Release No. 2043 (July 11, 2002) (charging hedge fund adviser with usurping favorable investment opportunities, for the benefit of the adviser); *In the Matter of Portfolio Advisory Services, LLC and Cedd L. Moses,* Investment Advisers Act Release No. 2038 (June 20, 2002) (Commission found hedge fund adviser caused its hedge funds to pay nearly $2 million in unnecessary and undisclosed commission costs, above markups already paid, to broker that had no role in executing trades, as reward for referring investors to the hedge funds).

[95] *SEC* v. *KS Advisors, Inc., et al.*, Litigation Release No. 18600 (Feb. 27, 2004) (asserting hedge fund advisers misrepresented performance and net asset value of two hedge funds to conceal massive trading losses); *SEC* v. *James S. Saltzman,* Litigation Release No. 17158 (Sept. 27, 2001) (asserting hedge fund adviser diverted significant amounts of fund assets to personal use).

[96] *See, e.g.*, Schulte Roth Letter, *supra* note 51; Sidley Austin Letter, *supra* note 51.

[97] *SEC* v. *Jean Baptiste Jean Pierre, Gabriel Toks Pearse and Darius L. Lee,* Litigation Release No. 18216 (July 7, 2003); *SEC* v. *Peter W. Chabot, Chabot Investments, Inc., Sirens Synergy and the Synergy Fund, LLC,* Litigation Release No. 18214 (July 3, 2003); *SEC* v. *David M. Mobley, Sr., et al.*, Litigation Release No. 18150 (May 20, 2003); *SEC* v. *Vestron Financial Corp., et al.*, Litigation Release No. 18065 (Apr. 2, 2003); *SEC* v. *Hoover and Hoover Capital Management, Inc.,* Litigation Release No. 17487 (Apr. 24, 2002); *SEC* v. *Beacon Hill Asset Management LLC, et al.*, Litigation Release No. 18745A (June 16, 2004); *SEC* v. *House Asset Management, L.L.C., House Edge, L.P., Paul J. House, and Brandon R. Moore,* Litigation Release No. 17583 (June 24, 2002); *SEC* v. *Edward Thomas Jung, et al.*, Litigation Release No. 17417 (Mar. 15, 2002); *SEC* v. *Evelyn Litwok & Dalia Eilat,* Litigation Release No. 16843 (Dec. 27, 2000); *SEC* v. *Ashbury Capital Partners, L.P., Ashbury Capital*

pumping,[98] misrepresentation of portfolio performance,[99] falsification of experience, credentials and past returns,[100] misleading disclosure regarding claimed trading strategies [101] and improper valuation of assets.[102]

Management, L.L.C., and Mark Yagalla, Litigation Release No. 16770 (Oct. 17, 2000).

[98] *SEC* v. *Michael Lauer, Lancer Management Group, LLC, and Lancer Management Group II, LLC,* Litigation Release No. 18247 (July 23, 2003); *SEC* v. *Burton G. Friedlander,* Litigation Rel. No. 18426 (Oct. 24, 2003).

[99] *In the Matter of Samer M. El Bizri and Bizri Capital Partners, Inc.,* Admin Proc. File No. 3–11521 (June 16, 2004); *SEC* v. *Millennium Capital Hedge Fund,* Litigation Release No. 18362 (Sept. 25, 2003); *SEC* v. *Peter W. Chabot, Chabot Investments, Inc., Sirens Synergy and the Synergy Fund, LLC, supra* note 97; *SEC* v. *David M. Mobley, Sr., et al., supra* note 97; *SEC* v. *Hoover and Hoover Capital Management, Inc., supra* note 97; *SEC* v. *Beacon Hill Asset Management LLC, et al., supra* note 97; *SEC* v. *Edward Thomas Jung, et al., supra* note 97; *SEC* v. *Michael W. Berger, Manhattan Capital Management Inc.,* Litigation Release No. 17230 (Nov. 3, 2001); *In the Matter of Charles K. Seavey and Alexander Lushtak,* Investment Advisers Act Release No. 1968 (Aug. 15, 2001); *In the Matter of Michael T. Higgins,* Investment Advisers Act Release No. 1947 (June 1, 2001); *SEC* v. *Ashbury Capital Partners, L.P., Ashbury Capital Management, L.L.C., and Mark Yagalla, supra* note 97.

[100] *SEC* v. *J. Scott Eskind,* Litigation Release No. 18558 (Jan. 29, 2004); *SEC* v. *Jean Baptiste Jean Pierre, Gabriel Toks Pearse and Darius L. Lee, supra* note 97; *SEC* v. *Peter W. Chabot, Chabot Investments, Inc., Sirens Synergy and the Synergy Fund, LLC, supra* note 97; *SEC* v. *Vestron Financial Corp., et al., supra* note 97; *SEC* v. *House Asset Management, L.L.C., House Edge, L.P., Paul J. House, and Brandon R. Moore, supra* note 97; *SEC* v. *Evelyn Litwok & Dalia Eilat, supra* note 97; *SEC* v. *Ashbury Capital Partners, L.P., Ashbury Capital Management, L.L.C., and Mark Yagalla, supra* note 97.

[101] *SEC* v. *Peter W. Chabot, Chabot Investments, Inc., Sirens Synergy and the Synergy Fund, LLC, supra* note 97; *SEC* v. *David M. Mobley, Sr., et al., supra* note 97; *SEC* v. *Edward Thomas Jung, et al., supra* note 97; *SEC* v. *Ashbury Capital Partners, L.P., Ashbury Capital Management, L.L.C., and Mark Yagalla, supra* note 97.

We have also charged registered hedge fund advisers with other types of fraud, including: misallocating favorable investment opportunities to a hedge fund, to the detriment of the adviser's other clients, *In the Matter of Nevis Capital Management, LLC, David R. Wilmerding, III and Jon C. Baker, supra* note 94; misallocating investment opportunities to the personal account of a hedge fund adviser, to the detriment of the hedge fund, *In the Matter of Zion Capital Management LLC, and Ricky A. Lang, supra* note 94; usurping a profitable, low-risk investment opportunity available to a hedge fund and taking it for the personal benefit of a hedge fund adviser, *SEC* v. *Schwendiman Partners, LLC, Gary Schwendiman, and Todd G. Schwendiman, supra* note 94; and causing hedge funds to pay commissions to a broker that had no role in executing trades, as reward for referring investors to the adviser's hedge funds, *In the Matter of Portfolio Advisory Services, LLC and Cedd L. Moses, supra* note 94. We have no reason to believe that unregistered advisers may not be perpetrating the same types of frauds, beyond our detection.

[102] *SEC* v. *Global Money Management, L.P.,* Litigation Release No. 18666 (Apr. 12, 2004); *SEC* v. *Burton G. Friedlander, supra* note 98; *SEC* v. *Michael Lauer, Lancer Management Group, LLC, and Lancer Management Group II, LLC, supra* note 98; *SEC* v. *David M. Mobley, Sr., et al., supra* note 97; *SEC* v. *Beacon Hill Asset Management LLC, et al., supra* note 97; *SEC* v. *Edward Thomas Jung, et al., supra* note 97; *In the Matter of Charles K. Seavey and Alexander Lushtak, supra* note 99; *In the Matter of Michael T. Higgins, supra* note 99.

3. Keeping Unfit Persons From Using Hedge Funds To Perpetrate Frauds

Registration with the Commission permits us to screen individuals associated with the adviser, and to deny registration if they have been convicted of a felony or had a disciplinary record subjecting them to disqualification.[103] We intend to use this authority to help keep fraudsters, scam artists and others out of the hedge fund industry.[104]

Several of the frauds we have seen appear to have been perpetrated by unscrupulous persons using the hedge fund as a vehicle to defraud investors. These persons appear to never have intended to establish a legitimate hedge fund, but used the allure of a hedge fund to attract their ''marks.'' [105] We have been concerned that these individuals may have been attracted to hedge funds because they could operate without regulatory scrutiny of their past activities.[106] Our lack of oversight may have contributed to the belief that their frauds would not be exposed. Our ability to screen individuals and, in some cases, to block their entrance into the advisory profession should serve to discourage unscrupulous persons from using hedge funds as vehicles for fraud.[107]

[103] Section 203(c)(2) of the Advisers Act [15 U.S.C. 80b–3(c)(2)] permits the Commission, after notice and opportunity for a hearing, to deny registration to an adviser that is subject to disqualification under section 203(e) [15 U.S.C. 80b–3(e)]. Item 11 of Part 1 of Form ADV requires applicants for registration as an investment adviser to report felonies and other disciplinary events occurring during the last 10 years. The Commission's screening, however, does not rely exclusively on an applicant's self-reporting of violations; our staff checks applicants against a large database of securities violators to determine whether there are any unreported disciplinary events.

[104] *See, e.g.,* SEC v. J. *Scott Eskind, supra* note (Eskind, already barred by the Commission from association with any investment adviser, raised more than $3 million from investors for a purported hedge fund, and simply misappropriated it); *SEC* v. *Sanjay Saxena,* Litigation Release No. 16206 (July 8, 1999) (Saxena, already barred by the Commission from the securities industry, defrauded hedge fund investors of approximately $700,000).

[105] *SEC* v. *Jean Baptiste Jean Pierre, Gabriel Toks Pearse and Darius L. Lee, supra* note (defendants raised nearly half a million dollars, the majority of which were simply *misappropriated by Jean Pierre*); *SEC* v. *Peter W. Chabot, Chabot Investments, Inc., Sirens Synergy and the Synergy Fund, LLC, supra* note 97 (Chabot raised over $1.2 million for an alleged hedge fund but did not buy any stocks or other securities with the funds, instead using the money for his personal expenses).

[106] Comment Letter of Vantis Capital Management LLC (July 14, 2004) (''Vantis July Letter'') (registered hedge fund adviser stated that the lack of scrutiny of hedge fund advisers has led to the industry attracting ''unsavory characters'').

4. Adoption of Compliance Controls

Registration under the Advisers Act will require hedge fund advisers to adopt policies and procedures designed to prevent violation of the Advisers Act, and to designate a chief compliance officer.[108] Hedge fund advisers that have not already done so must develop and implement a compliance infrastructure. We adopted this requirement last year for all advisers registered with us in recognition that advisers have the primary obligation to ensure compliance with the securities laws, and to foster more effective compliance practices.[109] Our examination staff resources are limited, and we cannot be at the office of every adviser at all times. Compliance officers serve as the front line watch for violations of securities laws, and provide protection against conflicts of interests.

Comment letters opposing registration of hedge fund advisers did not challenge the benefits of compliance programs; rather, they complained of the costs of developing a compliance infrastructure, and of submitting to our compliance examinations.[110] They asserted that these costs would make them less competitive, and would impose barriers to entry preventing new hedge fund advisers from starting their own hedge funds.[111] We acknowledge that development and maintenance of compliance controls involves costs,[112]

[107] We acknowledge that many new sponsors of hedge funds may not have $25 million of assets under management and thus may not be required to register with us. See section 203A(a)(1) of the Act [15 U.S. 80b-3a(a)(1)] (prohibiting certain advisers having less than $25 million from registering with the Commission). It is likely that if we adopt this rule, many prospective investors may insist that newly-formed hedge fund advisers be registered with the Commission. These advisers will apply for registration pursuant to our rule 203A–2(d) [17 CFR 275.203A–2(d)], which permits an adviser with less than $25 million of assets under management to register with us if the adviser has a reasonable expectation that it will be eligible to register within 120 days.

[108] Rule 206(4)–7 [17 CFR 275.206(4)–7].

[109] *See Compliance Programs of Investment Companies and Investment Advisers,* Investment Advisers Act Release No. 2204 (Dec. 17, 2003) [68 FR 74714 (Dec. 24, 2003)].

[110] *See, e.g.,* MFA Letter, *supra* note 51; Madison Capital Letter, *supra* note 51; Sidley Austin Letter, *supra* note 51.

[111] *See* Comment Letter of Seward & Kissel LLP (Sept. 15, 2004) (''Seward & Kissel Letter''); Comment Letter of Bryan Cave LLP (Aug. 16, 2004) (''Bryan Cave Letter'').

[112] In the Proposing Release, we estimated that the new registrants would need to spend $20,000 in professional fees and $25,000 in internal costs, including staff time, to develop the compliance infrastructure required of a registered investment adviser. These estimates were based on our

Continued

but these are costs that today all advisers registered with us must bear, including advisers that are much smaller and have substantially fewer resources than many hedge fund advisers.[113]

Our 2003 Staff Hedge Fund Report noted that, while many unregistered hedge fund managers had strong compliance controls, others had very informal procedures that appeared to be inadequate for the amount of assets under their management.[114] These lack of controls concern not only us, but also hedge fund investors. A recent survey of institutional investors reported that the adequacy of operational controls at hedge fund advisory firms was one of most frequently mentioned concerns.[115] While these investors can request to see a hedge fund manager's compliance policies and procedures, we are in a position to determine whether the hedge fund adviser's operations seem to be in accordance with those policies and procedures.

Application of our recent rule requiring more formalized compliance policies administered by an employee designated as a chief compliance officer will serve to better protect hedge fund investors.[116] We also believe it will well serve hedge fund advisers that, for business reasons alone, should have a compliance infrastructure commensurate with the nature of their operations and the risks involved.[117] These costs appear small relative to the scale of the industry.[118] The typical hedge fund fee structure, which involves both a management fee of two percent or more and a performance fee of twenty percent or more provides hedge fund advisers with a substantial cash flow.[119] Today there are many investment advisers registered with us that manage a comparable amount of assets, charge substantially lower fees, and bear these same compliance costs. One recent study estimated that ''in 1999, with $450 billion in assets under management, hedge funds'' fee revenues were higher than those of the whole U.S. equity mutual fund industry.'' [120]

There are today ''[e]xtremely low barriers to entry and tremendous monetary and non-monetary incentives for hedge fund [advisers],'' [121] and thus the cost of compliance with these rules should not present significant additional barriers to entry for new hedge fund advisers. Indeed some have suggested that our regulatory initiative may ''play a positive role of increasing confidence in hedge fund use by further demystifying them.'' [122]

5. Limitation on Retailization

Registration under the Advisers Act will have the salutary effect of resulting in all direct investors in most hedge funds meeting minimum standards of rule 205–3 under the Advisers Act, because hedge fund advisers typically charge performance fees.[123] Rule 205–3 requires that each investor, in a private investment company that pays a performance fee, generally have a net worth of at least $1.5 million or have at least $750,000 of assets under management with the adviser.[124] Many hedge fund advisers will rely on rule 205–3 to continue charging a performance fee to the funds they manage.

Most commenters did not address this effect of registration under the Act, except with respect to expressing their support for the transitional rule we also proposed, and which we discuss later in this Release.[125] Some argued that we should, instead, raise the ''accredited investor'' standards applicable to private offerings pursuant to Regulation D, which may have a similar effect on limiting direct investments in hedge funds.[126] Raising the accredited investor standards would not address the broader concerns, discussed above, of the indirect exposure to hedge funds by an increasingly large number of persons who are beneficiaries of pensions plans or invest through other intermediaries that are likely to meet any higher standards.

6. CFTC Regulation

Several commenters suggested that the Commission exempt from registration hedge fund advisers that are registered with the CFTC as commodity pool operators in order to avoid duplicative registration.[127] In 2000 Congress addressed this concern by adding section 203(b)(6) to the Advisers Act, which exempts any CFTC-registered commodity trading advisor from investment adviser registration if its business does not consist primarily

discussions with industry, including attorneys whose practice involved counseling registered and unregistered investment advisers. Commenters argued that their costs would be higher. We discuss the benefits and costs of our rulemaking in Section IV. of this Release.

[113] *See* ICAA Letter, *supra* note 47. As of September 30, 2004, of the 8,535 advisers registered with the Commission, 2,758 reported on their Form ADV that they were managing less than $50 million in client assets.

[114] *See* 2003 Staff Hedge Fund Report, *supra* note 18 at section VII.A.1.b.

[115] BONY Report, *supra* note 39, at 15–16.

[116] Rule 206(4)–7. Hedge fund advisers have substantial conflicts of interest, both with their hedge funds and with their investors. These conflicts arise from management strategies, fee structures, use of fund brokerage and other aspects of hedge fund management.

[117] One hedge fund adviser agreed: ''Benefits [of registration] include * * * the structure it provides for advisers'' policies and procedures, the value of having an additional layer of oversight of advisers' compliance programs.'' Vantis August Letter, *supra* note 50.

[118] In concluding that registration would impose substantial burdens on a hedge fund adviser, several commenters mistakenly assumed that compliance with rule 206(4)–7(c) would require them to hire a new chief compliance officer. The rule requires all registered advisers to ''designate'' an individual as chief compliance officer, which could be an individual currently employed by the adviser who has similar responsibilities.

[119] Some hedge fund advisers charge up to four percent in asset-based fees, and others take between 30 and 50 percent of their funds' profits. *See Hedge Funds Grab More In Fees As Their Popularity Increases, supra* note 11.

[120] *See* Bernstein 2003 Report, *supra* note 24, at 4.

[121] *Id.* at 15. *See also* Vantis July Letter, supra note 106 (''there are presently too few barriers to entry'' in the hedge fund industry).

[122] Bernstein 2003 Report, *supra note* 24, at 14. Regulatory oversight to deter frauds may forestall erosion of investor confidence in this growing industry. *See, e.g.*, Vantis July Letter, supra note 106 (mandatory registration will improve the image of the hedge fund industry); Hennessee Foundation and Endowment Survey, supra note 39 (survey participant remark that registration ''lends creditability to the field''); Comment Letter of North American Securities Administrators Association, Inc. (Oct. 18, 2004) (SEC registration will increase investor confidence, thereby benefiting hedge fund advisers).

[123] *See supra* note 119.

[124] Hedge funds in the United States are generally organized to avoid regulation under the Investment Company Act by qualifying for an exclusion, from the definition of ''investment company,'' under section 3(c)(1) [15 U.S.C. 80a–3(c)(1)] or 3(c)(7) [15 U.S.C. 80a–3(c)(7)] of that Act. There are no performance fee restrictions on 3(c)(7) funds, but each investor in the fund must be a ''qualified purchaser,'' which for natural persons generally means having investments of at least $5 million. See section 2(a)(51) of the Investment Company Act [15 U.S.C. 80a–2(a)(51)]. Rule 205–3 requires advisers to 3(c)(1) funds to consider each investor in the fund as a client for purposes of charging a performance fee.

[125] *See infra* Section II.H of this Release.

[126] Regulation D [17 CFR 230.501 through 508] exempts from registration under the Securities Act of 1933 offerings and sales of securities that satisfy certain conditions, including certain sales to ''accredited investors.'' As noted in the 2003 Staff Hedge Fund Report, *supra* note 18, at 313, our approach of leaving eligibility requirements for accredited investors unchanged also allows small businesses to continue to seek capital from historical sources.

[127] Comment Letter of Denali Asset Management LLLP (Aug. 27, 2004) (''Denali Letter''); Comment Letter of Willkie Farr & Gallagher LLP (Sept. 13, 2004) (''Willkie Farr Letter''); Comment Letter of National Futures Association (Sept. 14, 2004) (''NFA Letter''); ICAA Letter, *supra* note 47; Comment Letter of Katten Muchin Zavis Rosenman (Sept. 14, 2004) (''Katten Muchin Letter''); Tudor Letter, *supra* note 53; Financial Services Roundtable Letter, *supra* note 53; Jeffrey R. Neufeld (Sept. 15, 2004) (''Neufeld Letter''); Kynikos Letter, *supra* note 80; Comment Letter of the Association of the Bar of the City of New York Committee on Futures Regulation (Sept. 15, 2004) (''NYC Bar Futures Committee Letter''); Comment Letter of the U.S. Commodity Futures Trading Commission (Oct. 22, 2004) (''CFTC Letter'').

of acting as an investment adviser.[128] A hedge fund adviser that qualifies for this statutory exemption is not required to register with us.

We disagree that our oversight of hedge fund advisers that are also commodity pool operators would be duplicative. Most hedge fund portfolios consist primarily of securities, and the CFTC's oversight necessarily focuses more on the area of futures trading, which is the activity of most concern to the CFTC.[129] It would be inconsistent with principles of functional regulation and contrary to the design and purpose of the 2000 amendments to the Advisers Act for the Commission not to oversee hedge fund advisers whose primary business is acting as an investment adviser.[130]

7. Moral Hazard Implications

Some commenters urged us not to adopt the rule because Commission oversight of hedge fund advisers might tend to cause hedge fund investors to rely on that oversight instead of performing appropriate due diligence before making an investment in a hedge fund.[131] Such an argument, if accepted, would support withdrawal of the Commission's oversight of all advisers, particularly of those advisers whose clients are less sophisticated and who might be less likely to appreciate the limitations of regulatory oversight.[132] Congress addressed such arguments in 1940 when it passed the Advisers Act by including a provision in the Act that makes it unlawful for any investment adviser to ''represent or imply in any manner whatsoever that [the adviser] has been sponsored, recommended, or approved, or that his abilities or qualifications have in any respect been passed upon by the United States or any agency or officer thereof.'' [133]

8. Proper Administration of the Advisers Act

In adopting rule 203(b)(3)–2, an important consideration for us has been our dissatisfaction with the operation of the existing safe harbor because it permits advisers, without registering under the Act, to manage large amounts of securities indirectly through hedge funds that may have, collectively, hundreds of investors.[134] We believe that the safe harbor has become inconsistent with the underlying purpose of the registration exemption in Section 203(b)(3), which was designed to exempt advisers whose business activities are too limited to warrant federal attention. Commenters have not persuaded us otherwise. Our actions today withdraw that safe harbor and require advisers to ''private funds''—which will include most hedge funds—to ''look through'' the funds to count the number of investors as ''clients'' for purposes of the private adviser exemption.

Many commenters who opposed the rule urged us to maintain the safe harbor because it operated to exempt advisers to hedge funds in which only wealthy and sophisticated investors participated.[135] This argument implicitly concedes that the Commission should look to the investors in the hedge fund (rather than the hedge fund itself) to determine whether the adviser should be required to register, but concludes that we should continue to exempt the adviser from registration because the ultimate advisory clients are wealthy or sophisticated.

Section 203(b)(3) was not intended to exempt advisers to wealthy or sophisticated clients. First, they were the primary clients of many advisers in 1940 when the provision was included in the Act.[136] Second, it would make no sense for Congress to have imposed a limit on the number of wealthy or sophisticated clients an adviser could have before it had to register under the Act. Surely, the fifteenth wealthy or sophisticated client would not trigger the need for registration. Other

[128] 15 U.S.C. 80b–203(b)(6). Congress enacted section 203(b)(6) as part of the Commodity Futures Modernization Act of 2000, Pub. L. 106–554, 114 Stat. 2763 (2000) (codified in scattered sections of the United States Code). A parallel provision was added simultaneously to the Commodity Exchange Act. Section 4m of the Commodity Exchange Act [7 U.S.C. 6m]. The exemption in section 203(b)(6) is not available if the firm acts as an adviser to a registered investment company or to a company that has elected to be a business development company under section 54 of the Investment Company Act [15 U.S.C. 80a–53].

[129] Roundtable Transcript of May 15 at 236–37, *supra* note (statement of Jane Thorpe that ''NFA certainly has the ability to go in and inspect vehicles that may not directly be trading in futures but based on a risk-based approach is going to focus on those areas that obviously it has the most and we have the most interest in'').

[130] We note that the frequency with which hedge fund advisers may also be registered with the CFTC as commodity pool operators (''CPOs'') may diminish substantially in the future. The CFTC recently adopted rules that may permit most hedge fund advisers to now avoid registering as CPOs or commodity trading advisors (''CTAs''). *See Additional Registration and Other Regulatory Relief for Commodity Pool Operators and Commodity Trading Advisors; Past Performance Issues* (Aug. 1, 2003) [68 FR 47221 (Aug. 8, 2003)] (''CFTC 2003 Exemptive Release'') (adopting new rule 4.13(a)(3), which exempts CPOs from registration if the pool is sold only to accredited investors and engages in limited trading of commodity interests, new rule 4.13(a)(4), which exempts CPOs from registration if the pool is offered only to persons reasonably believed to be ''qualified eligible persons,'' and new rule 4.14(a)(10), which exempts CTAs who during the preceding 12 months provide advice to fewer than 15 legal entities). *See also* Susan Ervin, *Downsizing Commodity Pool Regulation: The CFTC's New Initiative,* Futures Industry, May/June 2003 (The CFTC has embarked upon a fundamental change in its regulatory program, which would free very sizable portions of the industry from CFTC regulation. Many new entrants would not need to register with the CFTC and many currently registered persons may elect to withdraw from registration.). We expect our staff will consult with the staff of the CFTC to discuss a variety of matters regarding examinations of hedge fund advisers, including the extent to which examinations should be coordinated or results shared.

[131] We note, however, that without the new rule requiring registration, a hedge fund adviser can now choose to register under the Advisers Act but then withdraw its registration, for example, at the prospect of an examination. Thus, without the new rule, any moral hazard would already exist, but without necessarily providing hedge fund investors the benefit of our oversight of their advisers.

[132] *See, e.g.*, 1940 Senate Hearings, supra note (testimony of Dwight C. Rose, President, Investment Counsel Association of America, (''Many incompetents would be permitted to register and describe themselves as registered or licensed investment counsel. This badge of registration and apparent approval by the Federal Government might, therefore, in spite of any express provision denying such approval in the act itself, give to the unsophisticated investor a mistaken and completely underserved impression of qualification and standing.'')). Indeed, such an argument could be made against Commission regulation of any broker-dealer, transfer agent, or investment company.

[133] Section 208(a) of the Act [15 U.S.C. 80b–8(a)]. A registered adviser may refer to itself as ''registered'' so long as the effect of registration is not misrepresented. Section 208(b) [15 U.S.C. 80b–8(b)].

[134] Practically speaking, a single hedge fund can have up to 499 investors; beyond this limit, the fund faces potential obligations to register under section 12 of the Exchange Act [15 U.S.C. 78h] and rule 12g–1 [17 CFR 240.12g–1], generally requiring registration of any issue with 500 holders of record of a class of equity securities and assets in excess of $10 million. Since rule 203(b)(3)–1 has generally allowed an adviser to count each hedge fund as one client, a hedge fund adviser could have 14 funds with 499 investors in each, or a total of 6,986 investors.

[135] *See*, *e.g.*, Chamber of Commerce Letter, *supra* note 52; MFA Letter, *supra* note 51. Opponents of the Advisers Act made this same argument to Congress in 1940 without success. *See*, *e.g.*, 1940 Senate Hearings, *supra* note (testimony of Charles O'Hearn, Clarke, Sinsabaugh & Co., (''Regulation of this profession by the Securities and Exchange Commission is not necessary for the protection of small, uninformed investors, since they do not use investment counsel service. There is a marked difference between the owners of investment trust securities and our clients. While investment trusts sell securities in amounts sufficiently small so that even the poorest may buy, our services are designed for and limited to a group of persons who are a minority in the community. We do not deal with the general public. Our clients represent substantial amounts of capital and have adequate means to inform themselves about us through their banking and legal affiliations.'')).

[136] The Commission's 1939 Investment Trust Study to Congress, which preceded enactment of the Advisers Act, found that the average size of individual clients' accounts managed by advisers surveyed in 1936 was $281,000, which equals $3.8 million in today's value. Individual clients represented about 83 percent of these advisers' client base. *See* SEC, Investment Trusts and Investment Companies, H.R. Doc. No. 279, 76th Cong., 1st Sess., pt. 2 at 8–9 (1940).

provisions in the federal securities laws designed to exempt transactions or relationships with wealthy or sophisticated investors contain no such limitations.[137]

The intent of Congress in enacting section 203(b)(3) appears to have been to create a limited exemption for advisers whose activities were not national in scope[138] and who provided advice to only a small number of clients, many of whom are likely to be friends and family members.[139] These advisers are unlikely to significantly affect investors and the securities markets generally.[140] While provisions of the Securities Act (and its rules) provide exemptions from registration under that Act for securities transactions with persons, including institutions, that have such knowledge and experience that they are considered capable of fending for themselves and thus do not need the protections of the applicable registration provisions,[141] the Advisers Act does not. When a client—even one who is highly sophisticated in financial matters—seeks the services of an investment adviser, he acknowledges he needs the assistance of an expert. The client may be unfamiliar with investing or the type of strategy employed by the adviser, or may simply not have the time to manage his financial affairs. The Advisers Act is intended to protect all types of investors who have entrusted their assets to a professional investment adviser.

Several commenters opposing the rule pointed to legislation enacted in 1996 that created a new exclusion from the definition of ''investment company'' under the Investment Company Act for pools of securities offered exclusively to ''qualified purchasers'' as evidence that Congress intended that hedge fund advisers be left unregulated by the Advisers Act as well as the Investment Company Act.[142] These commenters offered no support for this proposition.

The 1996 National Securities Markets Improvement Act (NSMIA) exempted these qualified purchaser funds from *only* the Investment Company Act.[143] Its legislative history explains only that Congress believed the protections afforded by the Investment Company Act were unnecessary for financially sophisticated investors.[144] Moreover, the current safe harbor, which can result in hedge fund advisers with hundreds of millions of dollars of assets being registered with one or more state regulators, is inconsistent with the policy and purposes of NSMIA, which allocated oversight responsibility for larger advisers to the Commission.[145]

The legislative record of NSMIA, in fact, suggests that Congress may have expected the Commission to regulate the activities of advisers to hedge funds eligible for the new Investment Company Act exclusion. NSMIA amended section 205 of the Advisers Act to exempt qualified purchaser funds from restrictions on performance fees. Section 205 of the Act does not apply to advisers ''exempt from registration pursuant to Section 203(b),'' and thus affects *only* funds advised by investment advisers registered with the Commission. Thus, Congress understood that at least some of these qualified purchaser pools would be advised by registered advisers, and chose to exempt these advisers only from the restrictions on performance fees.

9. Alternatives Submitted

Several commenters submitted alternative approaches for our consideration. These alternatives included provisions aimed at addressing several of the considerations that led us to propose rule 203(b)(3)–2, such as the need for information about hedge fund advisers and the broadening exposure of investors to hedge funds. We have considered these alternatives. However, as discussed below, the alternatives each involve partial responses to our concerns, and all would deny us the ability to examine the activities of hedge fund advisers, and would not, in our judgment, accomplish the goals of this rulemaking.

Some commenters suggested we except hedge fund advisers from the adviser registration requirement if all investors in their hedge funds meet ''qualified purchaser'' standards under section 3(c)(7) of the Investment Company Act.[146] Others suggested that in lieu of requiring hedge fund adviser registration, we should increase the current ''accredited investor'' standards for private securities offerings under Regulation D.[147] These alternatives would address one aspect of our concern about the prospect of direct ownership of hedge funds by investors who may not previously have participated in these types of risky investments, but would not permit us to protect the interests of those whose exposure is through intermediaries such as funds of funds and pension funds.[148] Moreover, as discussed earlier, the Advisers Act does not exempt an adviser from registration merely because its clients may be wealthy or sophisticated.[149]

Other commenters offered alternatives based on amending our Form D to

[137] *See*, *e.g.*, section 3(c)(7) [15 U.S.C. 80a–3(c)(7)] of the Investment Company Act.

[138] *See* section 201 of the Act [15 U.S. 80b–1] (activities of investment advisers are of national concern because they substantially affect national securities exchanges and the national economy).

[139] The legislative history of section 3(c)(1) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(1)], a parallel section to section 203(b)(3) that was enacted at the same time, reflects Congress' view that privately placed investment companies, owned by a limited number of investors likely to be drawn from persons with personal, familial, or similar ties, do not rise to the level of federal interest. *See* 1940 Senate Hearings, *supra* note 73.

[140] *See* section 201 of the Act.

[141] *See*, *e.g.*, sections 4(2) and 4(6) of the Securities Act of 1933 [15 U.S.C. 77d(2) and 77d(6)] and Regulation D and rule 144A [17 CFR 230.144A]; *SEC* v. *Ralston Purina Co.*, 346 U.S. 119 (1953).

[142] *See*, *e.g.*, Comment Letter of Wilmer Cutler Pickering Hale and Dorr LLP (Sept. 8, 2004) (''Wilmer Cutler Letter'').

[143] Pub L. No. 104–290, 110 Stat. 3416 (1996) (codified in scattered sections of the United States Code).

[144] S.Rep. No. 104–293, at 10 (1996).

[145] Title III of NSMIA amended the Advisers Act to allocate regulatory responsibility over advisers between the Commission and state securities authorities. It gave the Commission responsibility for advisers with more than $25 million of assets under management, and preempted state registration and other requirements for advisers registered with the Commission. These are firms that Congress concluded were ''[l]arger advisers, with national businesses [that] should be registered with the Commission and be subject to national rules.'' S. Rep. No. 293, 104th Cong., 2d Sess. (1996) at 3–4.

[146] *See*, *e.g.*, Financial Services Roundtable Letter, *supra* note 53; Tudor Letter, *supra* note 53. Another commenter suggested that the investments of the hedge fund adviser's insiders be excluded in applying the registration requirements. Comment Letter of Alex M. Paul (July 21, 2004). We are adopting a provision that allows an adviser to exclude certain knowledgeable insiders when counting its clients. *See infra* Section II.D.2 of this Release.

[147] *See*, *e.g.*, Chamber of Commerce Letter, *supra* note 52; Neufeld Letter, *supra* note 127 (increase accreditation standards, with exemptions for family members of advisory firms' employees). *See also* MFA Letter, *supra* note 51 (suggesting creation of investor accreditation standards under the Advisers Act for hedge fund investors).

[148] Other commenters suggested variations with special rules for funds of funds or pension plans. Regardless of the extent to which these alternatives might limit indirect participation in hedge funds advised by unregistered advisers, these alternatives would not permit us to examine unregistered hedge fund advisers. *See*, *e.g.*, Bryan Cave Letter, *supra* note 111 (apply investor accreditation standards to funds of funds on a look-through basis); Comment Letter of Leon M. Metzger (Sept. 15, 2004) (''Metzger Letter'') (require fund of funds whose investors do not meet accreditation standards to invest only in funds with registered advisers; coordinate with Department of Labor to prohibit pension fund investments in hedge funds with unregistered advisers); Madison Capital Letter, *supra* note 51 (apply the look-through for purposes of counting up to 15 clients, but the only investors that would be counted towards the limit would be (i) investors that did not meet 3(c)(7) ''qualified purchaser'' standards, (ii) pension funds, and (iii) registered investment companies).

[149] *See supra* Section II.B.8 of this Release.

require hedge funds to provide certain information about their advisers.[150] Some suggested that hedge fund advisers whose funds submitted this information be excepted from adviser registration requirements,[151] while others suggested it be an alternative to registration.[152] Some commenters further suggested that these information requirements be combined with limited application of specific rules that apply only to registered advisers, such as the custody rule or the compliance rule.[153] None of these alternatives, however, would provide us with examination authority.[154]

Finally, some commenters suggested that, instead of registering hedge fund advisers, we gather information about them from a variety of regulatory filings currently made by hedge funds, their advisers, and broker-dealers.[155] We have considered this alternative, but the reports and information currently available would provide at best a partial, inadequate view of the activities of hedge fund advisers. While some of the reports emphasized by these commenters might provide us with basic identifying information about hedge funds advisers that are registered as broker-dealers or commodity pool operators, many are not registered in either capacity. These commenters also focus on several existing transactional reporting requirements, arguing they contain a wealth of information about hedge funds. However, as discussed above, making use of this information would require substantial effort on the part of our staff to extract a composite of information about any particular hedge fund, yielding limited information about its assets instead of any useful information about whether its adviser is fulfilling its fiduciary duties. As we stated in the Proposing Release, we need information that is reliable, current, and complete, and we need it in a format reasonably susceptible to analysis by our staff.

C. Our Legal Authority Under the Advisers Act

A few commenters challenged our legal authority to adopt rule 203(b)(3)–2, asserting that the approach of the rule, which requires an adviser to ''look through'' a hedge fund to determine whether it is eligible for the private adviser exemption, is contrary to the Act. For the reasons discussed below, we believe we have broad authority to adopt the rule. We start our discussion with the statutory language.

Section 203(b)(3) of the Act provides an exemption from registration for certain investment advisers. To qualify for the exemption, Congress provided two specific tests, each of which an adviser must satisfy. First, the adviser must not advise fifteen or more clients and, second, the adviser must not hold itself out to the public as an investment adviser. In enacting this provision, Congress exempted from the registration requirements a category of advisers whose activities were not sufficiently large or national in scope, *e.g.*, advisers to family or friends, to implicate the policy objectives identified in section 201 of the Act.[156]

Congress did not appear to have addressed or considered whether an adviser must count an investor in a pooled investment vehicle as a client for purposes of section 203(b)(3). Nevertheless, it has long been recognized that determining whether the exemption applies could not be limited to a formalistic assessment of whether the adviser provided investment advice to a single legal entity, but instead requires consideration of the surrounding circumstances of the advisory arrangement, which, in appropriate cases, might call for ''looking through'' the advised entity.[157]

For purposes of counting clients, ''looking through'' the advised entity in appropriate circumstances is fully consistent with the broad remedial purposes of the Advisers Act and the exemptive provisions of section

---

[150] Form D [17 CFR 239.500] is the form filed with the Commission by issuers (including many hedge funds) that make private securities offerings in reliance on Regulation D. Other commenters suggested informational filing requirements but did not focus on Form D in particular. *See, e.g.*, Comment Letter of the American Bar Association Section of Business Law (Sept. 28, 2004) (''ABA Letter''); MFA Letter, *supra* note 51 (informational filing coupled with certification that insiders of the adviser or its funds did not have disciplinary history that would be reportable under Form ADV, and adviser's agreement to provide certain additional information to the Commission on ''special call'' in limited circumstances).

[151] These commenters suggested registration carve-outs apply to hedge fund advisers whose funds submitted the expanded Form D information and accepted investments only from persons meeting ''accredited investor'' or ''qualified client'' criteria. *See, e.g.*, Bryan Cave Letter, *supra* note 111; Seward & Kissel Letter, *supra* note 111. Bryan Cave also suggested that hedge funds be covered under revised and expanded Suspicious Activity Reports (''SARs''), and any information reported be shared with the Commission to aid enforcement efforts. The Financial Crimes Enforcement Network requires banks, brokers, and other financial institutions to file SARs if the institution observes suspected or potential financial crimes. We believe this kind of monitoring of hedge funds' financial transactions with third parties would provide us only with partial information about hedge fund advisers' activities.

[152] *See, e.g.*, Comment Letter of Coudert Brothers LLP (Sept. 15, 2004) (''Coudert Letter''); Katten Muchin Letter, *supra* note 127.

[153] *See, e.g.*, Bryan Cave Letter, *supra* note 111; MFA Letter, *supra* note 51; Kynikos Letter, *supra* note 80. Kynikos suggested that each adviser certify its compliance with the custody, compliance, and code of ethics rules and its adherence to investor qualification standards, as well as provide investors with special disclosures of key valuation and allocation standards, and distribute quarterly unaudited and annual audited financial statements to investors. Other commenters similarly included audit requirements as part of their alternatives. *See, e.g.*, Madison Capital Letter, *supra* note 51 (suggesting annual audit requirement (with results delivered to investors and the Commission) and expanded Form D information reporting); Willkie Farr Letter, *supra* note 127 (suggesting self-executing exemptive application procedure for advisers whose funds distribute audited financials and special valuation disclosures to investors). We have previously requested comment on alternatives that would incorporate private audits into our oversight of investment advisers. *Compliance Programs of Investment Companies and Investment Advisers*, Investment Advisers Act Release No. 2017 (Feb. 5, 2003) [68 FR 7038 (Feb. 11, 2003)]. However, as commenters in that inquiry noted, reliance on auditors can be problematic, since their reviews are not necessarily designed to address all the issues addressed by our oversight program, and audit personnel do not necessarily have an in-depth knowledge of the Advisers Act. *See, e.g.*, Comment Letter of the Council of Institutional Investors (April 10, 2003), available at *http://www.sec.gov/rules/proposed/s70303/cii041003.htm*.

[154] Further, under this alternative, hedge fund advisers could not use Investment Adviser Registration Depository system (''IARD''), the electronic filing system that investment advisers use to make filings with us. Thus, information about investment advisers to hedge funds would not be integrated with information about other investment advisers, it would not be included in the data reports available to our staff, and disciplinary and other important information about hedge fund advisers would not be available to the public through the Investment Adviser Public Disclosure system, which draws data from the IARD.

[155] *See, e.g.*, MFA Letter, *supra* note 51; Tudor Letter, *supra* note 53.

[156] *See also supra* notes 138–140 and accompanying text.

[157] Before the Commission adopted the safe harbor in 1985, the staff issued numerous no-action letters that required an investment adviser to look through an entity and count each individual advisee or member as a separate client. *See Ruth Levine,* SEC Staff No-Action Letter (Dec. 15, 1976); *David Shilling,* SEC Staff No-Action Letter (Apr. 3, 1976); *B.J. Smith,* SEC Staff No-Action Letter (Dec. 25, 1975); *S.S. Program Limited,* SEC Staff No-Action Letter (Oct. 17, 1974); *Wofsey, Rosen, Kweskin & Kuriansky,* SEC Staff No-Action Letter (Apr. 25, 1974); *Hawkeye Bancorporation,* SEC Staff No-Action Letter (June 11, 1971). Ambiguity with respect to this issue was fueled in part by *Abrahamson* v. *Fleschner,* 568 F.2d 862 (2d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978), *overruled on other grounds by TransAmerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11 (1979), in which the Second Circuit held that general partners of limited partnerships investing in securities were investment advisers. The Second Circuit originally characterized the individual limited partners as the ''clients'' of the general partner, (1976–77) Fed.Sec.L.Rep. (CCH) ¶ 95,889, at 91,282 n. 16, but later withdrew this characterization, 568 F. 2d at 872 n. 16, leaving unanswered the issue of whether the partnership, or each of the partners, should be ''counted'' as a client. For a discussion, *see* Robert Hacker and Ronald Rotunda, *SEC Registration of Private Investment Partnerships after Abrahamson* v. *Fleschner,* 78 Colum. L. Rev. 1471, 1477 (1978).

203(b)(3).[158] The Act's objectives would be substantially undermined if an adviser with more than fifteen clients could evade its registration obligation through the simple expedient of having those clients invest in a limited partnership or similar fund vehicle—which the adviser would thereafter count as a single client. This concern is amplified where the adviser solicits investments directly in the fund vehicle based on the adviser's investment management skills, and offers investors the ability to redeem their assets on a short-term basis, as they would be permitted to do if they opened an account directly with the adviser.

The legislative and regulatory history of the Advisers Act since its enactment in 1940 is consistent with the understanding that the statute in appropriate cases may require ''looking through'' the entity for purposes of counting clients. Congressional action involving section 203(b)(3), the Commission's rulemaking under the provision, and staff no-action letters [159] evidence the longstanding recognition that the exemption does not require a rigid approach to counting clients without consideration of the surrounding circumstances.

First, the amendment to section 203(b)(3) in 1980 confirmed that the exemption could be read to require an adviser to ''look through'' a legal entity and count its investors. In 1980, Congress amended the section to provide that, in the case of a business development company, ''no shareholder, partner, or beneficial owner * * * shall be deemed to be a client of such investment adviser unless such person is a client of such investment adviser separate and apart from his status as a shareholder, partner or beneficial owner.'' The language of this provision would have been superfluous absent a recognition that, in some cases, a shareholder, partner, or beneficial owner, could be counted for purposes of the exemption. Further, the legislative history indicates that Congress deliberately left open the question of how to count clients for entities other than business development companies.[160]

Second, the Commission's creation of the existing safe harbor in current rule 203(b)(3)–1 would have been entirely unnecessary if there had not been a substantial concern, at that time, that an adviser to a hedge fund might, in some cases, either be required to ''look through'' the fund for counting purposes or to view itself as having violated the ''holding out'' limitation set out in the statutory exemption.

When adopting the safe harbor in 1985, we determined to resolve the uncertainty regarding when advisers to hedge funds must register by expressly exempting them from registration.[161] At that time, when advisers to hedge funds played a far less significant role in the national markets than they do today, we did not consider it inconsistent with the legislative objectives embedded in the statutory exemption to exempt those advisers from registration. However, as we stated when we proposed the safe harbor, ''a different approach could be followed in counting clients.'' [162] In light of the developments regarding hedge funds and their advisers, we are now taking a different approach.

As discussed above, in the intervening two decades and particularly in recent years, much has changed in our capital markets. The growth of hedge funds, their market activity and their trading volume has been dramatic, and as a result they now have a substantial effect on national securities markets and on the national economy. This growth, together with the increase in fraud involving hedge fund advisers, fully justifies a reexamination of whether it is consistent with the Act to continue to provide an across-the-board registration exemption for all advisers to hedge funds. The amendments adopted by the Commission today recognize those changed circumstances and constitute an appropriate use of the Commission's rulemaking authority under the Act.

The Commission has broad rulemaking authority under section 211(a) of the Act, which states that the Commission may adopt rules ''necessary or appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere in this title * * *'' and ''may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters.'' [163] Section 206(4) of the Act provides us with authority to adopt rules ''that define, and prescribe means reasonably designed to prevent such acts, practices, and courses of business as are fraudulent, deceptive or manipulative.'' [164] Once these advisers are registered, the Commission will be able to carry out its regulatory function with respect to them, such as conducting inspections and examinations,[165] and implementing other provisions, discussed elsewhere in this Release, to further investor protection.

The amendments we adopt today implement our rulemaking authority in a manner specifically targeted to those advisers whose activities involving ''private funds'' most directly suggest the need for registration. As discussed in more detail below,[166] first, a private fund will be one that is excepted from the definition of investment company under section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940. By definition, these funds engage in significant securities related activities in a context where they deal privately with

---

[158] In other circumstances, we look through pools to the investors themselves in specifying advisers' obligations under the Advisers Act. *See, e.g.,* rule 205–3(b) (requiring each investor in a private investment company to meet qualified client criteria if the adviser charges the private investment company a performance fee); rule 206(4)–2(a)(3)(iii) (requiring that custody account statements for funds and securities of limited partnerships for which the adviser acts as general partner be delivered to each limited partner). We note, also, that other regulators have required a look-through approach in similar circumstances. Various states look through investment vehicles to count the investors as ''clients'' of the adviser. *See* Comment Letter of North American Securities Administrators Association (Oct. 18, 2004) (''NASAA Letter''). In addition, section 4m(1) of the Commodity Exchange Act [7 U.S.C. 6m(1)] provides an exemption from CTA registration that parallels the exemption in section 203(b)(3) of the Advisers Act, and until recently, the CFTC looked through legal organizations to count owners for purposes of determining whether a person had provided commodity trading advice to more than 15 persons in the preceding 12 months. *See Additional Registration and Other Regulatory Relief for Commodity Pool Operators and Commodity Trading Advisors,* (Mar. 10, 2003) [68 FR 12622 (Mar. 17, 2003)] (proposing new rule 4.14(a)(10) to treat legal organizations as single clients).

[159] *See supra* note 157.

[160] *See* H.R. Rep. No. 96–1341, at 62–63 (1980) (''with respect to persons or firms which do not advise business development companies, [this amendment] is not intended to suggest that each shareholder, partner or beneficial owner of a company advised by such a person or firm should or should not be regarded as a client of that person or firm''), and S.Rep. No. 96–958 at 41.

[161] Rule 203(b)(3)–1 Adopting Release, *supra* note 10 (by providing a safe harbor, rule 203(b)(3)–1 will provide greater certainty regarding when advisers can rely on section 203(b)(3)). Commenters did not challenge our authority to withdraw the safe harbor of rule 203(b)(3)–1(a)(2)(i) with respect to private funds.

[162] *Definition of ''Client'' for Purposes Relating to Limited Partnerships,* Investment Advisers Act Release No. 956 (Feb. 25, 1985) [50 FR 8740 (Mar. 5, 1985)] (proposed rule [203(b)(3)–1] is intended to provide investment advisers to limited partnerships with greater certainty in determining the circumstances under which they may rely on section 203(b)(3)).

[163] 15 U.S.C. 80b–11(a). *See also* section 202(a)(17) of the Act [15 U.S.C. 80(b)–2(a)(17)] (''The Commission may by rules and regulations classify, for the purposes of any portion or portions of this title, persons, including employees controlled by an investment adviser.'').

[164] 15 U.S.C. 80b–6(4). The Supreme Court has upheld, in a similar context, our broad authority to prohibit acts not themselves fraudulent in order to prevent fraudulent or manipulative conduct. *See U.S.* v. *O'Hagan,* 521 U.S. 642, 672–73 (1997).

[165] *See* section 204 of the Act [15 U.S.C. 80b–4] (inspection and examination authority).

[166] *See infra* Section II.E of this Release.

each of their investors (since under sections 3(c)(1) and 3(c)(7) they may not engage in a public offering).[167] Second, the term ''private funds'' is limited to investment pools with redemption features that offer investors a short-term right to withdraw their assets from management, based on their individual liquidity needs and other preferences, in a manner similar to clients that directly open an account with an adviser. This condition will ensure that the definition does not inadvertently include private equity funds, venture capital funds, or other funds that require long-term commitment of capital. Third, the term is limited to those funds that are marketed based on the skills, ability, and expertise of the adviser to the fund, thereby confirming the direct link between the adviser's management services and the investors. These investors thus not only expect to receive, but are solicited explicitly on the basis of, the investment management ability of the adviser. Under the definition of private fund, an adviser will only need to look through for purposes of counting clients where some affirmative steps have been taken to make fifteen or more potential clients aware of the ability to obtain the adviser's services through the fund vehicle.[168] Based on this definition of private fund, we believe registration of these advisers will advance the objectives of the Advisers Act.

Some commenters argued that the Commission lacks authority because the new rule and rule amendments contradict the ''unambiguous'' intent of Congress expressed in section 203(b)(3).[169] However, as discussed above, the intent of Congress appears to have been to create a limited exemption for advisers whose activities were not national in scope and who provided advice to family members or friends. Further, since hedge funds did not exist until 1949,[170] it is unclear whether Congress would have viewed a hedge fund or the hedge fund's investors as the client.[171] Moreover, the term ''client'' is not defined in the Act, nor does the word have one clear meaning.[172] To the extent section 203 is unclear, the Commission has authority to interpret an exemption and to adopt a rule that is reasonably related to the statutory purpose.[173] As we have explained above, rule 203(b)(3)–2 is such a rule.[174]

Although Congress in 1940 may not have anticipated the client counting questions that arose from the development of hedge funds and other pooled investment vehicles, by 1960 it clearly anticipated that, in certain cases, enforcement of the Act may require the Commission or courts to ''look through'' legal artifices to address the substance of a transaction or relationship.[175] Section 208(d), added in 1960, made it unlawful for any person ''to indirectly, through or by any other person to do any act or thing which it would be unlawful for such person to do directly under the provisions of this [Act], or any rule or regulation thereunder.'' [176]

Today, an adviser with, for example, 15 clients and $100 million in assets under management can take those client assets, move them into a hedge fund it advises and, because the adviser now has but one client, withdraw its Advisers Act registration.[177] If those clients' assets had been managed similarly or identically (and today in many cases they are),[178] nothing will have changed, except that the clients will have lost the protection of our oversight. Advisers to hedge funds market their services based on the skills, ability and expertise of the persons who will make the fund's investment decisions. Thus, the clients will still rely exclusively on the efforts and skill of the investment adviser, and any new investors will be attracted to the hedge fund as a means to obtain the asset management services of the adviser. The clients will periodically receive reports from the adviser about the hedge fund, and their decisions whether or not to withdraw their assets from the fund will necessarily rely heavily on those reports.[179]

A hedge fund adviser may not treat all of its hedge fund investors the same. Some investors may have greater access to risk and portfolio information,[180]

---

[167] *See* sections 3(a) and 3(b) of the Investment Company Act [15 U.S.C. 80a–3(a) and 80a–3(b)].

[168] Although rule 203(b)(3)–1(c) provides that an adviser will not be deemed to be holding itself out generally to the public as an investment adviser solely as a result of participating in a non-public offering of limited partnership interests, there may be circumstances where the marketing activities of a hedge fund adviser go beyond the scope of this safe harbor.

[169] *See, e.g.,* Wilmer Cutler Letter, *supra* note 142. See also Comment Letter of Managed Funds Association (Oct. 12, 2004).

[170] *See Hard Times Come To The Hedge Funds, supra* note 13 at 10.

[171] The original version of section 203(b) in 1940 also exempted from registration any adviser ''whose only clients are investment companies.'' Investment Advisers Act, Section 203(b), Pub. L. No. 76–768, 54 Stat. 847, 850 (1940). This language does not, as some commenters have asserted, undermine the Commission's interpretation of section 203(b)(3) with respect to counting the number of clients in a hedge fund. *See, e.g.,* Wilmer Cutler Letter, *supra* note 142. Even if Congress in 1940 clearly intended, with respect to investment companies, that a legal entity be the client, that does not mean that Congress must have intended the same result with respect to entities—such as hedge funds—that are not investment companies. Moreover, Congress may have included this provision because it believed that, absent an express exemption for investment companies, individual investors might be counted as clients, or may have simply concluded that advisers to entities subject to Title I of the statute they were considering (the Investment Company Act) would not be subject to Title II (the Advisers Act). Title I of the legislation established a new comprehensive scheme for the regulation of investment companies, and Congress may have determined that the investment advisory relationship between an adviser and an investment company would be governed by the new Investment Company Act. *See* 1940 Senate Hearings, *supra* note 73, (statement of Senator Boren (''there is a distinct separation of investment advisers under the two different sections of the bill'')).

[172] Although commenters argue, citing certain dictionaries, that ''client'' has a plain meaning that cannot include passive investors in an entity who are not being advised individually, resort to dictionary definitions is inconclusive. *See* Webster's Unabridged Dictionary (2nd ed. 1934) (''client'' means ''one who consults a legal adviser in order to obtain his professional advice or assistance, *or submits his cause to his management''* (emphasis added.)).

[173] *Chevron U.S.A.* v. *NRDC,* 467 U.S. 837, 843–44 (1984). Because the Commission has the inherent authority to interpret the ambiguous language used in section 203(b)(3), the absence of a specific grant of authority in the Advisers Act to define terms (such as is found in the Investment Company Act and other securities statutes) does not limit the scope of our authority. Nor is our authority undermined by the fact that, as explained in the Proposing Release, we are changing our interpretation of the statutory exemption from registration created by section 203(b)(3), as it applies to hedge funds, in light of changed circumstances resulting from the growth of hedge funds. Courts have recognized that agencies have clear authority to change a prior position in light of changed circumstances. *See, e.g., American Trucking Assns., Inc.* v. *Atchison, Topeka & Santa Fe Ry Co., supra* note 59; *United Video Inc.* v. *FCC,* 890 F.2d 1173, 1181–82 (D.C. Cir. 1989).

[174] Some commenters assert that the method for counting clients of a private fund set forth in rule 203(b)(3)–2 would be inconsistent with the Supreme Court's view of the scope of the Advisers Act expressed in *Lowe* v. *SEC,* 472 U.S. 181 (1985). However, *Lowe* involved a different issue and a different statutory provision—the meaning of the exclusion from the definition of investment adviser in section 202(a)(11)(D) for ''the publisher of any bona fide newspaper, news magazine or business of financial publication of general and regular circulation.'' 15 U.S.C. 80b–2(11)(d).

[175] *See supra* note 158.

[176] 15 U.S.C. 80b–8d. Congress added section 208(d) to the Advisers Act in 1960, Investment Advisers Act of 1940, Amendment, Pub. L. 86–750, 54 Stat. 847 (1960).

[177] *See, e.g., SEC* v. *Gary A Smith,* 1995 Lexis 22352 (S.D. Mich. 1995) (adviser persuaded client to place accounts in trusts to try to avoid Advisers Act regulation).

[178] *See Status of Investment Advisory Programs Under the Investment Company Act of 1940,* Investment Company Act Release No. 22579 (Mar. 24, 1997) [62 FR 15098 (Mar. 31, 1997)] (adopting rule providing safe harbor from investment company registration for similarly managed accounts).

[179] Similar factors led the Second Circuit to conclude that limited partners of an investment partnership were clients of the general partner/investment adviser for purposes of section 206 of the Act. *See Abrahamson* v. *Fleschner, supra* note 157, at 869–70.

[180] *See, e.g.,* Roundtable Transcript of May 14 at 171, *supra* note (statement of Robert Bernard, Chief

Continued

different lock-up periods may be provided,[181] and some investors may be able to negotiate lower fees.[182] ''Side pockets,'' in which assets are segregated, may operate to provide different investors with different investment experiences.[183] Thus, today each account of a hedge fund investor may bear many of the characteristics of separate investment accounts, which, of course, must be counted as separate clients for purposes of section 203(b)(3). Our rule closes this loophole.

D. Rule 203(b)(3)–2

Rule 203(b)(3)–2 requires investment advisers to count each owner of a ''private fund'' towards the threshold of 14 clients for purposes of determining the availability of the private adviser exemption of section 203(b)(3) of the Act.[184] As a result, an adviser to a ''private fund,'' which is defined in rule 203(b)(3)–1 and discussed below, can no longer rely on the private adviser exemption if the adviser, during the course of the preceding twelve months, has advised private funds that had more than fourteen investors.[185] Furthermore, an adviser that advises individual clients directly must count those clients together with the investors in any private fund it advises in determining its total number of clients for purposes of section 203(b)(3).[186] If the total number of individual clients and investors in private funds exceeds fourteen, the adviser is not eligible for the private adviser exemption and must register with us, assuming it meets our minimum requirements for assets under management.

The new rule is designed to amend the method of counting that hedge fund advisers use for purposes of applying the private adviser exemption. It is not intended to alter the duties or obligations owed by an investment adviser to its clients.[187]

1. Minimum Assets Under Management

Rule 203(b)(3)–2 does not alter the minimum amount of assets under management that an investment adviser generally must have in order to register with the Commission. A hedge fund adviser whose principal office and place of business is in the United States cannot (subject to certain exceptions) register with the Commission unless it manages at least $25 million.[188] A hedge fund adviser whose principal office and place of business is outside the United States (an ''offshore adviser'') must register with the Commission if it has more than fourteen clients who are resident in the United States regardless of the amount of assets the adviser has under management. We are not applying the $25 million threshold to offshore advisers, as urged by some commenters,[189] because that threshold is premised on regulation of the unregistered adviser by one or more states in which the adviser has its principal office and place of business.[190]

In determining the amount of assets it has under management, a hedge fund adviser whose principal office and place of business is in the United States must include the total value of securities portfolios in its assets under management. That is, it may not reduce the value of those assets by amounts borrowed to acquire them. An adviser may exclude proprietary assets invested in the fund, and need not include the value of assets attributable to non-U.S. investors.[191]

2. Counting ''Owners''

Rule 203(b)(3)–2 requires investment advisers to count each owner of a private fund towards the threshold of fourteen clients, that is, each shareholder, limited partner, member, or beneficiary of the private fund.[192] In response to suggestions by several commenters we have revised the rule. First, we have added a provision clarifying that an adviser does not have to count itself as a client regardless of the form its ownership in the pool takes.[193] Second, we permit a hedge fund adviser to exclude certain knowledgeable advisory personnel who are ''qualified clients'' (*i.e.*, who are ''insiders'') that may be charged a

of Administration and Finance, RiskMetrics Group) (some investors have the market power to receive full portfolio position disclosure); *id.* at 177–78 (statement of Robert Bernard). *See also* Roundtable Transcript of May 15 at 108–09, *supra* note 17, (statement of Patrick McCarty) (an investor with $25 or $30 million in a fund will have more access than someone investing a small amount).

[181] Ron S. Geffner, *Deals on the Side,* HEDGEFUNDMANAGER, (US East Coast 2005).

[182] *See, e.g.*, Roundtable Transcript of May 14 at 167, *supra* note (statement of David Swensen, Chief Investment Officer, Yale University) (Yale sometimes negotiates ''deal structures'' that differ from the terms set forth in the offering documents); *id.* at 211–12 (same).

[183] *See id.* at 68 (statement of Joel Press, Senior Partner, Ernst & Young). *See also id.* at 56 (statement of Joel Press) (hedge funds may establish separate share classes by type of investor in order to track each investor's return separately). We also note that on June 13, 2002, the Commission issued a Formal Order of Private Investigation in the matter of Investor Protection Implications of Private Investment Fund Growth. In the course of their investigation, our staff reviewed materials that appear to indicate that different investors in a hedge fund may have different investment experiences or may receive different disclosure. Under one limited partnership agreement, for example, limited partners can elect not to participate in the fund's purchase of illiquid assets, which are kept apart from the majority of the fund's assets. Under another limited partnership agreement, as much as 20 percent of the fund's yearly profits, including profits from ''hot issue'' accounts, could be reallocated to certain limited partners. Marketing material for a third hedge fund stated that investors investing over a certain amount in the fund are provided with additional information about the fund's portfolio holdings.

[184] For convenience, we will use the terms ''adviser to a private fund'' and ''hedge fund adviser'' interchangeably. As proposed, rule 203(b)(3)–2 was titled ''definition of client for certain private funds.'' The rule is now titled ''methods for counting clients in certain private funds.'' This change does not alter the substance of the rule but is meant to clarify the rule's scope.

[185] As discussed in Section III of this Release, we are implementing a special transition period for the new rule so that advisers to private funds need not look back for the 12-month period when determining their registration obligations as of the compliance date of the new rule.

[186] Commenters asked us to provide further clarification on how hedge fund advisers should count investors when looking through private funds. Comment Letter of Tannenbaum Helpern Syracuse & Hirschtritt LLP (Sept. 14, 2004) (''Tannenbaum Helpern Letter''). If an adviser manages private funds that have, in the aggregate, more than 14 investors, it must register. Thus, an adviser to two private funds, each of which has eight investors, will need to register. Similarly, an adviser must register if it advises a private fund that has 10 investors, and also manages five other portfolios that are not private funds. For counting purposes, an adviser that is required to count the investors in a private fund need not also count the private fund itself.

[187] We remind advisers, however, that, independent of this new rule, the antifraud provisions of the Advisers Act apply to the adviser's relationship with the fund's limited partners. *See Abrahamson* v. *Fleschner, supra* note 157.

[188] *See* section 203A(a)(1)(A) [15 U.S.C. 80b–3a(a)(1)(A)]. The National Securities Markets Improvement Act of 1996 amended the Advisers Act to divide the responsibility for regulating investment advisers between the Commission and the state securities authorities. Section 203A of the Advisers Act [15 U.S.C. 80b–3a] effects this division by generally prohibiting investment advisers from registering with us unless they have at least $25 million of assets under management or advise a registered investment company, and preempting most state regulatory requirements with respect to SEC-registered advisers. *See* Pub. L. 104–290, 110 Stat. 3416 (1996) (codified in scattered sections of the United States Code).

[189] *See* Seward & Kissel Letter, *supra* note 111, Comment Letter of the European Commission (Sept. 15, 2004) (''European Commission Letter''); Comment Letter of the Alternative Investment Management Association Limited (Sept. 15, 2004) (''AIMA Letter''); ABA Letter, *supra* note 150. Seward & Kissel suggested we apply a $100 million threshold to offshore advisers.

[190] Any adviser whose principal office and place of business is in a state that has enacted an investment adviser statute is subject to this statutory minimum. Any investment adviser whose principal office and place of business is outside the United States, or in Wyoming (the only U.S. state that does not have an adviser statute), is not subject to this minimum and must register with us regardless of the amount of assets it manages. See NSMIA Implementing Release, *supra* note 10 at Section II.E.

[191] Instruction 5(b) to Part 1 of Form ADV [17 CFR 279.1]

[192] Rule 203(b)(3)–2(a).

[193] *Id.*

performance fee.[194] An adviser to a private fund may also exclude the value of these insiders' interests in the private fund when calculating the firm's assets under management for purposes of the $25 million registration threshold.[195]

3. Funds of Hedge Funds

Under rule 203(b)(3)–2, a hedge fund adviser whose investors include a fund of funds that is itself a ''private fund'' must apply the general provisions of the new rule, which compel looking through that ''top tier'' private fund and counting its investors as clients for purposes of the private adviser exemption.[196] If the fund of funds is a registered investment company, rule 203(b)(3)–2(b) requires the adviser to an underlying private fund to look through the investment company and to count its investors as clients for purposes of the exemption. Without the look-through requirement, an adviser could provide its services through fourteen or fewer top tier funds and continue to indirectly manage the assets of hundreds or, in the case of registered funds of hedge funds, thousands of investors, without registering or being subject to the Commission's oversight.[197]

4. Offshore Advisers

Some commenters suggested that advisers located offshore[198] be exempted from regulation under the Advisers Act if they are subject to regulation in their home jurisdiction.[199] The Commission has not chosen to take such an approach. The Commission's primary concern when developing regulatory policy that has implications for foreign participants in our markets is to ensure that U.S. investors are protected and that there is a level playing field for all market participants. In this regard, a single set of rules provides greater transparency to investors, who can be confident that they will receive the same level of protection with respect to their investments regardless of the country of origin of their investment adviser. Similarly, a single set of rules assures a level playing field for both U.S. and foreign participants in our markets. Our approach to offshore advisers to offshore funds with U.S. investors, discussed below, represents an accommodation and not a fundamental change of policy in this regard.

Acceptance of home jurisdictional regulatory protections or ''mutual recognition'' may be a compelling alternative for participants in a common regulatory and statutory framework, such as the European Union. However, the absence of such a framework would require us to determine regulatory equivalence of hundreds of potential home jurisdictions. Such an effort would tax our resources. Moreover, regulatory systems that may be equivalent today may diverge in a matter of a few years, thus the evaluation would have to occur on an ongoing basis.[200]

a. Counting Clients of Offshore Advisers

The final rules impose the same counting requirements on offshore advisers to hedge funds as offshore advisers providing advice directly to U.S. clients. Thus, for purposes of eligibility for the private adviser exemption, an offshore hedge fund adviser must look through each private fund it advises, whether or not those funds are also located offshore, and count each investor that is a U.S. resident as a client.[201] An offshore adviser to any hedge fund that, in the course of the preceding twelve months, has more than fourteen investors (or other advisory clients) that are U.S.

[194] Rule 203(b)(3)–2(a). Rule 205–3(d)(1)(iii) under the Advisers Act permits certain knowledgeable personnel of an investment adviser to pay a performance or incentive fee to the adviser without meeting the net worth or invested assets requirements that would otherwise apply. Similarly, rule 3c–5 under the Investment Company Act [17 CFR 270.3c–5] provides that ''knowledgeable employees'' of a private investment pool or of its adviser need not be counted in determining the number of beneficial owners of the pool (for 3(c)(1) pools) or in determining whether all investors in the pool are ''qualified purchasers'' (for 3(c)(7) pools). An adviser could not, however, make a private fund investor a partner in the advisory firm to avoid counting the investor for purposes of the private adviser exemption. *See* section 208(d) of the Advisers Act.

[195] An adviser is permitted, but not required, to include the value of its family and proprietary securities portfolios in calculating its assets under management under Instruction 5.b(1)(a) to Part 1A of Form ADV. A hedge fund adviser may construe the investments of these inside personnel and their families as proprietary or family assets for purposes of calculating its assets under management. This does not, however, alter the fiduciary obligations of the adviser with respect to those accounts.

[196] The new rule does not require the adviser to the underlying fund to receive information as to the identities of the top tier investors, and does not specify when or how often the underlying hedge fund adviser must assess whether the number of investors in the top tier funds exceeds 14. The underlying adviser need not necessarily receive information as to the precise number of the top tier investors, so long as the underlying adviser can determine, on a periodic ongoing basis, its own registration obligations. Although some commenters expressed concern that advisers to funds of funds would face uncertainty as to their registration obligations, we believe it would be exceedingly rare for the top tier funds to have 14 or fewer investors. Most advisers to underlying hedge funds will not be eligible to rely on the private adviser exemption, absent facts and circumstances that provide assurances to the underlying adviser that no more than 14 investors, in the aggregate, are being served.

[197] Commenters suggested that the adviser to an underlying hedge fund be required to look through its top tier funds only under limited circumstances, such as when the top tier fund holds more than ten percent of the underlying fund. *See, e.g.*, Comment Letter of Dechert LLP (Sept. 15, 2004) (''Dechert Letter''), Comment Letter of Davis Polk & Wardwell (Sept. 15, 2004) (''Davis Polk Letter''); ABA Letter, *supra* note 150. Such an approach would, however, permit hedge fund managers to avoid registration simply by providing their services to a multitude of investors through, for example, 12 funds of funds, each of which owned eight percent of the underlying fund.

[198] Whether an adviser is ''offshore'' depends on the location of the adviser's principal office and place of business. *See* rule 203(b)(3)–1(b)(5).

[199] *See, e.g.*, Financial Services Roundtable Letter, *supra* note 53; Tannenbaum Helpern Letter, *supra* note 186. Some commenters raised concerns that regulation under the Advisers Act would conflict with regulations in offshore advisers' home jurisdictions. *See* Financial Services Roundtable Letter, *supra* note 53. According to one law firm's analysis, however, registration under the Advisers Act will have little impact on most non-U.S. hedge fund managers: ''For unregistered non-U.S. investment managers, it is likely that the impact will be less significant because in most jurisdictions where hedge fund managers are concentrated, including, for example, London, Paris and Frankfurt and other European Union jurisdictions, management of third party assets is generally an activity which requires registration with local regulators and ongoing compliance with minimum operational standards, regardless of the number of ''clients'' for whom these services are provided. It is likely therefore that most major non-U.S. hedge fund managers that will be affected by the SEC's recommendations will already be complying in their home jurisdictions with broadly similar requirements to those the Staff now seeks to impose.'' *See* Shearman & Sterling, *SEC Report: Implications of the Growth of Hedge Funds,* Jan. 2004, available in File No. S7–30–04.

[200] So that our oversight of offshore advisers can be conducted effectively and efficiently in light of potential overlap with foreign regimes, we have asked our Division of Investment Management, our Office of Compliance Inspections and Examinations, and our Office of International Affairs to explore ways to obtain and share information with foreign authorities with oversight of hedge advisers that may register with the SEC.

[201] As discussed in Section II.F. of this Release, new rule 203(b)(3)–2 and rule 203(b)(3)–1 are designed to work together. Once the offshore adviser looks through the private fund as required under rule 203(b)(3)–2, rule 203(b)(3)–1(b)(5) provides that only U.S. clients must be counted towards the private adviser exemption.

Commenters asked that, because rule 203(b)(3)–1 speaks only to residents, we provide further guidance on when a client, particularly a client that is not a natural person, should be considered a U.S. client. Several commenters suggested that the Advisers Act should look to the definition of ''U.S. person'' in Regulation S under the Securities Act of 1933. *See* 17 CFR 230.902. Regulation S is designed for use in transactions, not ongoing advisory relationships, and its use in this context raises larger issues that we cannot address in this rulemaking. Until the Commission reconsiders this question, however, we would not object if advisers looked (i) in the case of individuals to their residence, (ii) in the case of corporations and other business entities to their principal office and place of business, (iii) in the case of personal trusts and estates to the rules set out in Regulation S, and (iv) in the case of discretionary or non-discretionary accounts managed by another investment adviser to the location of the person for whose benefit the account is held.

residents generally must register under the Advisers Act.[202]

At the suggestion of commenters, we are adopting a provision that allows an adviser to a private fund to determine whether an investor is a U.S. client or a non-U.S. client at the time of the investment in the private fund.[203] If an investor is a non-U.S. client at the time of that investment, the adviser may continue to count the investor as a non-U.S. client even if the investor subsequently relocates to the United States.

Several commenters suggested that offshore advisers be required to look through their private funds only if more than 25 percent of the fund was held by U.S. investors.[204] We believe that this suggestion would result in most offshore advisers that serve U.S. investors being exempt from registration, and we are not adopting it.[205]

b. Advisers to Offshore Publicly Offered Funds

The final rule includes an exception to the definition of ''private fund'' for a company that has its principal office and place of business outside the United States, makes a public offering of its securities in a country outside the United States, and is regulated as a public investment company under the laws of the country other than the United States.[206] Absent this provision, advisers to offshore publicly offered mutual funds or closed-end funds might be required to register with us simply because more than fourteen of their investors are now residents in the United States.[207] The exception applies to any type of publicly offered fund, whether in corporate, trust, contractual or other form,[208] so long as the fund is authorized for sale in the same jurisdiction in which it is regulated as a public investment company.[209]

c. Advisers to Offshore Privately Offered Funds

Rule 203(b)(3)–2 limits the extraterritorial application of the Advisers Act that would otherwise occur as a result of the new rule, by providing that an offshore adviser to an offshore private fund may treat the fund (and not the investors) as its client for most purposes under the Act.[210] Because we do not apply most of the substantive provisions of the Act to the non-U.S. clients of an offshore adviser,[211] and because the offshore fund would be a non-U.S. client,[212] the substantive provisions of the Act generally would not apply to the offshore adviser's dealings with the offshore fund.[213]

Commenters supported this aspect of the rule, but also requested that we clarify how we would apply the Advisers Act to offshore advisers relying on it.[214] The offshore adviser will be required (unless eligible for an exemption) to register under the Act [215] and to keep certain books and records as required by our rules,[216] and will

---

[202] The offshore adviser would not have to register, however, if it were eligible for some other exemption from registration.

[203] Rule 203(b)(3)–1(b)(7). If, however, a non-U.S. investor transfers his interest to a U.S. investor, the adviser should count the transferee as a U.S. client.

[204] Comment Letter of International Bar Association (Sept. 14, 2004) (''International Bar Letter''), ABA Letter, *supra* note 150, AIMA Letter, *supra* note 189.

[205] Commenters pointed out that, because of provisions in the U.S. tax laws, U.S. investors in offshore hedge funds are likely to be tax-exempt investors such as pension and benefit plans subject to the Employee Retirement Income Security Act of 1974 (''ERISA'') [29 U.S.C. 1001 *et seq.*]. Many hedge funds permit no more than 25 percent of the fund's assets to be held by pension plans subject to ERISA in order to prevent the assets of the fund from being deemed ''plan assets'' under ERISA. *See* 29 CFR 2510.3–101 (Department of Labor regulation deems participation by plan investors of 25 percent or more in the unregistered securities of an entity to be significant which would then trigger certain ERISA limitations on the hedge fund). Accordingly, it may be unusual for these funds to have more than 25 percent U.S. ownership.

[206] Rule 203(b)(3)–1(d)(3). Commenters supported this exception.

[207] Section 7(d) of the Investment Company Act [15 U.S.C. 80a–7(d)] generally prohibits a foreign investment company from publicly offering its securities in the United States unless registered with us. That provision does not preclude these foreign investment companies from making private offerings in the United States. *Resale of Restricted Securities,* Investment Company Act Release No. 17452 (Apr. 23, 1990) [55 FR 17933 (Apr. 30, 1990)]. *See also Touche Remnant & Co.,* SEC Staff No-Action Letter (Aug. 27, 1984); *Goodwin, Procter & Hoar,* SEC Staff No-Action Letter (Feb. 28, 1997). Our staff has also provided no-action relief to address circumstances where U.S. persons are shareholders of foreign investment companies as a result of, for example, relocating to the United States. *See, e.g., Investment Funds Institute of Canada,* SEC Staff No-Action Letter (Mar. 4, 1996).

[208] This clarification responds to an issue raised by the European Commission. *See* European Commission Letter, *supra* note 189. Some commenters asked whether all funds listed on an offshore securities exchange were offshore public funds. *See* AIMA Letter, *supra* note 189; Coudert Letter, *supra* note 152. We note that listing criteria in some jurisdictions may be distinct from criteria for public offerings, and we cannot provide guidance in this area at this time. The European Commission also pointed out that some offshore public funds may be authorized for public sale in multiple countries pursuant to harmonized regulations, while others may be sold publicly only in individual countries. A fund would qualify for this exception so long as it is regulated as a public investment company in at least one of the jurisdictions in which it may be offered to the public.

[209] We are aware that, in some jurisdictions, hedge funds may be publicly offered. Such funds would not be public investment companies for purposes of this rule. Whether a particular fund is a public investment company will turn on, among other things, how it is known in those other jurisdictions.

[210] Rule 203(b)(3)–2(c). This provision applies in the case of an adviser whose principal office and place of business is outside the United States, if the fund is organized under the laws of a country other than the United States. The proposal looked instead to the principal office and place of business of the fund, but as one commenter noted, a fund as a passive vehicle typically has no offices. ABA Letter, *supra* note 150.

[211] This policy was first set forth in a staff letter from our Division of Investment Management, in which Division staff stated that they would not recommend to the Commission enforcement action against an offshore fund adviser under such circumstances. *See Uniao de Banco de Brasileiros S.A.,* SEC Staff No-Action Letter (July 28, 1992) (''Unibanco letter'').

[212] It has been estimated that 70 percent of hedge funds are organized offshore. *See* Bernstein 2003 Report, *supra* note at 11.

[213] It is not uncommon for U.S. investors to acquire interests in an offshore hedge fund that has few connections to the United States other than the investors (or the securities in which they invest). The laws governing such a fund would likely be those of the country in which it is organized or those of the country in which the adviser has its principal place of business. U.S. investors in such a fund generally would not have reasons to expect the full protection of the U.S. securities laws. *See Offshore Offers and Sales,* Securities Act Release No. 6863 (Apr. 24, 1990) [55 FR 18306 (May 2, 1990)]. Moreover, as a practical matter, U.S. investors may be precluded from an investment opportunity in offshore funds if their participation resulted in the full application of the Advisers Act and our rules.

[214] Dechert Letter, *supra* note 197, Comment Letter of White & Case LLP (Aug. 31, 2004) (''White & Case Letter''); Comment Letter of Jonathan Baird (Aug. 11, 2004) (''Baird Letter''); ICI Letter, *supra* note 48; Tannenbaum Helpern Letter, *supra* note 186, European Commission Letter, *supra* note 189, Davis Polk Letter, *supra* note 197, AIMA Letter, *supra* note 189; Comment Letter of the Association of the Bar of the City of New York Committee on Private Investment Funds (Sept. 15, 2004) (''NYC Bar Private Funds Letter''); ABA Letter, *supra* note 150.

[215] One commenter asked whether we would view it as misleading for an offshore adviser to represent itself as registered with the Commission under the Advisers Act, given that it is not required under the rule to comply with many provisions of the Act with respect to its offshore clients. NYC Bar Private Funds Letter, *supra* note 214. We note that offshore advisers seeking no-action relief from our staff have undertaken not to represent themselves to offshore clients as registered with us. *E.g., Royal Bank of Canada,* SEC Staff No-Action Letter (June 3, 1998). We are not, at this time, prohibiting offshore advisers from representing themselves as SEC-registered advisers, but we remind them that they remain subject to the Act's antifraud provisions and that substantial clarification and disclosure may be necessary to make the representation not misleading.

[216] Our staff has provided guidance, in a series of no-action letters, regarding the recordkeeping obligations of registered advisers that are located offshore. Under that analysis, the registered adviser must, in order to rely on the no-action relief, comply with our recordkeeping rules, other than (1) rules 204–2(a)(3) and (7) with respect to transactions involving offshore clients that do not relate to advisory services performed by the registered adviser on behalf of United States clients or related securities transactions; and (2) rules 204–2(a)(8), (9), (10), (11), (14), (15) and (16) and 204–2(b) with respect to transactions involving, or representations or disclosures made to, offshore clients. *See, e.g., Royal Bank of Canada, supra* note 215. In the context of rule 203(b)(3)–2, an offshore

remain subject to examinations by our staff.[217] Other requirements, including the Act's compliance rule,[218] custody rule,[219] and proxy voting rule,[220] would not apply to the registered offshore adviser, assuming it has no U.S. clients other than for counting purposes under the private adviser exemption.[221] The registered offshore adviser without U.S. clients (other than for counting purposes) will not be required to adopt a code of ethics but must retain its access persons' personal securities reports that would otherwise be required under such a code.[222]

E. Definition of ''Private Fund''

Because our concern is focused on hedge fund advisers and their oversight, we did not propose to require advisers to ''look through'' every business or other legal organization they advised for purposes of determining the availability of the ''private adviser'' exemption. Our proposal included a definition of ''private fund'' in order to identify those legal organizations that advisers would be required to look through.[223] We proposed to define a ''private fund'' by reference to three characteristics shared by virtually all hedge funds, and that differentiate hedge funds from other pooled investment vehicles such as private equity funds[224] or venture capital funds.[225] In our amendments to rule 203(b)(3)–1, we are adopting the definition substantially as proposed, and we discuss each of the characteristics of a private fund below.

1. Section 3(c)(1) and 3(c)(7)

First, a fund will not be a ''private fund'' unless it is a company that would be subject to regulation under the Investment Company Act but for the exception, from the definition of ''investment company,'' provided in either section 3(c)(1) (a ''3(c)(1) fund'') or section 3(c)(7) (a ''3(c)(7) fund'') of such Act.[226] Thus, advisers are not required to ''look through'' most clients that are business organizations, including insurance companies, broker-dealers, and banks, but are required to look through many types of pooled investment vehicles investing in securities, including hedge funds.[227]

---

adviser to an offshore private fund would treat the fund as its offshore client for purposes of its recordkeeping requirements.

[217] During an examination, the registered offshore adviser must provide to our staff any and all records required to be kept under our rules as well as any records the adviser keeps under foreign law. *Id.* Section 204 of the Act [15 U.S.C. 80b–4] authorizes us to examine *all records* of any registered adviser.

[218] 17 CFR 275.206(4)–7.

[219] 17 CFR 275.206(4)–2.

[220] 17 CFR 275.206(4)–6.

[221] In addition, we would not require an offshore adviser to deliver a written disclosure brochure to its offshore clients (or to any investors in an offshore private fund it advises) under rule 204–3 [17 CFR 275.204–3], although the adviser does have a fiduciary duty to provide those clients with full and fair disclosure of conflicts of interest. We would not require an offshore adviser's contracts with its offshore clients, including an offshore private fund, to include certain provisions that would otherwise be required by section 205. Moreover, with respect to an offshore fund, an adviser, whether located within or without the United States, is not subject to the prohibition on performance fees contained in section 205; section 205(b)(5) makes that prohibition inapplicable to an advisory contract with a person that is not a resident of the United States. [15 U.S.C. 80b–5]. Thus, a registered adviser can charge performance fees to an offshore fund regardless of whether the fund has U.S. investors. We would not apply section 206(3)'s restrictions to an offshore adviser's principal transactions with offshore clients. [15 U.S.C. 80b–6(3)]. We would also not subject an offshore adviser to our rules governing adviser advertising [17 CFR 275.206(4)–1], or cash solicitations [17 CFR 275.206(4)–3] with respect to offshore clients.

A registered offshore adviser must, of course, comply with all of the Advisers Act and our rules with respect to any U.S. clients it may have.

[222] 17 CFR 275.204A–1.

[223] Our approach to defining the scope of rule 203(b)(3)–2 is similar to that taken recently by the Department of Treasury in defining the scope of its proposed rule requiring ''private investment companies'' to adopt anti-money laundering programs. *See Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Unregistered Investment Companies,* Department of the Treasury Release [67 FR 60617 (Sept. 26, 2002)]. Like the Treasury Department, we have tried to keep the definition simple, and provide a ''bright line'' indicator of when an adviser must look through a client that is a legal organization.

[224] Private equity funds concentrate their investments in unregistered (and typically illiquid) securities. They typically are long-term investments providing for liquidation at the end of a term specified in the fund's governing documents. Private equity investors typically commit to invest a certain amount of money with the fund over the life of the fund, and make their contributions in response to ''capital calls'' from the fund's general partner. Private equity funds offer little, if any, opportunity for investors to redeem their investments.

[225] Venture capital funds are generally organized to invest in the start-up or early stages of a company. Venture capital funds have the same features that distinguish private equity funds generally from hedge funds, such as capital contributions over the life of the fund and the long-term nature of the investment. A venture capital fund typically seeks to liquidate its investment once the value of the company increases above the value of the investment.

A few commenters suggested that the rule distinguish hedge funds from other privately offered investment pools on the basis of their investment strategies or portfolio composition. *See, e.g.*, Madison Capital Letter, *supra* note 51. We have not adopted such an approach because we are concerned that it could serve to chill advisers' use of certain investment strategies solely in order to avoid registration under the Advisers Act, and might possibly negatively affect the markets.

[226] Rule 203(b)(3)–1(d)(1)(i). Section 3(c)(1) excepts from the definition of investment company, an issuer the securities (other than short-term paper) of which are beneficially owned by not more than 100 persons and that is not making or proposing to make a public offering of its securities. An issuer that is organized in a country other than the United States is not subject to the 100-investor limitation of section 3(c)(1) with respect to its beneficial owners who are non-U.S. persons. Section 3(c)(7) excepts from the definition of investment company, an issuer the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers and that is not making or proposing to make a public offering of its securities. An issuer that is organized in a country other than the United States is not subject to the qualified purchaser limitation of section 3(c)(7) with respect to its owners who are non-U.S. persons. Under certain conditions, an issuer organized in a country other than the United States may make a private placement in the U.S. in accordance with Regulation D concurrently with an offering in another country in accordance with Regulation S under the Securities Act of 1933 without integrating the two offerings for purposes of determining whether the issuer complies with section 3(c)(1) or 3(c)(7) or has made a public offering in contravention of section 7(d) of the Investment Company Act (prohibiting investment companies organized outside of the United States from making a public offering). *Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore,* Securities Act Release No. 7516 (Mar. 23, 1998); *See also Touche Remnant & Co.,* SEC Staff No-Action Letter (Aug. 27, 1984) and *Goodwin, Proctor & Hoar,* SEC Staff No-Action Letter (Feb. 28, 1997) (addressing public offerings for purposes of section 7(d)). *Cf. Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145,* Securities Act Release No. 33–6862 (Apr. 30, 1990), at Section II.F. Our staff's no-action letter, *The France Growth Fund, Inc.,* SEC Staff No-Action Letter (July 15, 2003), is superseded to the extent that it is inconsistent with this Release.

An offshore hedge fund in which U.S. persons invest will ordinarily be a section 3(c)(1) or 3(c)(7) issuer because it makes a private offering (if any) in the U.S., and has 100 or fewer beneficial owners that are U.S. persons or requires all of its owners who are U.S. persons to be qualified purchasers, respectively.

[227] These companies, as opposed to other entities, by definition, engage in significant securities related activities. *See* sections 3(a) and 3(b) of the Investment Company Act. Moreover, 3(c)(1) and 3(c)(7) funds invest in the context in which they deal privately with investors because both provisions require that the fund not engage in a public offering.

Commenters asked whether the rule would require a U.S. adviser to look through an offshore pooled investment vehicle whose investors are all non-U.S. persons. If interests in the pool are offered only to non-U.S. investors, it is unlikely that the pool would be relying on the exceptions in either section 3(c)(1) or section 3(c)(7). If the pool does not rely on one of those exceptions, the pool is not a private fund under the rule, and thus only the pool itself would count as a single client.

Many offshore hedge funds are organized as master-feeder structures in which an offshore adviser organizes a ''master'' fund interests in which are purchased by multiple ''feeder funds.'' The feeder funds seek to achieve their investment objectives solely by investing in the master fund and thus the feeder is a conduit that provides different investors access to the master fund. One feeder fund may be organized as a corporation and offered solely to non-U.S. investors, while another may be organized as a limited partnership in a foreign jurisdiction offering its shares exclusively to more than 14 U.S. investors. *See* Thomas P. Lemke et al, Hedge Funds and Other Private Funds: Regulation and Compliance (2004–05) at 19. The

Continued

Several commenters suggested that the definition of private fund exclude 3(c)(7) funds because investors in a 3(c)(7) fund must all be qualified purchasers and can be presumed to have a certain level of financial sophistication.[228] We have considered these comments but believe such an exclusion would not be consistent with the purpose and scope of the private adviser exemption. As we discussed above, the Advisers Act does not exempt from registration advisers whose clients are all financially sophisticated, and indeed a client's decision to engage a professional adviser acknowledges that the client needs an expert's assistance.[229]

2. Redemption Within Two Years

Second, a company will be a private fund only if it permits investors to redeem their interests in the fund within two years of purchasing them.[230] The provision applies to each interest purchased or amount of capital contributed to the fund.[231] Hedge funds typically offer their investors liquidity access [232] following an initial ''lock-up'' period, which is typically for less than two years.[233] Thus, this provision will include most hedge fund advisers, but will exclude advisers that manage only private equity funds, venture capital funds, and similar funds that require investors to make long-term commitments of capital.[234] These other funds are similar to hedge funds in some respects, but the Commission has not encountered significant enforcement problems with advisers with respect to their management of private equity or venture capital funds. In contrast, the Commission has developed a substantial record of frauds associated with hedge funds. A key element of hedge fund advisers' fraud in most of our recent enforcement cases has been the advisers' misrepresentation of their funds' performance to current investors,[235] which in some cases was used to induce a false sense of security for investors when they might otherwise have exercised their redemption rights.[236] Because hedge funds are where we have seen a recent growth in fraud enforcement actions, we will focus our examination resources on their advisers, rather than on advisers to private equity or venture capital funds, at this time.[237] Most commenters who spoke to the issue supported drawing this distinction between hedge funds, on the one hand, and private equity and venture capital funds, on the other.[238]

The rule permits a fund to offer redemption rights under extraordinary circumstances without being considered a private fund under the rule.[239] Private equity and venture capital funds may offer redemption rights under extraordinary circumstances, and these extraordinary redemptions do not change the basic character of the investment pool into a hedge fund. We are omitting the proposed requirement that such circumstances be ''unforeseeable.'' Commenters suggested that to the extent an investor negotiated for the right to redeem its interest in extraordinary circumstances, the circumstances could be viewed as ''foreseeable.'' [240] The redemption test

---

feeder fund is a private fund under rule 203(b)(3)–1(d); interests in the feeder are sold directly to U.S. investors, and thus the feeder must rely on either section 3(c)(1) or 3(c)(7) to avoid being subject to the Investment Company Act. The adviser to the master fund must look through the master fund as well as the feeder in order to count U.S. investors as clients, so that it is not violating section 208(d) of the Act by doing indirectly through the master what it could not do if it provided its advice directly to the feeder fund. *See* discussion *supra* note 176.

[228] Comment Letter of David Schroll (July 27, 2004) (''Schroll Letter''); Proskauer Letter, *supra* note 51; Comment Letter of Guy Judkowski (July 27, 2004) (''Judkowski Letter''); Seward & Kissel Letter, *supra* note 111; Madison Capital Letter, *supra* note 51; Tudor Letter, *supra* note 53; Davis Polk Letter, *supra* note 197; Financial Services Roundtable Letter, *supra* note 53; Comment Letter of Kleinberg, Kaplan, Wolff & Cohen, P.C. (Sept. 15, 2004) (''Kleinberg Letter'').

[229] *See supra* Section II.B.8 of this Release. Further, Congress chose to not to exempt 3(c)(7) fund advisers from the Advisers Act. An adviser that manages more than fourteen 3(c)(7) funds is required to register and is subject to all provisions of the Advisers Act, yet the investors in those funds are no less sophisticated than other 3(c)(7) fund investors. Also, Congress excepted 3(c)(7) fund advisers from performance fee restrictions under section 205 of the Act, which applies only to advisers who are *not* otherwise exempt from registration under section 203(b). *See* section 205(b)(4) [15 U.S.C. 80b–5(b)(4)].

[230] Rule 203(b)(3)–1(d)(1)(ii). Two commenters suggested we shorten the period while another suggested it be longer. *See* AIMA Letter, *supra* note 189; Seward & Kissel Letter, *supra* note 111; Comment Letter of UnFarallon Coalition (Sept. 14, 2004) (''UnFarallon Letter''). Research has shown that hedge funds' average lock-up period is 12 months. Bernstein 2003 Report, *supra* note 24, at 5. We believe a two-year period, therefore, would include most hedge funds as private funds, and we are adopting a redemption test of two years as proposed.

[231] Funds could use a ''first in, first out'' for determining the age of purchases and capital contributions.

[232] Private funds operate in this respect similarly to an account an investor maintains with an adviser.

[233] Hedge funds generally offer semi-annual, quarterly, or monthly liquidity terms to their investors. Because liquidity is important to hedge fund investors, some hedge fund advisers offer certain investors ''side letter agreements'' to provide shorter liquidity terms than other investors in the same fund may receive. *See* Alexander M. Ineichen, *Funds of Hedge Funds: Industry Overview,* 4 J. Wealth Mgmt. 47 (Mar. 22, 2002); Ron S. Geffner, *Deals on the Side,* HEDGEFUNDMANAGER, U.S. East Coast 2005, at 22–23. An investment pool cannot use side letters to bypass the two-year redemption test. That is, if the pool uses side letters to provide some, but not all, investors the opportunity to redeem shares within two years, the pool would meet the definition of a private fund.

[234] This provision is also designed to prevent certain structured finance vehicles from being included as ''private funds.'' *See, e.g.*, rule 3a–7(a) under the Investment Company Act [17 CFR 270.3a–7(a)] (exemption from Investment Company Act is not available to structured finance vehicle issuing redeemable securities); *see also* Comment Letter of Chapman and Cutler LLP (Sept. 15, 2004) (expressing concerns that some structured finance vehicles would inappropriately be deemed to be private funds).

[235] *See, e.g., SEC* v. *Jean Baptiste Jean Pierre, Gabriel Toks Pearse and Darius L. Lee,* Litigation Release No. 17303 (Jan. 10, 2002) and *supra* note 97; *In the Matter of Michael T. Higgins, supra* note 99; *SEC* v. *David M. Mobley, Sr., et al., supra* note 99; *SEC* v. *Michael W. Berger, Manhattan Capital Management Inc., supra* note 99; *SEC* v. *Todd Hansen and Nicholas Lobue,* Litigation Release No. 17299 (Jan. 9, 2002).

[236] We are currently pursuing actions in which we allege hedge fund advisers lulled investors into keeping their assets in the hedge fund. *See, e.g., SEC* v *Anthony P. Postiglione, Jr., et al.*, Litigation Release No. 18824 (Aug. 9, 2004).

[237] Moreover, periodic redemption rights offered by hedge funds provide the hedge fund investors with a level of liquidity that allows the investor to withdraw a portion of his or her assets, controlled by the adviser, or to terminate the relationship with the hedge fund adviser and choose a new adviser. The ability to terminate the relationship with an adviser and choose a new one, or to withdraw a portion of one's investment after a relatively short time period, is consistent with the notion that hedge fund advisers are effectively providing advisory services to the fund's investors. As a result, the redeemability feature of the definition of private fund will promote the purposes of the Act by applying the rule to those relationships that the Act was designed to address.

[238] *E.g.,* NYC Bar Private Funds Letter, *supra* note 214. Some commenters expressed concern that hedge fund advisers would extend their lock-up periods beyond two years in order to avoid registration. *E.g.,* Comment Letter of the Greenwich Roundtable (Sept. 15, 2004). Others felt that the two-year test drew an appropriate line between hedge funds and private equity or venture capital funds. *See* Comment Letter of National Venture Capital Association (Sept. 15, 2004) (''NVCA Letter'') (''As a practical means of exempting venture capital from the proposed rule's definition of 'private fund,' two years is appropriate.''). We will continue to monitor developments regarding this aspect of the new rule and whether it continues effectively to distinguish hedge funds from private equity and venture capital funds.

[239] Rule 203(b)(3)–1(d)(2)(i).

[240] *See* Davis Polk Letter, *supra* note 214, NYC Bar Private Funds Letter, *supra* note 150, ABA Letter, supra note 150. Many partnership agreements provide the investor the opportunity to redeem part or all of its investment, for example, in the event continuing to hold the investment became impractical or illegal, in the event of an owner's death or total disability, in the event key personnel at the fund adviser die, become incapacitated, or cease to be involved in the management of the fund for an extended period of time, in the event of a merger or reorganization of the fund, or in order to avoid a materially adverse tax or regulatory outcome. Similarly, some investment pools may offer redemption rights that can be exercised only in order to keep the pool's assets from being considered ''plan assets'' under ERISA. Offering redemption rights that apply only in these types of circumstances will not make the fund a ''private fund'' under the new rule.

also does not restrict the general partner or investment adviser from initiating distributions payable to all owners, or a class of owners, in accordance with the fund's governing documents.[241] The rule also provides an exception to the two-year redemption test for interests acquired through reinvestment of distributed capital gains or income.[242]

3. Advisory Skills, Ability, or Expertise

Third, a company will be a private fund only if interests in it are offered based on the investment advisory skills, ability or expertise of the investment adviser.[243] As we discussed in the Proposing Release, a hedge fund adviser's history, experience, past performance, strategies, and disciplinary record are likely important to investors, who rely on the adviser for their investment's success, in deciding whether to invest in a particular hedge fund.[244] Accordingly, hedge fund advisers often emphasize the portfolio manager's record when marketing their fund, and provide prospective investors with information about the adviser and individual manager. This reliance by hedge fund investors implicates the need for the protections that Advisers Act registration offers.[245]

[241] These are distributions, as distinguished from redemptions initiated by the investor. Similarly, an investor's transfer of his interest to, for example, a new limited partner in a secondary market transaction will not be considered a redemption.

[242] Proposed rule 203(b)(3)–1(d)(2)(ii). Though we proposed this exception only for interests acquired with reinvested dividends, commenters noted that venture capital and private equity funds are more likely to distribute capital gains than declare dividends.

[243] If interests in an investment pool are offered based on the investment advisory skills, ability or expertise of the pool's investment adviser, then the pool is a private fund and all advisers to the pool, including subadvisers, must look through it to count owners as clients for purposes of the private adviser exemption. Advisers may not circumvent the rule by delegating the advisory function to subadvisers, including subadvisers that might not be identified in the fund's offering materials, or by establishing a ''manager of managers'' structure.

[244] *See also* Roundtable Transcript of May 14 at 167–68, *supra* note 17 (statement of David Swensen, Chief Investment Officer, Yale University) (investor looks for ''the character, the intelligence, the integrity, the creativity, and market savvy'' of the fund adviser, and the most important criterion when making an investment decision is the character and quality of the investment adviser).

[245] This is particularly true when this attribute is combined with the redeemability feature discussed earlier, such that an investment in a hedge fund more closely resembles an advisory account. It is also worth noting in this regard that section 203(b)(3) of the Advisers Act [15 U.S.C. 80b–3(b)(3)] specifically excludes an adviser from relying on the exemption, even if it has fewer than 15 clients, if it holds itself out generally to the public as an investment adviser.

F. Other Amendments to Rule 203(b)(3)–1

We are amending rule 203(b)(3)–1 to clarify that investment advisers may not count hedge funds as single clients under that safe harbor.[246] As discussed earlier, many hedge fund advisers have avoided Advisers Act registration in the past by relying on paragraph (a)(2)(i) of this rule, which we adopted in 1985 in order to permit advisers to count a legal organization, rather than its owners, as a single client.[247] Advisers to private funds may, however, continue to rely on the other paragraphs of rule 203(b)(3)–1 when determining the number of their clients for purposes of the private client exemption.[248] We have designed new rule 203(b)(3)–2 to be used in conjunction with rule 203(b)(3)–1.[249] The adviser to a private fund must, under rule 203(b)(3)–2, look through the fund to its investors, but may rely on the safe harbor of rule 203(b)(3)–1 to determine whether each investor must count as a separate client or whether a ''single client'' may include more than one investor.[250]

[246] Rule 203(b)(3)–1(b)(6). We are also adopting, as proposed, non-substantive changes to the wording of several other paragraphs of rule 203(b)(3)–1 to clarify those sections.

[247] Rule 203(b)(3)–1(a)(2)(i).

[248] For example, particularly paragraph (a)(1) of rule 203(b)(3)–1 allows a ''single client'' to encompass (i) a natural person, (ii) his or her minor children, (iii) his or her relatives, spouse, and relatives of spouse who share the same principal residence, as well as (iv) any accounts or trusts of which the only primary beneficiaries are the foregoing persons. In addition, if a given individual invests in two private funds advised by the same adviser, that individual need be counted only once towards the 14-client threshold.

[249] Several commenters suggested that new rule 203(b)(3)–2 contain a special provision for limited partnerships owned or controlled primarily by members of a single family. *See* Comment Letter of Paul, Hastings, Janofsky & Walker LLP (Sept. 10, 2004) (''Paul Hastings Letter''); Comment Letter of Skadden, Arps (Sept. 14, 2004) (''Skadden Letter''), Kynikos Letter, *supra* note 80, ABA Letter, *supra* note 150. Others suggested we adopt a provision declaring that interests in family limited partnerships are not offered based on the expertise of the adviser. *See* Davis Polk Letter, supra note 197, Comment Letter of William S. McGinness, Jr. (July 26, 2004). This latter suggestion may be true in some circumstances, but there may be other cases in which, for example, a family group has engaged an outside adviser and interests in the family vehicle are offered to family members based on the expertise of the adviser. We believe that rule 203(b)(3)–1(a)(1) already affords family office advisers considerable flexibility before they reach fifteen clients. We also note that we have granted exemptive relief, on application, to a number of family office advisers. *E.g., Bear Creek Inc.*, Investment Advisers Act Release No. 1931 (Mar. 9, 2001) [66 FR 15150 (Mar. 15, 2001)] (notice); *Moreland Management Co.*, Investment Advisers Act Release No. 1700 (Feb. 12, 1998) [63 FR 8710 (Feb. 20, 1998)] (notice). A further exception for family limited partnerships is outside the scope of this rulemaking.

[250] An adviser to a hedge fund underlying a fund of funds must, as discussed earlier, apply new rule 203(b)(3)–2 to look through the top tier fund and count that fund's investors as clients for purposes of the private adviser exemption. Once the underlying adviser has looked through the layers of private funds, however, it may then apply the provisions of rule 203(b)(3)–1(a)(1) to those investors for counting purposes.

G. Amendments to Rule 204–2

We are adopting two amendments to the adviser recordkeeping rule. The first of these amendments permits hedge fund advisers that are required to register with us under new rule 203(b)(3)–2 to market their performance from periods prior to their registration with us, even if they have not kept documentation that our rules would otherwise require.[251] This exception applies not only to the adviser's private funds (as proposed), but also to other accounts.[252] Hedge fund advisers are required to retain whatever records they do have that support the performance they earned prior to their registration with us, but are excused from our recordkeeping rule to the extent that those records are incomplete or otherwise do not meet the requirements of rule 204–2.[253]

[251] Under rule 204–2(a)(16), a registered investment adviser that makes claims concerning its performance track record must keep ''[a]ll accounts, books, internal working papers, and any other records or documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return of any or all managed accounts or securities recommendations in any notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication that the investment adviser circulates or distributes, directly or indirectly, to 10 or more persons (other than persons connected with such investment adviser); *provided, however*, that, with respect to the performance of managed accounts, the retention of all account statements, if they reflect all debits, credits, and other transactions in a client's account for the period of the statement, and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts shall be deemed to satisfy the requirements of this paragraph.'' The supporting records must be retained for a period of five years after the performance information is last used. Rule 204–2(e)(3). Thus, if a registered adviser promotes its 20-year performance record in 2004, it must continue to keep its supporting records for its 1984 performance through 2009—five years after the last time that 1984 performance is included.

[252] Rule 204–2(e)(3)(ii). Commenters pointed out that hedge fund advisers may manage other clients' assets.

[253] Commenters generally supported this transitional exemption for hedge fund advisers' past performance records, in order to avoid placing these new registrants at a competitive disadvantage in promoting the returns they have earned, in some cases over many years. *See* Comment Letter of Cumberland Associates LLC (Sept. 9, 2004) (''Cumberland Letter''), Comment Letter of James E. Mitchell (Sept. 1, 2004) (''Mitchell Letter''), ICAA Letter, *supra* note 47, Davis Polk Letter, *supra* note 197; ABA Letter, *supra* note 150. Three commenters suggested that we require hedge fund advisers to place a legend on any marketing materials that contained performance claims for which the adviser did not maintain all required records. CFA Institute Letter, *supra* note 47; ICAA Letter, *supra* note 47,

Continued

As proposed, the exemption would have covered only the records supporting the performance of the adviser's private funds. Commenters pointed out that a hedge fund adviser may also manage other pools, such as private equity funds. The amendment as we are adopting it applies to records supporting any accounts managed by the hedge fund adviser.[254]

Our second amendment to the recordkeeping rule clarifies that, for purposes of section 204 of the Advisers Act,[255] the books and records of a registered hedge fund adviser include records of the private funds for which the adviser acts as investment adviser and the adviser or a related person [256] acts as general partner, managing member, or in a similar capacity.[257] Our examiners require access to these records to determine whether a hedge fund adviser is meeting its fiduciary obligations to a private fund under the Advisers Act and rules.[258]

H. Amendments to Rule 205–3

We are adding grandfathering provisions to rule 205–3 under the Advisers Act, the performance fee rule, to avoid disrupting existing arrangements between newly-registered hedge fund advisers and their current pool investors or separate account clients.[259] Most hedge fund advisers charge a ''performance fee'' based on their fund's capital gains or appreciation. Our rules, however, permit registered investment advisers to charge performance fees only to ''qualified clients.'' [260] Unregistered hedge fund advisers have not necessarily required all of their investors to meet this standard.[261] We proposed (and commenters supported) an amendment to rule 205–3 grandfathering the existing equity accounts of hedge fund investors, and allowing these investors to add to their accounts.[262] Commenters noted, however, that our proposal would disrupt performance fee agreements with other types of investment pools or separate accounts sometimes managed by hedge fund advisers.[263] We have revised the coverage of the amendment to permit existing owners in any 3(c)(1) fund to retain their investment and to add to it,[264] and to permit the newly-registered advisers to continue in effect advisory contracts they may have with other clients that are not 3(c)(1) funds.

I. Amendments to Rule 206(4)–2

We are amending rule 206(4)–2, the adviser custody rule, to allow additional time for completion of audit work on behalf of advisers to funds of hedge funds that choose to distribute audited fund financial statements to investors under the custody rule.[265] The amendments extend from 120 to 180 days the time within which an adviser to a fund of funds may distribute the fund's audited financial statements. Some advisers to funds of funds are not able to comply with the current 120-day deadline because they cannot obtain completion of their fund audits prior to completion of the audits for the underlying funds in which they invest. To be eligible for the extended deadline, a fund of funds must invest at least ten percent of it assets in other, unrelated, pooled investment vehicles.[266] Commenters strongly supported the amendment, but persuaded us that our proposal to extend the period for all pooled investment vehicles (instead of just funds of funds) would lead to the underlying funds taking advantage of the extension themselves, leaving funds of funds in no better position to comply than they were previously.[267]

J. Amendments to Rule 222–2 and Rule 203A–3

This rulemaking is designed to alter the method of counting clients that hedge fund advisers use for purposes of determining their registration

UnFarallon Letter, *supra* note 230. The final rule does not impose such a requirement, but we caution hedge fund advisers that they remain, as they were prior to their registration, subject to the Advisers Act's antifraud provisions with respect to their marketing materials. One commenter opposed the exemption.

[254] Rule 204–2(e)(3)(ii).

[255] Section 204 of the Act [15 U.S.C. 80b–4] generally subjects records of registered investment advisers to examination by the Commission.

[256] We include private funds for which the adviser's related person (as defined in Form ADV) acts as general partner, managing member, or in a similar capacity, because many hedge fund advisers establish a separate special purpose vehicle to be named as the fund's general partner.

[257] Rule 204–2(l). One commenter described this amendment as a ''necessary requirement.'' CFA Institute Letter, *supra* note 47. The rule does not require that the adviser maintain duplicate books and records for the funds, nor that a registered private fund adviser be the party to keep the books and records of the private funds in question. Because the private funds' records will be deemed to be records of the adviser, however, our examination staff will have access to them when they examine the adviser.

[258] The rule applies to related person general partners only when the adviser has an advisory relationship with the fund in question. It does not, as one commenter was concerned, apply to every related general partnership in a large financial complex.

[259] Rule 205–3 permits registered advisers to charge performance fees that would otherwise be prohibited by section 205(a) [15 U.S.C. 80b–5(a)]. Registered advisers are not prohibited from charging performance fees to 3(c)(7) funds, investors in which must all be ''qualified purchasers.'' Section 205(b)(4) [15 U.S.C. 80b–5(b)(4)].

[260] Rule 205–3(a). The adviser to a 3(c)(1) fund must look through the fund to determine whether all investors are qualified clients. *See* rule 205–3(b). A ''qualified client'' under rule 205–3 is: (i) A natural person who or a company that immediately after entering into the contract has at least $750,000 under the management of the investment adviser; (ii) A natural person who or a company that the investment adviser entering into the contract (and any person acting on his behalf) reasonably believes, immediately prior to entering into the contract, either: (A) Has a net worth (together, in the case of a natural person, with assets held jointly with a spouse) of more than $1,500,000 at the time the contract is entered into; or (B) Is a qualified purchaser as defined in section 2(a)(51)(A) of the Investment Company Act of 1940 [15 U.S.C. 80a–2(a)(51)(A)] at the time the contract is entered into; or (iii) A natural person who immediately prior to entering into the contract is: (A) An executive officer, director, trustee, general partner, or person serving in a similar capacity, of the investment adviser; or (B) An employee of the investment adviser (other than an employee performing solely clerical, secretarial or administrative functions with regard to the investment adviser) who, in connection with his or her regular functions or duties, participates in the investment activities of such investment adviser, provided that such employee has been performing such functions and duties for or on behalf of the investment adviser, or substantially similar functions or duties for or on behalf of another company for at least 12 months. Rule 205–3(d)(1).

[261] In the absence of relief, the newly-registered adviser would have to either force the non-qualified client out of the 3(c)(1) fund or restructure its fee so that the non-qualified client is not paying the performance-based component of the fee.

[262] Proposed rule 205–(3)(c)(2) (grandfathering investors in ''private funds'').

[263] NYC Bar Private Funds Letter, *supra* note 214.

[264] One hedge fund adviser suggested that we also allow grandfathered investors to open new accounts in the hedge fund in which they were invested, and two other commenters suggested we also allow grandfathered investors to invest in new funds advised by the same hedge fund adviser. Davis Polk Letter, *supra* note 197, ABA Letter, *supra* note 150. These suggestions go significantly beyond our oxbjective in proposing the grandfathering provision, which was to avoid disrupting existing business arrangements.

[265] An adviser acting as general partner to a pooled investment vehicle it manages, including a hedge fund, has custody of the pool's assets. Rule 206(4)–2(c)(1)(iii). The adviser may satisfy its obligation to deliver custody account information to investors by distributing the pool's audited financial statements to investors. Rule 206(4)–2(b)(3). The current rule gives advisers 120 days from the pool's fiscal year-end to distribute the financial statements. *Id.*

[266] A ''fund of funds'' under the amended rule is any limited partnership (or limited liability company or other type of pooled investment vehicle) that invests at least 10 percent of its total assets in other pooled investment vehicles that are not related persons of the fund of funds, or related persons of the adviser or general partner of the fund of funds. Rule 206(4)–2(c)(4). Where the underlying funds are related to the fund of funds, the fund of funds should have ample opportunity to coordinate its audit with that of the underlying funds.

[267] Dechert Letter, *supra* note 197; Renaissance, Alternative Investment Group Letter, *supra* note 47; Comment Letter of Stroock/Credit Suisse Union Bancaire (Sept. 2, 2004) (''Stroock Letter''); Katten Muchin Letter, *supra* note 127; Van Hedge Letter, *supra* note 45; Coudert Letter, *supra* note 152; Comment Letter of Price Meadows (Sept. 15, 2004) (''Price Meadows Letter''); Comment Letter of Silver Creek (Sept. 15, 2004) (''Silver Creek Letter'').

obligations with us. It is not our intention to amend advisers' method of counting clients for other purposes. Two commenters raised concerns about whether private fund investors must be counted as clients for purposes of applying the national ''de minimis'' standard for state adviser registration.[268] One commenter also questioned whether advisers' supervised persons must count private fund investors as clients for purposes of the definition of ''investment adviser representative'' in rule 203A–3.[269]

To respond to commenters' concerns, we are amending both rules 222–2 and 203A–3 to clarify that advisers and supervised persons may, for purposes of those rules, count clients as provided in rule 203(b)(3)–1 without giving regard to the look through requirements in rule 203(b)(3)–2.[270]

K. Amendments to Form ADV

We proposed to amend Form ADV to require advisers to ''private funds'' as defined in the proposed rule to identify themselves as hedge fund advisers, and we are adopting this provision as proposed. One commenter spoke to these changes to say they were essential.[271]

III. Effective and Compliance Dates

The effective date of the amendments to rule 206(4)–2 and Form ADV is January 10, 2005. The effective date of new rule 203(b)(3)–2 and amendments to rules 203(b)(3)–1, 203A–3, 204–2, 205–3, and 222–2 is February 10, 2005. Hedge fund advisers may elect to begin complying with the new rule and the rule amendments as of their effective date, but have until February 1, 2006 to come into compliance with rule 203(b)(3)–2 and the amendments to rules 203(b)(3)–1, 203A–3, 204–2, 205–3, 206(4)–2, and 222–2.[272] We are providing hedge fund advisers with this long transition period so that they have time to work through any technical issues as they prepare for registration. Our staff will be available to work with these new registrants on resolving technical questions.

By the compliance date, February 1, 2006, each adviser required to register under the new rule[273] must have its registration effective, and must have in place all policies and procedures required under our rules.[274] Each adviser must also have designated a chief compliance officer.[275] Also by February 1, 2006, advisers must ensure that they are in compliance with our rule for custody of client funds and securities.[276] We expect that most private funds are already subject to an annual audit and that advisers will elect to have the audit results distributed to investors within the appropriate time period under the custody rule. Some advisers, however, may need to either arrange for their private funds to be audited or for quarterly transaction statements to be distributed to the investors in lieu of audit results.

Once their registrations are effective, the new registrants must, of course, comply with the Advisers Act and all of our rules, including provisions applying to registered advisers such as the limitations on performance fees,[277] our books and records requirements,[278] and our rules governing advertising[279] and cash solicitations.[280]

Several commenters asked whether the two-year redemption test under the definition of private fund would apply to investments made prior to the effectiveness of the new rules. Advisers must apply the two-year redemption test to any investments made on or after February 1, 2006, whether those investments are made by new or existing investors, but need not apply this test to investments made prior to the compliance date.

The IARD filing system will incorporate the amendments made to Form ADV on March 8, 2005. Registered advisers amending their Form ADV after the form has incorporated the amendments must respond to Item 7.B of Part 1A as amended[281] and must in any event amend their Form ADV to respond to the revised item by February 1, 2006. By implementing these changes to the IARD system in March of 2005, we will allow most registered advisers to respond to the revised item in conjunction with their regular annual updating amendment, rather than requiring them to file an additional amendment. Implementing this change to the IARD system promptly will also ensure that our staff, as well as members of the investing public, can begin to

[268] The ABA Letter, *supra* note 150, and NYC Bar Private Funds Letter, *supra* note 214, both raised this specific concern. Section 222(d) of the Advisers Act [15 U.S.C. 80b–18a(d)] provides that a state may not require an adviser to register with its state securities authority unless the adviser has a place of business located within the state or has had, during the preceding 12-month period, at least 6 clients who are residents of that state. Rule 222–2 [17 CFR 275.222–2] provides that an adviser may rely on rule 203(b)(3)–1 when counting clients for purposes of the de minimis standard.

[269] 17 CFR 275.203a–3. *See* NYC Bar Private Funds Letter, *supra* note 214.

[270] The amendment makes new rule 203(b)(3)–1(a)(6) inapplicable in the context of rules 203A–3 and 222–2. Because new rule 203(b)(3)–1(a)(6) does not apply, advisers are free to look to rule 203(b)(3)–1(a)(2)(i) with respect to private funds.

[271] CFA Institute Letter, *supra* note 47. Because advisers' responses to Form ADV are made available to the investing public on the Internet through the Investment Adviser Public Disclosure system, one commenter asked that we confirm that hedge fund advisers would not be disqualified from relying on section 4(2) of the Securities Act of 1933 [15 U.S.C. 77d(2)] or on rule 506 [17 CFR 230.506] thereunder, both of which are unavailable in the event of a public offering, solely as a result of the private fund being identified through the IAPD. *See* ABA letter, *supra* note 150. The mere identification of a private fund through the IAPD does not render section 4(2) or rule 506 unavailable. We note that Form ADV already calls for registered advisers to identify the private investment pools they manage; this information appears on the IAPD for the estimated 40 to 50 percent of hedge fund advisers that are already registered with us.

[272] Commenters expressing a view on the compliance period generally suggested hedge fund advisers would require one year to begin complying as registered advisers under the Advisers Act and its rules. Dechert Letter, *supra* note 197, Seward & Kissel Letter, *supra* note 111, Davis Polk Letter, *supra* note 197, AIMA Letter, *supra* note 189, Coudert Letter, *supra* note 152; NYC Bar Private Funds Letter, *supra* note 214, NYC Bar Futures Committee Letter, *supra* note 127, ABA Letter, *supra* note 150.

[273] The private adviser exemption requires that the adviser count all persons who have been clients at any time during the preceding 12 months. At the suggestion of a commenter, we will apply the new counting rule only prospectively, without regard to this ''look back'' provision for the period leading up to the compliance date. Coudert Letter, *supra* note 152.

[274] Under the Advisers Act and our rules, registered investment advisers must, for example, have policies in place to ensure compliance with the Act and its rules (rule 206(4)–7), including policies to prevent misuse of material nonpublic information (section 204A [15 U.S.C. 80b–4a]) and policies to ensure that (if they vote client securities) client securities are voted in the best interest of the client (rule 206(4)–6). Registered advisers must also have in place a code of ethics applicable to their supervised persons, which code must require access persons to submit reports of personal securities transactions and holdings (rule 204A–1). We understand that, in many advisory firms, access persons use their year-end brokerage statements to compile their securities holding reports; accordingly, we have set the compliance date for the new rules so as to allow sufficient time for hedge fund advisers' access persons to receive their brokerage statements for the period ended December 31, 2005 and to submit their securities holdings reports before the compliance date. For this reason, we are hereby extending the compliance date for rule 204A–1 from January 7, 2005 to February 1, 2005. *See Investment Adviser Codes of Ethics*, Investment Advisers Act Release No. 2256 (July 2, 2004) [69 FR 41695 (July 9, 2004)] at Section III.

[275] Rule 206(4)–7. Several commenters seemed to believe our rule would require them to hire a new executive to serve as chief compliance officer. As we have explained previously, the rule does not require an adviser to hire new staff, only to designate the person within the firm that is primarily responsible for compliance.

[276] Rule 206(4)–2.

[277] Section 205(a)(1) and rule 205–3.

[278] Rule 204–2.

[279] Rule 206(4)–1.

[280] Rule 206(4)–3.

[281] Similarly, advisers applying for registration with the Commission after the form has incorporated the amendments must respond to Item 7.B of Part 1A as amended.

access information about advisers to private funds.

IV. Cost-Benefit Analysis

We are sensitive to the costs and benefits that result from our rules. Rule 203(b)(3)–2 requires certain hedge fund advisers to register with us under the Investment Advisers Act of 1940. We are also adopting related rule amendments to facilitate a smooth transition for hedge fund advisers. In the Proposing Release, we identified possible costs and benefits of the rule and rule amendments and requested comment on our analysis. Many commenters supported the new rule,[282] although many commenters, chiefly hedge fund advisers and a trade association, expressed reservations at the potential costs of the new rule.[283]

A. Benefits

As discussed above in this Release, we expect that hedge fund investors, advisory clients and advisers will benefit from the rule and rule amendments, although these benefits are difficult to quantify.

1. Benefits to Hedge Fund Investors

(a) *Deter fraud and curtail losses.* Our oversight may prevent or diminish losses that hedge fund investors would otherwise experience as a result of hedge fund advisers' fraud. Registration allows us to conduct examinations of hedge fund advisers, and our examinations provide a strong deterrent to advisers' fraud, identify practices that may harm investors, and lead to earlier discovery of fraud that does occur.[284] Registration also permits us to screen individuals seeking to advise hedge funds, and to deny entry to those with a history of disciplinary problems.[285]

In the last five years, the Commission has brought or authorized 51 enforcement cases in which we assert hedge fund advisers have defrauded hedge fund investors or used the hedge fund to defraud others. While three of these frauds were detected in time to prevent investor losses, this was the exception rather than the rule.[286] In 40 of these cases, our staff estimates potential investor losses aggregate approximately $1.1 billion.[287] Staff cannot at this time estimate the amount of losses in the remaining eight cases.[288] We are concerned that individuals have targeted hedge fund investors and chosen hedge funds as a vehicle for fraud because these individuals could operate their funds without regulatory scrutiny of their activities. Only eight of the 51 cases involve investment advisers registered with the Commission, with over $75.7 million in estimated aggregate investor losses.[289] The remaining 43 cases involve advisers that were not registered with us, with over $1 billion in estimated aggregate investor losses.[290]

While our regulatory oversight cannot guarantee hedge fund investors will never be defrauded, we expect our oversight will reduce investor losses.[291]

---

[282] *See supra* notes 46–50 and accompanying text.

[283] *See supra* note 51 and accompanying text.

[284] *See* Section II.B.2 of this Release. We received comments specifically focusing on these benefits under the rule. *See, e.g.*, ICAA Letter, *supra* note 47. One commenter asserted it may be impossible for the Commission to identify potentially harmful compliance problems at an early stage absent the ability to examine hedge fund advisers. ICI Letter, *supra* note 48.

[285] *See* Section II.B.3 of this Release. Commenters also viewed this screening function as an important benefit for investors. *See, e.g.*, Vantis July Letter, *supra* note 106 (registered hedge fund adviser stated that lack of scrutiny of hedge fund advisers has led to the industry attracting ''unsavory characters''); Ohio PERS Letter, *supra* note 47; ICI Letter, *supra* note 48; IMCA Letter, *supra* note 48.

[286] *SEC* v. *EPG Global Private Equity Fund*, Litigation Release No. 18577 (Feb. 17, 2004); *SEC* v. *Millennium Capital Hedge Fund, L.P., Millennium Capital Group, LLC, and Andreas F. Zybell, supra* note 99; *In the Matter of John Christopher McCamey and Sierra Equity Partners, LP*, Securities Exchange Act Release No. 48917 (June 18, 2003).

[287] *SEC* v. *Haligiannis, et al*, Litigation Release No. 18853 (Aug. 25, 2004); *SEC* v. *Scott B. Kaye, et al.*, Litigation Release No. 18845 (Aug. 24, 2004); *SEC* v. *Gary M. Kornman*, Litigation Release No. 18836 (Aug. 18, 2004); *SEC* v. *Anthony P. Postiglione, Jr., et al., supra* note 236; *In the Matter of Samer M. El Bizri and Bizri Capital Partners, Inc., supra* note 99, *SEC* v. *Daniel D. Dyer and Oxbow Capital Partners, LLC,* Litigation Release No. 18719 (May 19, 2004); *SEC* v. *J. Robert Dobbins, Dobbins Capital Corp., Dobbins Offshore Capital LLC, Dobbins Partners, L.P., and Dobbins Offshore, Ltd.*, Litigation Release No. 18634 (Mar. 23, 2004); *SEC* v. *Patrollers Capital Fund and Franklin S. Marone*, Litigation Release No. 18601 (Feb. 27, 2004); *SEC* v. *Darren Silverman and Matthew Brenner*, Litigation Release No. 18597 (Feb. 25, 2004); *In the Matter of Nevis Capital Management, LLC, David R. Wilmerding, III and Jon C. Baker, supra* note 94; *In the Matter of Robert T. Littell and Wilfred Meckel*, Investment Advisers Act Release No. 2203 (Dec. 15, 2003); *SEC* v. *Adam G. Kruger and Kruger, Miller, and Tummillo, Inc.*, Litigation Release No. 18473 (Nov. 20, 2003); *SEC* v. *Koji Goto*, Litigation Release No. 18456 (Nov. 14, 2003); *SEC* v. *John F. Turant, Jr., Russ R. Luciano, JTI Group Fund, LP, J.T. Investment Group, Inc., Evergreen Investment Group, LP, and New Resource Investment Group, Inc.*, Litigation Release No. 18351 (Sept. 15, 2003); *SEC* v. *Michael Batterman, Randall B. Batterman III, and Dynasty Fund, Ltd., et al.*, Litigation Release No. 18299 (Aug. 20, 2003); *SEC* v. *Ryan J. Fontaine and Simpleton Holdings Corporation a/k/a Signature Investments Hedge Fund, supra* note 11; *In the Matter of Ascend Capital, LLC, Malcolm P. Fairbairn, and Emily Wang Fairbairn*, Investment Advisers Act Release No. 2150 (July 17, 2003); *SEC* v. *Beacon Hill Asset Management LLC, et al., supra* note 97; *SEC* v. *J. Scott Eskind, Lorus Investments, Inc., and Capital Management Fund, Limited Partnership, supra* note 100; *SEC* v. *Michael L. Smirlock and LASER Advisers, Inc.*, Litigation Release No. 17630 (July 24, 2002); *SEC* v. *Schwendiman Partners, LLC, Gary Schwendiman, and Todd G. Schwendiman, supra* note 94; *SEC* v. *Von Christopher Cummings, Paramount Financial Partners, L.P., Paramount Capital Management, LLC, John A. Ryan, Kevin L. Grandy and James Curtis Conley*, Litigation Release No. 17598 (July 3, 2002); *SEC* v. *House Asset Management, L.L.C., House Edge, L.P., Paul J. House, and Brandon R. Moore, supra* note 97; *In the Matter of Portfolio Advisory Services, LLC and Cedd L. Moses, supra* note 94; *SEC* v. *Jean Baptiste Jean Pierre, Gabriel Toks Pearse and Darius L. Lee, supra* note 97; *In the Matter of Zion Capital Management LLC, and Ricky A. Lang, supra* note 101; *SEC* v. *Peter W. Chabot, Chabot Investments, Inc., Sirens Synergy and the Synergy Fund, supra* note 97; *SEC* v. *Vestron Financial Corp., et al., supra* note 97; *SEC* v. *Edward Thomas Jung, et al., supra* note 97; *SEC* v. *Burton G. Friedlander, supra* note 98; *SEC* v. *Hoover and Hoover Capital Management, Inc., supra* note 97; *SEC* v. *Evelyn Litwok & Dalia Eilat, supra* note 97; *SEC* v. *Ashbury Capital Partners, L.P., Ashbury Capital Management, L.L.C., and Mark Yagalla, supra* note 97; *SEC* v. *James S. Saltzman, supra* note 95; *In the Matter of Stephen V. Burns*, Investment Advisers Act Release No. 1910 (Nov. 17, 2002); *In the Matter of Michael T. Higgins, supra* note 99; *SEC* v. *David M. Mobley, Sr., et al., supra* note 97; *SEC* v. *Michael W. Berger, Manhattan Capital Management Inc., supra* note 99; *In the Matter of Charles K. Seavey and Alexander Lushtak, supra* note 99; *SEC* v. *Todd Hansen and Nicholas Lobue, supra* note 235.

[288] *SEC* v. *Global Money Management, LP, LF Global Investments, LLC, and Marvin I. Friedman, supra* note 102; *SEC* v. *KS Advisors, Inc. et al., supra* note 95; *In the Matter of Alliance Capital Management, L.P., supra* note 29; *SEC* v. *Edward J. Strafaci*, Litigation Release No. 18432 (Oct. 29, 2003); *In the Matter of Stephen B. Markovitz, supra* note 29; *Michael Lauer, Lancer Management Group, LLC, and Lancer Management Group II, LLC, supra* note 98; *In the Matter of Martin W. Smith and World Securities, Inc.*, Investment Advisers Act Release No. 2124 (Apr. 18, 2003); *SEC* v. *Platinum Investment Corp. et al.*, Litigation Release No. 17643 (July 31, 2002).

[289] *In the Matter of Alliance Capital Management, L.P., supra* note 29; *SEC* v. *Michael L. Smirlock, supra* note 287; *SEC* v. *Edward J. Strafaci, supra* note 288; *In the Matter of Nevis Capital Management, supra* note 94; *In the Matter of Martin W. Smith and World Securities, Inc., supra* note 288; *SEC* v. *Schwendiman Partners, LLC, Gary Schwendiman, and Todd G. Schwendiman, supra* note 94; *In the Matter of Portfolio Advisory Services, LLC and Cedd L. Moses, supra* note 94; *In the Matter of Zion Capital Management LLC, and Ricky A. Lang, supra* note 101. Staff cannot estimate the amount of losses in 3 of these cases at this time.

[290] Staff cannot estimate the amount of losses in 5 of these cases at this time.

[291] As substantial inflows chase absolute returns, there may be pressure for hedge fund advisers to engage in strategies that may not be consistent with the funds' disclosure or may be unlawful. *See* David Reilly, *Hot Hedge Fund Vega Grapples With Growth: Global/Macro Style of Investing May Provide Room to Maneuver, But a Door Is Closed to New Cash*, The Wall St. J., June 4, 2004, at C1 (as hedge funds' assets explode, difficulties in finding winning strategies raises the specter of diminished returns and concentrations of investment risk that are difficult to unwind in a crisis); Mara Der Hovanesian, *Will Hedge Funds Be Overrun By All The Traffic?*, BusinessWeek, Mar. 11, 2002 (some hedge fund strategies are becoming less effective as the capacity of managers to generate high absolute returns diminishes when investment portfolios are too large). *See also* Alexander M. Ineichen, *Absolute Returns* (2003) at 47 (falling barriers to entry for new hedge fund advisers are causing a dilution of the talent pool, making adviser selection more difficult). In the absence of Commission oversight as a deterrent, these incentives may tempt hedge fund advisers to engage in fraud.

Some commenters argued that registration of hedge fund advisers would not address the frauds evidenced by these enforcement cases, arguing the majority of the advisers in these fraud cases were too small to meet the $30 million threshold for registration under the Advisers Act or were registered already.[292] We disagree with these commenters. Half of the advisers in these 51 cases appear to have managed more than $30 million or otherwise been eligible for registration with us, and it was these larger advisers who caused nearly all the investor losses, representing over $1 billion of the estimated total losses of $1.1 billion. This strongly suggests that the Commission's registration requirement will affect an appropriate group of hedge fund advisers and serve as an effective response to combat hedge fund fraud.

In addition, these commenters argued that examination programs are unable to detect fraud, and that regulatory authorities must instead rely on ''tips'' to uncover misconduct. However, in 5 of the 8 cases against registered advisers, it was our examiners who uncovered the fraudulent conduct.[293] These cases show that registered hedge fund advisers contemplating their chances of ''getting away'' with a breach of their fiduciary duty to their clients would be well advised to fear detection. We believe this has a genuine deterrent effect.[294]

(b) *Provide basic information about hedge fund advisers.*

Form ADV information that hedge fund advisers will file in registering will aid hedge fund investors in evaluating potential managers. Filing Form ADV will require hedge fund advisers to disclose information about their business, affiliates and owners, and disciplinary history. As commenters pointed out, many investors currently lack good access to this information about their hedge fund managers.[295] Although the information hedge fund advisers will be required to provide on their Form ADV filings and to comply with our rules cannot substitute for an investor's due diligence, it should aid investors by providing a publicly accessible foundation of basic information.[296]

(c) Improve compliance controls.

Hedge fund investors should benefit from their advisers' improved compliance controls. Several commenters confirmed this assessment in their comment letters.[297] Once registered, hedge fund advisers will be required to have comprehensive compliance procedures and to designate a chief compliance officer.[298] Specific procedures governing proxy voting[299] and a code of ethics including requirements for personal securities reporting will also be required.[300] In addition, the obligation to commit to a program of compliance controls combined with our examinations foster adherence to a culture of compliance by advisers.[301] These compliance measures are the first line of defense in protecting investors against an adviser's misconduct.

2. Benefits to Mutual Fund Investors

Mutual fund investors will benefit from hedge fund adviser registration to the extent that Commission oversight deters hedge funds and their advisers from illegal conduct that exploits mutual funds. Many of the market timers and illegal late traders involved in recent mutual fund scandals have been hedge fund advisers.[302] The 51 enforcement cases discussed earlier do not include 18 other actions we have brought to date against persons charged with late trading of mutual fund shares on behalf of hedge fund groups, and against mutual fund advisers or principals for permitting hedge fund advisers to market time mutual funds contrary to the mutual funds' prospectus disclosure.[303] Hedge fund advisers reaped huge profits for their funds over an extended period while costing our nation's retail mutual fund investors hundreds of millions of dollars.[304]

3. Benefits to Other Investors and Markets

The registration of hedge fund advisers will benefit not only hedge fund investors but also other investors and the securities markets, to the extent that the Commission's oversight eliminates opportunities for hedge fund advisers to engage in other types of unlawful conduct in the securities markets. Commenters also saw this as a benefit to adviser registration.[305] The mutual fund scandals have shown us that hedge fund advisers' improper or illegal activities can cause harm beyond the hedge funds' own investors. There may be other fraudulent activities by hedge fund advisers of which we are unaware because we cannot examine these advisers regularly. Adviser registration, as discussed above, should lead to earlier discovery of fraudulent activities and thus enhance protections to all investors in the securities markets.

4. Benefits to Regulatory Policy

Registration of hedge fund advisers will benefit all investors and market participants by providing us and other policy makers with better data. We have limited information about hedge fund advisers and the hedge fund industry, and much of what we do have is indirect information extrapolated from other data. This hampers our ability to develop regulatory policy for the protection of hedge fund investors and

[292] *See, e.g.*, MFA Letter, *supra* note 51; LaRocco Letter, *supra* note 51; Chamber of Commerce Letter, *supra* note 52; ISDA Letter, *supra* note 52.

[293] In addition, in two of the 43 cases against unregistered advisers, our examiners uncovered the fraud as a result of examining registered advisers who employed the principals of the hedge fund. *See supra* notes 94 and 95.

[294] *Cf.* Alternative Investment Group Letter, *supra* note 47 (hedge fund managers will realize they are more likely to receive SEC scrutiny and will tighten their procedures toward a greater culture of compliance); Vantis August Letter, *supra* note 50 (possibility of SEC exams on short notice creates an extra incentive for firm professionals to remain disciplined and keep files updated on a timely basis). In addition, as discussed above, examination of regulatory issues relating to the deterrent effect of unannounced government inspections, under economic theories of monitoring and deterrence based on principal-agent models, suggest that randomized monitoring is sufficient to generate a deterrent effect. *See supra* note 88.

[295] UnFarallon Letter, *supra* note 230; Comment Letter of Gregg D. Caplitz (Aug. 9, 2004) (''Caplitz Letter''); Comment Letter of Rosalind D. Herman (August 10, 2004) (''Rosalind Herman Letter'').

[296] The difficulty many institutional investors have in obtaining information about hedge fund advisers is reflected in the Hennessee Group's survey clarifying the involvement of foundations and endowments in the hedge fund market. Among foundations and endowments responding to the survey, those supporting hedge fund adviser registration outnumbered its opponents by nearly 2 to 1. *See* Hennessee Foundation and Endowment Survey, *supra* note 39. Participants at our Hedge Fund Roundtable last year similarly spoke of the difficulty and costs that investors face in obtaining information from hedge fund advisers. Roundtable Transcript, May 15 (statement of Sandra Manzke) (''[I]t's very difficult to get answers out of managers, and they hold all the keys right now. If you want to get into a good fund, and you ask some difficult questions, you may not get that answer. Sure, there is a lot of access, to get online and do background checks, and hire firms * * *. But that's expensive. And can the retail investor do it? No. Firms like ours, we spend a lot of money, we have a lot more people working for us now to uncover these types of situations.'').

[297] *See, e.g.*, ICAA Letter, *supra* note 47, Alternative Investment Group Letter, *supra* note 47, Caplitz Letter, *supra* note 295.

[298] Rule 206(4)–7.

[299] Rule 206(4)–6.

[300] Rule 204A–1.

[301] Some registered hedge fund advisers used their own experiences to support this conclusion. *See, e.g.*, Vantis August Letter, *supra* note 50, Alternative Investment Group Letter, *supra* note 47.

[302] *See supra* note 29.

[303] *Id.*

[304] *Id.*

[305] *See, e.g.*, ICAA Letter, *supra* note 47; Rosalind Herman Letter, *supra* note 295; Patch Letter A, *supra* note 48; Comment Letter of Joe Allebaugh (July 14, 2004) (''Allebaugh Letter''); Vantis August Letter, *supra* note 50; Saul Letter, *supra* note 49.

investors in general.[306] Hedge fund adviser registration would provide the Congress, the Commission and other government agencies with important information about this rapidly growing segment of the U.S. financial system. While some commenters agreed with our assessment of this benefit,[307] others suggested that, instead of registering hedge fund advisers, we compile information about them from a variety of scattered regulatory filings currently made by hedge funds, their advisers, and broker-dealers.[308] We have considered this alternative, but the reports and information currently available would provide at best a partial and inadequate view of the activities of hedge fund advisers.[309]

5. Benefits to Hedge Fund Advisers

Mandatory registration will provide a level playing field for hedge fund advisers. Many hedge fund advisers have already registered with us, and have organized their compliance procedures under the Advisers Act. [310] Unregistered hedge fund advisers, however, vary substantially in their compliance practices.[311] While many of them have adopted sound compliance practices, many others, against whom they and the registered advisers compete, have not allocated resources to implement an effective compliance infrastructure. We received comments noting that mandatory registration would ensure that all hedge fund advisers compete on the same basis in this regard.[312]

Registering hedge fund advisers may enhance investor confidence in a growing and maturing industry. As discussed above, the hedge fund industry has been growing at an extraordinary pace in the past decade.[313] Registration under the Advisers Act will bring hedge fund advisers to the same compliance level as other SEC-registered advisers, thus providing hedge fund investors with additional protections with respect to conflicts of interest addressed by the funds' advisers.[314]

Some commenters, however, argued that registration would create a ''moral hazard'' by providing hedge fund investors with a *false* sense of enhanced investor protection that might cause them to be less diligent in their own investigations.[315] We disagree. Such argument could have been used against registration of any kind of investment adviser and against any regulation of the securities industry.[316] In addition, without the new rule requiring registration, a hedge fund adviser can now choose to register under the Advisers Act but then withdraw its registration, for example, at the prospect of an examination. Thus, without a registration requirement, any ''moral hazard'' would already exist, but without necessarily providing hedge fund investors the benefit of our oversight of their advisers.

B. Costs

As we discussed in the Proposing Release, registration of hedge fund advisers under the Advisers Act would not impede hedge funds' operations. Comments from registered hedge fund advisers agreed.[317] The Act does not prohibit any particular investment strategies, nor does it require or prohibit specific investments. Instead of imposing specific procedures on registrants, the Advisers Act is principally a disclosure statute that requires registrants to fully inform clients of conflicts so that those clients can determine whether to give their consent. For the same reasons, registering hedge fund advisers should not impair the ability of hedge funds to continue their important roles of providing price information and liquidity to our markets.[318]

Nevertheless, registration imposes certain costs. In the Proposing Release, we analyzed various costs that hedge fund advisers would incur in connection with registration. Commenters representing the views of unregistered hedge fund advisers generally challenged our cost estimates and predicted the costs of compliance would be burdensome.[319] Comments from registered advisers generally characterized the costs as being significant, but reasonable in light of the nature of the advisory business.[320] As we discussed in the Proposing Release, the costs of compliance for a new registrant can vary widely among firms depending on size, activities, and the sophistication of the existing compliance infrastructure. Investment advisers, whether registered with us or not, place the future of their business at peril if they do not establish a sound compliance infrastructure to fulfill their fiduciary duties towards their clients under the Act. Registered hedge fund advisers estimated that advisers with good compliance infrastructures in place would incur much less incremental cost than those that did not have good compliance infrastructures.[321]

1. Registration Costs

In our Proposing Release, we estimated that the costs of preparing adviser registration submissions, including preparation and submission of Part 1A of Form ADV, would not be high. Although one commenter suggested the costs of preparing a Part 1A submission can be quite high, we believe the commenter's example does not reflect the experience of other advisers, none of whom made similar comments.[322] Part 1A requires advisers

[306] *See* Section II.B.1 of this Release.

[307] *See, e.g.*, Ohio PERS Letter, *supra* note 47, ICAA Letter, *supra* note 47, ICI Letter, *supra* note 48, IMCA Letter, *supra* note 48.

[308] *See, e.g.*, MFA Letter, *supra* note 51, Tudor Letter, *supra* note 53.

[309] *See* Section II.B.9 of this Release.

[310] Many advisers to hedge funds are required to register with us because of other advisory business they have. Still others have chosen to register with us because their investor clients require it. Registered hedge fund advisers commented on the benefits of registration. *See* Vantis August Letter, *supra* note 50.

[311] *See* Section VII.A.1.b. of the 2003 Staff Hedge Fund Report, *supra* note 18.

[312] *See, e.g.*, Saul Letter, *supra* note 49, Rosalind Herman Letter, *supra* note 295, Caplitz Letter, *supra* note 295.

[313] *See* Section I.A. of this Release.

[314] *See, e.g.*, Vantis July Letter, *supra* note 106 (mandatory registration will improve the image of the hedge fund industry); Hennessee Foundation and Endowment Survey, *supra* note 39 (survey participant remark that registration ''lends creditability to the field''); Comment Letter of North American Securities Administrators Association, Inc. (Oct. 18, 2004) (SEC registration will increase investor confidence, thereby benefiting hedge fund advisers).

[315] *See, e.g.*, MFA Letter, *supra* note 51, Chamber of Commerce Letter, *supra* note 52, ISDA Letter, *supra* note 52, David Thayer Letter, *supra* note 52.

[316] Furthermore, section 208(a) of the Act [15 U.S.C. 80b–8(a)] expressly forbids registered advisers from implying that their services bear the imprimatur of the government. Section 208(b) of the Act permits a registered adviser to state that it is registered, but only if the effect of registration is not misrepresented.

[317] Vantis August Letter, *supra* note 50, Alternative Investment Group Letter, *supra* note 47.

[318] *See Hedge Funds, Leverage, and the Lessons of Long-Term Capital Management—Report of the President's Working Group on Financial Markets, supra* note 43, at 2. The 2003 Staff Hedge Fund Report also noted that hedge funds' trading brings price information to our securities markets, thus improving market efficiency, and hedge funds also provide liquidity to our capital markets. *See* 2003 Staff Hedge Fund Report, *supra* note 18, at 4.

[319] *See, e.g.*, Madison Capital Letter, *supra* note 51; Chamber of Commerce Letter, *supra* note 52; ISDA Letter, *supra* note 52; Blanco Partners, *supra* note 52; Millrace Letter, *supra* note 92.

[320] Vantis August Letter, *supra* note 50, Alternative Investment Group Letter, *supra* note 47, ICI Letter, *supra* note 48, ICAA Letter, *supra* note 47, CFA Institute Letter, *supra* note 47.

[321] *See* Vantis August Letter, *supra* note 50, Alternative Investment Group Letter, *supra* note 47.

[322] The MFA stated that one of its members expended $75,000 of internal staff time in preparing its Form ADV filing. *See* MFA Letter, *supra* note 51. MFA's comments are also not reflective of other feedback we have received on revised Form ADV and the IARD electronic filing system, which were launched in 2001. *See* Letter from Karen Barr, General Counsel, Investment Counsel Association of America, to Paul F. Roye, Director, Division of

to answer basic questions about their business, their affiliates and their owners, and Part 1A can be completed using information readily available to hedge fund advisers. Numerous hedge fund advisers have already registered with the Commission using Part 1A, and none has reported to us that its business model presents any difficulty in using the form.[323] Advisers must also complete Part II of Form ADV and deliver a copy of Part II or a disclosure brochure containing the same information to clients.[324] Part II requires disclosure of certain conflicts of interest, which even unregistered advisers have a fiduciary duty to disclose to their clients. We expect that hedge fund advisers will face relatively small internal costs in preparing a Part II, and will be likely to include their Part II disclosure as part of their private placement memoranda for their hedge funds, reducing their overall costs even further. We received no comments to the contrary.

2. Cost of Establishing a Compliance Infrastructure

New hedge fund adviser registrants will also face costs to bring their operations into conformity with the Advisers Act and the rules under the Act. In the Proposing Release, we estimated the cost of establishing a compliance infrastructure would primarily consist of establishing procedures and systems that address rules under the Advisers Act such as the books and records rule,[325] the custody rule,[326] the proxy voting rule,[327] the compliance rule,[328] and the code of ethics rule.[329] While some commenters also focused on these factors,[330] others identified additional cost considerations, as we discuss below.

Many unregistered hedge fund advisers have already built sound compliance infrastructures because their business compels it. These firms already have procedures designed to keep good records of all transactions, to keep their clients' assets safe, to provide fair and full disclosure of conflicts of interest, and to prevent their supervised persons from breaching fiduciary duties.[331] In the Proposing Release, we estimated these advisory firms should face little cost to modify their current compliance practices to comply with the Advisers Act rules. Comments from registered hedge fund advisers agreed.[332] For other hedge fund advisers that have not yet established sound compliance programs, however, the costs will be higher.

In the Proposing Release, we estimated the cost for hedge fund advisers to establish the required compliance infrastructure will be, on average, $20,000 in professional fees and $25,000 in internal costs including staff time.[333] These estimates were prepared in consultation with private attorneys who, as part of their practice, counsel hedge fund advisers establishing their registrations with the SEC. The estimates are averages, premised on the understanding that the costs will likely be less for new registrants that have already established sound compliance practices and more for new registrants that do not yet have good compliance procedures. Several law firms and attorneys representing hedge fund advisers challenged these estimates as being too low, but these firms did not provide any estimates of their own.[334] The ICAA, based on the experience of its adviser members generally, commented that the costs of a compliance infrastructure are considerable, but that they are justified, especially considering the relative risks of hedge fund activities as compared to many other investment advisory activities.

Several hedge fund advisers estimated the costs to be in the range of $300,000, but most or all of the cost was attributable to compensation costs for hiring a dedicated chief compliance officer (CCO).[335] Our compliance rule does not require firms to hire a new individual to serve as a full-time CCO, and the question of whether an advisory firm can look to existing staff to fulfill the CCO requirement internally is firm-specific. Firms may consider factors such as the size of the firm, the complexity of its compliance environment, and the qualifications of current staff.

While we recognize some hedge fund advisers will need to designate someone to serve as CCO on a full-time basis, we expect these will be larger firms—those with many employees and a sizeable amount of investor assets under management. Because there is no currently-available comprehensive database of hedge fund advisers, we cannot determine the number of these larger hedge fund firms in operation, but our staff estimates it is relatively few. Staff estimates approximately half of these hedge fund advisers are already registered with us, and have already designated a CCO. While the remaining, unregistered, larger hedge fund advisers may not have designated a CCO as such, many of these firms likely already have personnel who perform similar functions to a CCO, in order to address the firm's liability exposure and protect its reputation.

In smaller hedge fund advisers, the designated CCO will likely also fill another function in the firm, and perform additional duties alongside compliance matters. Firms designating a CCO from existing staff may experience costs to the extent the individual is taking on additional compliance responsibilities or giving up other non-compliance responsibilities. These costs may include costs of shifting responsibilities among employees, and might in some cases include additional compensation costs. Some of these firms may need to add compliance capacity to their staffs. Costs will vary from firm to firm, depending on the extent to which firm staff is already performing some or all of the requisite compliance functions, the extent to which the CCO's non-compliance responsibilities need to be lessened to permit allocation of more time to compliance responsibilities, and the value to the firm of the CCO's non-compliance responsibilities. We do not have access to information that would

Investment Management, U.S. Securities and Exchange Commission (May 16, 2001) (noting that ICAA members found the filing system easy to use and found the form instructions and staff responses to frequently-asked questions to provide useful guidance).

[323] In fact, our new rule makes only one small change to Part 1A, to better identify which advisers' pooled investment vehicles are hedge funds. *See* Section II.K. of this Release.

[324] *See* rule 204–3, the brochure delivery rule.

[325] Rule 204–2.

[326] Rule 206(4)–2.

[327] Rule 206(4)–6.

[328] Rule 206(4)–7.

[329] Rule 204A–1.

[330] *See, e.g.,* Schulte Roth Letter, *supra* note 51; ICAA Letter, *supra* note 47.

[331] One private attorney commenting on the rule noted he knows of few hedge fund managers which do not already comply with the substantive provisions of the Advisers Act as a matter of best practice. Sidley Austin Letter, *supra* note 51.

[332] Alternative Investment Group Letter, *supra* note 47; Vantis August Letter, *supra* note 50.

[333] Our staff has estimated that between 690 and 1,260 hedge fund advisers would be new Advisers Act registrants under the new rule and rule amendments. *See infra* Section V of this Release; Section V of the Proposing Release. Aggregate start-up costs to establish required compliance infrastructure for all new registrants are therefore estimated to range from $31 to $57 million.

[334] Schulte Roth Letter, *supra* note 51; Bryan Cave Letter, *supra* note 111; Davis Polk Letter, *supra* note 197.

[335] Lander Letter, *supra* note 51, Madison Capital Letter, *supra* note 51, MFA Letter, *supra* note 51 (recounting the estimates of members, and noting larger firms' cost for a chief compliance officer can approach $500,000). Data from the SIA *Report on Management and Professional Earnings in the Securities Industry 2003,* modified by the SEC staff for an 1800-hour work-year and with a 35 percent markup for overhead, however, suggest that the total cost for hiring a full-time chief compliance officer in New York City would be approximately $234,000.

allow us to determine these costs, and commenters did not provide estimates.

3. Ongoing Costs of Compliance and Examination

Several comments on our Proposing Release identified additional cost considerations related to hedge fund advisers' ongoing, annual costs of compliance and the costs of undergoing examination by the Commission. There may be a number of unregistered hedge fund firms whose operations are already substantially in compliance with the Advisers Act and that would therefore experience only minimal incremental ongoing costs as a result of registration.[336] There are other unregistered hedge fund advisers, however, who will face additional ongoing costs to conduct their operations in compliance with the Advisers Act. These costs may be significant for some hedge fund advisers.

We do not have access to information that would enable us to determine these additional ongoing costs, which are predominantly internal to the firms themselves. Incremental ongoing compliance costs will vary from firm to firm depending on factors such as the complexity of each firm's activities, the business decisions it makes in structuring its response to its compliance obligations, and the extent to which it is already conducting its operations in compliance with the Advisers Act.[337] We received comments from small hedge fund advisers estimating that their annual compliance costs would be approximately $25,000 and could be as high as $50,000.[338] These commenters and other small hedge fund advisers expressed concerns that compliance costs would be prohibitive in comparison to their management fee revenues.[339] Other small hedge fund advisers commented that their existing staff could not accommodate the compliance responsibilities they would face as a result of registration.[340] We also, however, received comments from investment advisory trade associations noting that thousands of small investment advisers currently operate under the same compliance burden.[341] We note that more than 2,500 smaller advisory firms are currently registered with us.[342] These firms have absorbed these compliance costs, notwithstanding the fact that their revenues are likely to be smaller than those of a typical hedge fund adviser.[343]

Some commenters asserted that there would be substantial costs associated with hedge fund advisers' responses to our examinations. One hedge fund adviser reportedly estimated spending 160 hours of internal staff time during an SEC examination.[344] We believe this does not reflect the typical experience of our registrants, with the possible exception of the very largest advisers, and few of the firms affected by the new rule are likely to be of this size.[345] A law firm commented that two registered hedge fund advisers reportedly spent an estimated $300,000 to $500,000 in out-of-pocket costs preparing for and undergoing SEC examinations.[346] We believe this also is not representative of our registrants' experiences, who do not typically find it necessary to involve private counsel in extensive pre-examination review of their activities and records. Also, we note that one registered hedge fund adviser commented that the firm itself derived benefit from the examination process.[347]

V. Effects on Commission Examination Resources

The new registration requirement will increase the number of investment adviser firms subject to Commission examinations. The examination program is operated by our Office of Compliance Inspections and Examinations (''OCIE''). OCIE's examination program already covers a number of advisers to hedge funds. These advisers have registered with the Commission, either because they advise non-hedge fund clients for whom registration is required, or because they perceive registration with the Commission to be necessary to their business model. Implementation of rule 203(b)(3)–2 will increase the number of SEC-registered advisers by some amount.

Several commenters expressed concerns about this increase.[348] As stated in the Proposing Release, there are various options we could pursue to lessen the effect of this increase. Though OCIE's resources will be spread over an expanded pool of investment adviser registrants, we are developing risk assessment tools to enhance the efficiency of our examination program by allowing our staff to focus examination resources on the areas of greatest risk to investors. In addition, we have recently adopted measures that require advisory personnel to be more accountable for the efficacy of

---

[336] One law firm commented that it knew of few hedge fund advisers that are not already complying with the substantive provisions of the Advisers Act as a matter of best practices. Sidley Austin Letter, *supra* note 51. *See also* Superior Capital Letter, *supra* note 51 (noting that the Advisers Act compliance regulations would be ''redundant'' for this firm).

[337] These underlying uncertainties surrounding these internal costs would introduce the same level of uncertainty to various alternatives that we might pursue in determining these costs. For example, advisory firms themselves are not likely to be able to provide reliable estimates for several reasons. First, experiences will vary across firms; second, few firms are likely to have allocated the internal resources necessary to assess which costs are a direct result of legal requirements and which arise from other factors; and third, firms' experience with some newer requirements (such as the adviser compliance rule and the adviser code of ethics rule) is still limited. Attempting to estimate the number of staff hours involved (and applying industry standard wage and benefit costs for the corresponding types of personnel) would entail the same uncertainties.

[338] Comment Letter of Joseph L. Vidich (Aug. 7, 2004) (''Vidich Letter'') (currently managing $10 million hedge fund); Comment Letter of Venkat Swarna (Sept. 14, 2004) (''Swarna Letter'') (anticipates managing $2 million hedge fund). Although these commenters would not be covered by our registration requirement, we have taken their cost estimates into consideration, because other small firms that will be covered did not provide us with quantified estimates.

[339] *See* Vidich Letter, *supra* note 338; Superior Capital Letter, *supra* note 51; LaRocco Letter, *supra* note 51; *see also* ISDA Letter, *supra* note 52.

[340] *See, e.g.*, Millrace Letter, *supra* note 92; *see also* Seward & Kissel Letter, *supra* note 111; Blanco Partners Letter, *supra* note 52.

[341] ICAA Letter, *supra* note 47, CFA Institute Letter, *supra* note 47.

[342] Some commenters suggested the threshold for hedge fund adviser registration should be $50 million, to address their concerns that the cost burden of adviser registration might be disproportionate for advisers managing lesser amounts of assets. *See, e.g.*, LaRocco Letter, *supra* note 51. However, many currently-registered firms, which presently comply with these same registration obligations, manage less than $50 million. As of September 30, 2004, 2,758 advisers registered with us reported that they were managing less than $50 million in client assets. These advisers represent 32 percent of our registrant pool. We also note that establishing a higher assets under management registration threshold for advisers to private funds would allow these other advisers to avoid registration merely by pooling some of their clients' assets into a private fund.

[343] In addition to asset-based investment management fees that are comparable to advisory fees charged by non-hedge fund advisory firms, hedge fund advisers also typically earn incentive compensation equaling 20 percent of the fund's net investment income. *See supra* note 11.

[344] MFA Letter, *supra* note 51 (reporting experience of one registered hedge fund adviser).

[345] As we discuss elsewhere, the absence of a comprehensive database of hedge fund advisers makes it difficult to estimate the number or size of hedge fund advisory firms that will be affected by the new rule. However, staff estimates half or more of the larger hedge fund advisers are likely already registered with us. *See also The Hedge Fund 100, supra* note 70 (estimating that even the top 100 hedge fund advisers manage in the range of $2 billion to $11.5 billion).

[346] Sidley Austin Letter, *supra* note 51.

[347] Vantis August Letter, *supra* note 50 (review provides additional assurance that any deficiencies not already identified by internal or external audit are identified; exam staff offers helpful instruction in regulatory issues and assistance in developing policies and procedures).

[348] *See, e.g.*, Schulte Roth Letter, *supra* note 51, Davis Polk Letter, *supra* note 197, Rodney Pitts Letter, *supra* note 52, Sheila Bair Letter, *supra* note 89, Comment Letter of Alex Cook (Aug. 26, 2004) (''Alex Cook Letter), Tudor Investment Letter, *supra* note 53.

compliance programs. As of October of this year, registered advisers have begun complying with our new compliance rule, which requires them to implement comprehensive policies and procedures for compliance with the Advisers Act, under the administration of a chief compliance officer.[349] As advisers improve their own compliance regimes, we expect this will facilitate our examination of advisory firms. As discussed in the Proposing Release,[350] another option would be to increase the current threshold for SEC registration from $25 million of assets under management to a slightly higher amount, thereby reducing the number of smaller advisers overseen by the Commission (instead of state securities administrators). Or we could seek additional resources from Congress, if necessary. We are continuing to develop techniques to assess risk.

Our ability to estimate the size of the increase in our workload has been hampered by the absence of any reliable and comprehensive database of hedge funds or advisers to hedge funds. In the Proposing Release, we described our staff's tentative estimates that the addition of new hedge fund advisers to our current registrant pool could increase the total size of this pool by 8 to 15 percent.[351] We received no comment on these estimates.

VI. Paperwork Reduction Act

As we discussed in the Proposing Release, rule 203(b)(3)–2 contains no new ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 to 3520). The rule amendments contain several collections of information requirements, but the amendments do not change the burden per response from that under the current rules. Rule 203(b)(3)–2 will have the effect of requiring most advisers to hedge funds to register with the Commission under the Advisers Act and will therefore increase the number of respondents under several existing collections of information, and, correspondingly, increase the annual aggregate burden under those existing collections of information. The Commission has submitted, to the Office of Management and Budget (''OMB'') in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11, the existing collections of information for which the annual aggregate burden will likely increase as a result of rule 203(b)(3)–2. The titles of the affected collections of information are: ''Form ADV,'' ''Form ADV–W and Rule 203–2,'' ''Rule 203–3 and Form ADV–H,'' ''Form ADV–NR,'' ''Rule 204–2,'' ''Rule 204–3,'' ''Rule 204A–1,'' ''Rule 206(4)–2, Custody of Funds or Securities of Clients by Investment Advisers,'' ''Rule 206(4)–3,'' ''Rule 206(4)–4,'' ''Rule 206(4)–6,'' and ''Rule 206(4)–7,'' all under the Advisers Act. The existing rules affected by rule 203(b)(3)–2 contain currently approved collection of information numbers under OMB control numbers 3235–0049, 3235–0313, 3235–0538, 3235–0240, 3235–0278, 3235–0047, 3235–0596, 3235–0241, 3253–0242, 3235–0345, 3235–0571 and 3235–0585, respectively. 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. All of these collections of information are mandatory, and respondents in each case are investment advisers registered with us, except that (i) respondents to Form ADV are also investment advisers applying for registration with us; (ii) respondents to Form ADV–NR are non-resident general partners or managing agents of registered advisers; (iii) respondents to Rule 204A–1 include ''access persons'' of an adviser registered with us, who must submit reports of their personal trading to their advisory firms; (iv) respondents to Rule 206(4)–2 are only those SEC-registered advisers that have custody of clients' funds or securities; (v) respondents to Rule 206(4)–3 are advisers who pay cash fees to persons who solicit clients for the adviser; (vi) respondents to Rule 206(4)–4 are advisers with certain disciplinary histories or a financial condition that is reasonably likely to affect contractual commitments; and (vii) respondents to Rule 206(4)–6 are only those SEC-registered advisers that vote their clients' securities. Unless otherwise noted below, responses are not kept confidential.

We cannot estimate with precision the number of hedge fund advisers that will be new registrants with the Commission under the Advisers Act after rule 203(b)(3)–2 is adopted. As discussed earlier, our staff has estimated that between 690 and 1,260 hedge fund advisers will be new Advisers Act registrants under the new rule and rule amendments.[352] For purposes of estimating the increases in respondents to the existing collections of information, we have used the midpoint of this estimated range, or 975 new respondents. We received no comments on these estimates.

A. Form ADV

Form ADV is the investment adviser registration form. The collection of information under Form ADV is necessary to provide advisory clients, prospective clients, and the Commission with information about the adviser, its business, and its conflicts of interest. Rule 203–1 requires every person applying for investment adviser registration with the Commission to file Form ADV. Rule 204–1 requires each registered adviser to file amendments to Form ADV at least annually, and requires advisers to submit electronic filings through the IARD. This collection of information is found at 17 CFR 275.203–1, 275.204–1, and 279.1. The currently approved collection of information in Form ADV is 102,653 hours. We estimate that 975 new respondents will file one complete Form ADV and one amendment annually, and comply with Form ADV requirements relating to delivery of the code of ethics. Accordingly, we estimate the new rule will increase the annual aggregate information collection burden under Form ADV by 28,958 hours[353] for a total of 131,611 hours.

B. Form ADV–W and Rule 203–2

Rule 203–2 requires every person withdrawing from investment adviser registration with the Commission to file Form ADV–W. The collection of information is necessary to apprise the Commission of advisers who are no longer operating as registered advisers. This collection of information is found at 17 CFR 275.203–2 and 17 CFR 279.2. The currently approved collection of information in Form ADV–W is 500 hours. We estimate that the 975 hedge fund advisers that will be new registrants will withdraw from SEC registration at a rate of approximately 16 percent per year, the same rate as other registered advisers, and will file for partial and full withdrawals at the same rates as other registered advisers, with approximately half of the filings being full withdrawals and half being partial withdrawals. Accordingly, we estimate the new rule will increase the annual aggregate information collection burden

[349] Rule 206(4)–7. *See Compliance Programs of Investment Companies and Investment Advisers, supra* note 109.

[350] *See* Section V. of the Proposing Release.

[351] Staff estimated that between 690 and 1,260 hedge fund advisers will be new Advisers Act registrants under the new rule and rule amendments. *See* Section V. of the Proposing Release.

[352] *See* Section V. of the Proposing Release.

[353] 975 filings of the complete form at 22.25 hours each, plus 975 amendments at 0.75 hours each, plus 6.7 hours for each of the 975 hedge fund advisers to deliver copies of their codes of ethics to 10 percent of their 670 clients annually who request it, at 0.1 hours per response. $(975 \times 22.25) + (975 \times 0.75) + (975 \times (670 \times 0.1) \times 0.1)$.

under Form ADV–W and rule 203–2 by 78 hours [354] for a total of 578 hours.

C. Rule 203–3 and Form ADV–H

Rule 203–3 requires that advisers requesting either a temporary or continuing hardship exemption submit the request on Form ADV–H. An adviser requesting a temporary hardship exemption is required to file Form ADV–H, providing a brief explanation of the nature and extent of the temporary technical difficulties preventing it from submitting a required filing electronically. Form ADV–H requires an adviser requesting a continuing hardship exemption to indicate the reasons the adviser is unable to submit electronic filings without undue burden and expense. Continuing hardship exemptions are available only to advisers that are small entities. The collection of information is necessary to provide the Commission with information about the basis of the adviser's hardship. This collection of information is found at 17 CFR 275.203–3, and 279.3. The currently approved collection of information in Form ADV–H is 10 hours. We estimate that the approximately 975 hedge fund advisers that will be new registrants will file for temporary hardship exemptions at approximately 0.1 percent per year, the same rate as other registered advisers.[355] Accordingly, we estimate the new rule will increase the annual aggregate information collection burden under Form ADV–H and rule 203–3 by 1 hour [356] for a total of 11 hours.

D. Form ADV–NR

Non-resident general partners or managing agents of SEC-registered investment advisers must make a one-time filing of Form ADV–NR with the Commission. Form ADV–NR requires these non-resident general partners or managing agents to furnish us with a written irrevocable consent and power of attorney that designates the Commission as an agent for service of process, and that stipulates and agrees that any civil suit or action against such person may be commenced by service of process on the Commission. The collection of information is necessary for us to obtain appropriate consent to permit the Commission and other parties to bring actions against non-resident partners or agents for violations of the federal securities laws. This collection of information is found at 17 CFR 279.4. The currently approved collection of information in Form ADV–NR is 15 hours. We estimate that the approximately 975 hedge fund advisers that will be new registrants will make these filings at the same rate (0.2 percent) as other registered advisers. Accordingly, we estimate the new rule will increase the annual aggregate information collection burden under Form ADV–NR by 2 hours [357] for a total of 17 hours.

E. Rule 204–2

Rule 204–2 requires SEC-registered investment advisers to maintain copies of certain books and records relating to their advisory business. The collection of information under rule 204–2 is necessary for the Commission staff to use in its examination and oversight program. Responses provided to the Commission in the context of its examination and oversight program are generally kept confidential.[358] The records that an adviser must keep in accordance with rule 204–2 must generally be retained for not less than five years.[359] This collection of information is found at 17 CFR 275.204–2. The currently approved collection of information for rule 204–2 is 1,537,884 hours, or 191.78 hours per registered adviser. We estimate that all 975 advisers that will be new registrants will maintain copies of records under the requirements of rule 204–2. Accordingly, we estimate the new rule will increase the annual aggregate information collection burden under rule 204–2 by 186,985.5 hours [360] for a total of 1,724,869.5 hours.

F. Rule 204–3

Rule 204–3, the ''brochure rule,'' requires an investment adviser to deliver or offer to prospective clients a disclosure statement containing specified information as to the business practices and background of the adviser. Rule 204–3 also requires that an investment adviser deliver, or offer, its brochure on an annual basis to existing clients in order to provide them with current information about the adviser. The collection of information is necessary to assist clients in determining whether to retain, or continue employing, the adviser. This collection of information is found at 17 CFR 275.204–3. The currently approved collection of information for rule 204–3 is 5,412,643 hours, or 694 hours per registered adviser, assuming each adviser has on average 670 clients. We estimate that all 975 advisers that will be new registrants will provide brochures as required by rule 204–3. Accordingly, we estimate the new rule will increase the annual aggregate information collection burden under rule 204–3 by 676,650 hours [361] for a total of 6,089,293 hours. We note that the average number of clients per adviser reflects a small number of advisers who have thousands of clients, while the typical SEC-registered adviser has approximately 76 clients. We requested, but did not receive, comments on the number of clients of the average hedge fund adviser.

G. Rule 204A–1

Rule 204A–1 requires SEC-registered investment advisers to adopt codes of ethics setting forth standards of conduct expected of their advisory personnel and addressing conflicts that arise from personal securities trading by their personnel, and requiring advisers' ''access persons'' to report their personal securities transactions. The collection of information under rule 204A–1 is necessary to establish standards of business conduct for supervised persons of investment advisers and to facilitate investment advisers' efforts to prevent fraudulent personal trading by their supervised persons. This collection of information is found at 17 CFR 275.204A–1. The currently approved collection of information for rule 204A–1 is 945,841 hours, or 117.95 hours per registered adviser. We estimate that all 975 advisers that will be new registrants will adopt codes of ethics under the requirements of rule 204A–1 and require personal securities transaction reporting by their ''access persons.'' Accordingly, we estimate the new rule will increase the annual aggregate information collection burden under rule 204A–1 by 115,001 hours [362] for a total of 1,060,842 hours.

H. Rule 206(4)–2

Rule 206(4)–2 requires advisers with custody of their clients' funds and securities to maintain controls designed to protect those assets from being lost, misused, misappropriated, or subjected to financial reverses of the adviser. The collection of information under rule 206(4)–2 is necessary to ensure that clients' funds and securities in the

[354] 156 filings (975 × 0.16), consisting of 78 full withdrawals at 0.75 hours each and 78 partial withdrawals at 0.25 hours each.

[355] We expect that no hedge fund advisers would be small advisers that would be eligible to file for a continuing hardship exemption.

[356] 1 filing (975 × 0.001) at 1 hour each.

[357] 2 filings (975 × 0.002) at 1 hour each.

[358] *See* section 210(b) of the Advisers Act [15 U.S.C. 80b–10(b)].

[359] *See* rule 204–2(e).

[360] 975 hedge fund advisers x 191.78 hours per adviser = 186,985.5 hours.

[361] 975 hedge fund advisers times 694 hours per adviser.

[362] 975 hedge fund advisers at 117.95 hours per adviser annually.

custody of advisers are safeguarded, and staff of the Commission uses information contained in the collections in its enforcement, regulatory, and examination programs. This collection of information is found at 17 CFR 275.206(4)–2. The currently approved collection of information for rule 206(4)–2 is 72,113 hours. We estimate that all 975 hedge fund advisers that will be new registrants will have custody. Advisers to pooled investment vehicles such as hedge funds may distribute audited financial statements to their investors annually in lieu of quarterly account statements sent by either the adviser or a qualified custodian. We are amending rule 206(4)–2 to make it easier for advisers to funds of hedge funds to use this approach. We estimate that all 975 new respondents will use this approach and will not be required to undergo an annual surprise examination. Accordingly, we estimate the new rule will increase the annual aggregate information collection burden under rule 206(4)–2 by 326,625 hours [363] for a total of 398,738 hours.

I. Rule 206(4)–3

Rule 206(4)–3 requires advisers who pay cash fees to persons who solicit clients for the adviser to observe certain procedures in connection with solicitation activity. The collection of information under rule 206(4)–3 is necessary to inform advisory clients about the nature of a solicitor's financial interest in the recommendation of an investment adviser, so the client may consider the solicitor's potential bias, and to protect investors against solicitation activities being carried out in a manner inconsistent with the adviser's fiduciary duties. This collection of information is found at 17 CFR 275.206(4)–3. The currently approved collection of information for rule 206(4)–3 is 10,982 hours. We estimate that approximately 20 percent of the 975 hedge fund advisers that will be new registrants will be subject to the cash solicitation rule, the same rate as other registered advisers. Accordingly, we estimate the new rule will increase the annual aggregate information collection burden under rule 206(4)–3 by 1,373 hours [364] for a total of 12,355 hours.

J. Rule 206(4)–4

Rule 206(4)–4 requires registered investment advisers to disclose to clients and prospective clients certain disciplinary history or a financial condition that is reasonably likely to affect contractual commitments. This collection of information is necessary for clients and prospective clients in choosing an adviser or continuing to employ an adviser. This collection of information is found at 17 CFR 275.206(4)–4. The currently approved collection of information for rule 206(4)–4 is 10,118 hours. We estimate that approximately 17.3 percent of the 975 hedge fund advisers that will be new registrants will be subject to rule 206(4)–4, the same rate as other registered advisers. Accordingly, we estimate the new rule will increase the annual aggregate information collection burden under rule 206(4)–4 by 1,265 hours [365] for a total of 11,383 hours.

K. Rule 206(4)–6

Rule 206(4)–6 requires an investment adviser that votes client securities to adopt written policies reasonably designed to ensure that the adviser votes in the best interests of clients, and requires the adviser to disclose to clients information about those policies and procedures. This collection of information is necessary to permit advisory clients to assess their adviser's voting policies and procedures and to monitor the adviser's performance of its voting responsibilities. This collection of information is found at 17 CFR 275.206(4)–6. The currently approved collection of information for rule 206(4)–6 is 103,590 hours. We estimate that all 975 hedge fund advisers that will be new registrants will vote their clients' securities. Accordingly, we estimate the new rule will increase the annual aggregate information collection burden under rule 206(4)–6 by 16,283 hours [366] for a total of 119,873 hours.

L. Rule 206(4)–7

Rule 206(4)–7 requires each registered investment adviser to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act, review those policies and procedures annually, and designate an individual to serve as chief compliance officer. This collection of information under rule 206(4)–7 is necessary to ensure that investment advisers maintain comprehensive internal programs that promote the advisers' compliance with the Advisers Act. This collection of information is found at 17 CFR 275.206(4)–7. The currently approved collection of information for rule 206(4)–7 is 623,200 hours, or 80 hours annually per registered adviser. We estimate all 975 advisers that will be new registrants will be required to maintain compliance programs under rule 206(4)–7. Accordingly, we estimate the new rule will increase the annual aggregate information collection burden under rule 206(4)–7 by 78,000 hours [367] for a total of 701,200 hours.

VII. Effects on Competition, Efficiency and Capital Formation

Section 202(c) of the Advisers Act mandates that the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[368]

As discussed above, rule 203(b)(3)–2 will, in effect, require most hedge fund advisers to register with the Commission under the Advisers Act. The new rule is designed to provide the protection afforded by the Advisers Act to investors in hedge funds, and to enhance the Commission's ability to protect our nation's securities markets. We are also adopting rule amendments that will facilitate hedge fund advisers' transition to registration and improve the Commission's ability to identify hedge fund advisers from information filed on their Form ADV. The new rule and rule amendments may indirectly increase efficiency for hedge fund investors. Hedge fund adviser registration will provide hedge fund investors and industry participants with better access to important basic information about hedge fund advisers and the hedge fund industry. This improved access may allow investors to investigate and select their advisers more efficiently.

We do not anticipate that the new rule will introduce any competitive disadvantages. The new rule may provide a level playing field with respect to advisers' compliance infrastructures. Many hedge fund advisers are already registered with us, either because their investors demand it or because they have other advisory business that requires them to register. These registered advisers must adopt compliance procedures under the

[363] 975 hedge fund advisers times 670 clients times 0.5 hours per annual financial statement distribution.

[364] 195 respondents (975 × 0.2) at 7.04 hours annually per respondent.

[365] 169 respondents (975 × 0.173) at 7.5 hours annually per respondent.

[366] We estimate that 975 hedge fund advisers will spend 10 hours each annually documenting their voting policies and procedures, and will provide copies of those policies and procedures to 10 percent of their 670 clients annually at 0.1 hours per response.

[367] 975 hedge fund advisers at 80 hours per adviser annually.

[368] 15 U.S.C. 80b–2(c).

Advisers Act and must provide certain safeguards to their clients, including their hedge fund investors. While some unregistered hedge fund advisers have adopted sound comparable compliance procedures, others have not. Mandatory registration will require that all hedge fund advisers compete with each other and with other investment advisers on the same basis in this regard. The amendment to rule 204–2 is designed to prevent newly-registered hedge fund advisers from being at a competitive disadvantage with respect to the promotion of their previous performance records, and the amendment to rule 206(4)–2 is designed to allow advisers to funds of hedge funds to use the same approach under the adviser custody rule as do advisers to other pooled investment vehicles.

Some hedge fund advisers may elect to limit the number of investors in their funds, or limit their total assets under management in order to avoid registration under the Advisers Act. To the extent that certain hedge fund advisers choose not to expand their business, some investors may not be able to place their assets with particular advisers; on the other hand, a hedge fund adviser's decision not to expand its business may make it easier for other advisers to enter the market.

The new rule is unlikely to have a substantial effect on capital formation. To the extent that registration and the prospect of Commission examinations improves the compliance culture at hedge fund advisory firms, it may bolster investor confidence and investors may be more likely to entrust hedge fund advisers with their assets for investment. However, these assets may be diverted from other investments in the capital markets.

VIII. Regulatory Flexibility Act

A. Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act,[369] the Commission hereby certifies that rule 203(b)(3)–2 and the amendments to rules 203(b)(3)–1, 203A–3, 204–2, 205–3, 222–2 and Form ADV will not have a significant economic impact on a substantial number of small entities. Under Commission rules, for the purposes of the Advisers Act and the Regulatory Flexibility Act, an investment adviser generally is a small entity if it: (i) Has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had $5 million or more on the last day of its most recent fiscal year.[370]

Rule 203(b)(3)–2 and the amendment to rule 203(b)(3)–1 will remove a safe harbor and require certain advisers to private funds to register with the Commission under the Advisers Act by requiring them to count investors in the fund as clients for purposes of the Advisers Act ''de minimis'' exemption from registration. Notwithstanding the new rule, investment advisers with assets under management of less than $25 million will remain generally ineligible for registration with the Commission under section 203A of the Advisers Act.[371] The amendments to rule 203A–3 and 222–2 clarify that advisers may continue to rely on rule 203(b)(3)–1's safe harbor when counting clients for purposes of rules that affect state licensing and registration. The amendments to rules 204–2 and 205–3 will allow advisers affected by the new rule to continue certain marketing practices and performance fees they now have in place. The amendment to Form ADV will require advisers to private funds to identify themselves as such. No other entities will incur obligations from the new rule and amendments. Accordingly, the Commission certifies that rule 203(b)(3)–2 and the amendments to rules 203(b)(3)–1, 203A–3, 204–2, 205–3, 222–2, and Form ADV will not have a significant economic impact on a substantial number of small entities.

B. Amendment to Rule 206(4)–2

The Commission has prepared the following Final Regulatory Flexibility Analysis (''FRFA'') regarding the amendment to rule 206(4)–2 in accordance with section 3(a) of the Regulatory Flexibility Act.[372]

1. Reasons for Action

We are amending rule 206(4)–2, the adviser custody rule, to accommodate advisers to private funds of funds, including funds of hedge funds.[373] Under the rule, advisers to pooled investment vehicles may satisfy their obligation to deliver custody account information to investors by distributing the pool's audited financial statements to investors within 120 days of the pool's fiscal year-end.[374] Some advisers to private funds of funds (including funds of hedge funds) have encountered difficulty in obtaining completion of their fund audits prior to completion of the audits for the underlying funds in which they invest, and as a practical matter will be prevented from complying with the 120-day deadline. We amended the rule to extend the period for funds of funds to distribute their audited financial statements to their investors from 120 days to 180 days, so that advisers to funds of hedge funds may comply with the rule.[375]

2. Objectives and Legal Basis

The objective of the amendment to rule 206(4)–2 is to make the rule requirements easier to comply with for advisers to private funds of funds such as funds of hedge funds. Section IX of this Release lists the statutory authority for the amendment.

3. Small Entities Subject to Rule

The Commission estimates that as of June 30, 2004,[376] approximately 490 SEC-registered investment advisers that would be affected by the amendment to the rule were small entities for purposes of the Advisers Act and the Regulatory Flexibility Act.[377]

4. Reporting, Record-keeping, and Other Compliance Requirements

The amendment will impose no new reporting, record-keeping or other compliance requirements. To the contrary, the amendment will provide all advisers, big or small, that advise funds of funds with the opportunity to reduce the burdens they incur complying with the present rule's requirements to send pools' audited financial statements to their investors within 120 days.

[369] 5 U.S.C. 605(b)

[370] Rule 0–7(a) [17 CFR 275.0–7(a)].

[371] 15 U.S.C. 80b–3A.

[372] 5 U.S.C. 603(a).

[373] Rule 206(4)–2.

[374] Rule 206(4)–2(b)(3).

[375] We initially proposed to extend the period for all investment advisers. Commenters pointed out that such extension would leave the advisers to funds of funds in the same situation, *i.e.*, the underlying hedge funds would use the entire 180-day period, and the advisers to the funds of funds would have no time to prepare financial statements for the funds of funds after they receive the financial statements from underlying hedge funds.

[376] This estimate is based on the information provided by SEC-registered advisers in Form ADV, Part 1A.

[377] *See* Section VIII.A. of this Release for the definition of a small entity. Unlike the other rules and amendments the Commission is proposing today, the scope of the amendment to rule 206(4)–2 is not limited to hedge fund advisers that would be subject to registration requirements under rule 203(b)(3)–2.

5. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission believes that there are no rules that duplicate, overlap, or conflict with the amendment.

6. Significant Alternatives

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that will accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the new rule, the Commission considered the following alternatives: (a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (c) the use of performance rather than design standards; and (d) an exemption from coverage of the amendment for such small entities.

The overall impact of the amendment is to decrease regulatory burdens on advisers; small advisers, as well as large ones, will benefit from the new rule. Moreover, the amendment achieves the rule's objectives through alternatives that are already consistent in large part with advisers' current custodial practices. For these reasons, alternatives to the amendment are unlikely to minimize any impact that the new rule may have on small entities. The 180-day rule cannot be further clarified, or improved by the use of a performance standard. Regarding exemption from coverage of the rule amendment, or any part thereof, for small entities, such an exemption will deprive small entities of the burden relief provided by the amendment.

IX. Statutory Authority

We are adopting new rule 203(b)(3)–2 and amendments to rule 203(b)(3)–1, rule 203A–3, rule 204–2, rule 205–3, rule 206(4)–2, rule 222–2 and Form ADV pursuant to our authority under section 19(a) of the Securities Act of 1933,[378] sections 23(a) and 28(e)(2) of the Securities Exchange Act of 1934,[379] section 319(a) of the Trust Indenture Act of 1939,[380] section 38(a) of the Investment Company Act of 1940,[381] and sections 202(a)(17), 203, 204, 205(e), 206(4), 206A, 208(d) and 211(a) of the Advisers Act.[382] Section 211(a) gives us authority to classify, by rule, persons and matters within our jurisdiction and to prescribe different requirements for different classes of persons, as necessary or appropriate to the exercise of our authority under the Act.[383] Our authority is described in more detail in Section II.C of this Release.

[378] 15 U.S.C. 77s(a).

[379] 15 U.S.C. 78w(a) and 78bb(e)(2).

[380] 15 U.S.C. 77sss(a).

[381] 15 U.S.C. 80a–37(a).

[382] 15 U.S.C. 80b–2(a)(17), 80b–3, 80b–4, 80b–6(4) and 80b–11(a).

[383] Section 211(a) also provides that ''the Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon the Commission * * *.''

Text of Rule, Rule Amendments and Form Amendments

List of Subjects in 17 CFR Parts 275 and 279

Investment Advisers, Reporting and recordkeeping requirements, Securities.

■ For reasons set forth in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 1. The general authority citation for Part 275 continues to read as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(F), 80b–2(a)(17), 80b–3, 80b–4, 80b–4a, 80b–6(4), 80b–6a, and 80b–11, unless otherwise noted.

* * * * *

■ 2. Section 275.203(b)(3)–1 is revised to read as follows:

§ 275.203(b)(3)–1 Definition of ''client'' of an investment adviser.

Preliminary Note to § 275.203(b)(3)–1. This section is a safe harbor and is not intended to specify the exclusive method for determining who may be deemed a single client for purposes of section 203(b)(3) of the Act. Under paragraph (b)(6) of this section, the safe harbor is not available with respect to private funds.

(a) *General.* You may deem the following to be a single client for purposes of section 203(b)(3) of the Act (15 U.S.C. 80b–3(b)(3)):

(1) A natural person, and:

(i) Any minor child of the natural person;

(ii) Any relative, spouse, or relative of the spouse of the natural person who has the same principal residence;

(iii) All accounts of which the natural person and/or the persons referred to in this paragraph (a)(1) are the only primary beneficiaries; and

(iv) All trusts of which the natural person and/or the persons referred to in this paragraph (a)(1) are the only primary beneficiaries;

(2)(i) A corporation, general partnership, limited partnership, limited liability company, trust (other than a trust referred to in paragraph (a)(1)(iv) of this section), or other legal organization (any of which are referred to hereinafter as a ''legal organization'') to which you provide investment advice based on its investment objectives rather than the individual investment objectives of its shareholders, partners, limited partners, members, or beneficiaries (any of which are referred to hereinafter as an ''owner''); and

(ii) Two or more legal organizations referred to in paragraph (a)(2)(i) of this section that have identical owners.

(b) *Special rules.* For purposes of this section:

(1) You must count an owner as a client if you provide investment advisory services to the owner separate and apart from the investment advisory services you provide to the legal organization, *provided, however,* that the determination that an owner is a client will not affect the applicability of this section with regard to any other owner;

(2) You are not required to count an owner as a client solely because you, on behalf of the legal organization, offer, promote, or sell interests in the legal organization to the owner, or report periodically to the owners as a group solely with respect to the performance of or plans for the legal organization's assets or similar matters;

(3) A limited partnership or limited liability company is a client of any general partner, managing member or other person acting as investment adviser to the partnership or limited liability company;

(4) You are not required to count as a client any person for whom you provide investment advisory services without compensation;

(5) If you have your principal office and place of business outside the United States, you are not required to count clients that are not United States residents, but if your principal office and place of business is in the United States, you must count all clients;

(6) You may not rely on paragraph (a)(2)(i) of this section with respect to any private fund as defined in paragraph (d) of this section; and

(7) For purposes of paragraph (b)(5) of this section, a client who is an owner of a private fund is a resident of the place at which the client resides at the time of the client's investment in the fund.

(c) *Holding out.* If you are relying on this section, you shall not be deemed to be holding yourself out generally to the

public as an investment adviser, within the meaning of section 203(b)(3) of the Act (15 U.S.C. 80b–3(b)(3)), solely because you participate in a non-public offering of interests in a limited partnership under the Securities Act of 1933.

(d) *Private fund.* (1) A private fund is a company:

(i) That would be an investment company under section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(a)) but for the exception provided from that definition by either section 3(c)(1) or section 3(c)(7) of such Act (15 U.S.C. 80a–3(c)(1) or (7));

(ii) That permits its owners to redeem any portion of their ownership interests within two years of the purchase of such interests; and

(iii) Interests in which are or have been offered based on the investment advisory skills, ability or expertise of the investment adviser.

(2) Notwithstanding paragraph (d)(1) of this section, a company is not a private fund if it permits its owners to redeem their ownership interests within two years of the purchase of such interests only in the case of:

(i) Events you find after reasonable inquiry to be extraordinary; and

(ii) Interests acquired through reinvestment of distributed capital gains or income.

(3) Notwithstanding paragraph (d)(1) of this section, a company is not a private fund if it has its principal office and place of business outside the United States, makes a public offering of its securities in a country other than the United States, and is regulated as a public investment company under the laws of the country other than the United States.

■ 3. Section 275.203(b)(3)–2 is added to read as follows:

§ 275.203(b)(3)–2 Methods for counting clients in certain private funds.

(a) For purposes of section 203(b)(3) of the Act (15 U.S.C. 80b–3(b)(3)), you must count as clients the shareholders, limited partners, members, or beneficiaries (any of which are referred to hereinafter as an ''owner'') of a private fund as defined in paragraph (d) of section 275.203(b)(3)–1, unless such owner is your advisory firm or a person described in paragraph (d)(1)(iii) of section 275.205–3.

(b) If you provide investment advisory services to a private fund in which an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 to 80a–64) is, directly or indirectly, an owner, you must count the owners of that investment company as clients for purposes of section 203(b)(3) of the Act (15 U.S.C. 80b–3(b)(3)).

(c) If you have your principal office and place of business outside the United States, you may treat a private fund that is organized or incorporated under the laws of a country other than the United States as your client for all purposes under the Act, other than sections 203, 204, 206(1) and 206(2) (15 U.S.C. 80b–3, 80b–4, 80b–6(1) and (2)).

■ 4. Section 275.203A–3 is amended by revising paragraph (a)(4) to read as follows:

§ 275.203A–3 Definitions.

(a) * * *

(4) Supervised persons may rely on the definition of ''client'' in § 275.203(b)(3)–1, without giving regard to paragraph (b)(6) of that section, to identify clients for purposes of paragraph (a)(1) of this section, except that supervised persons need not count clients that are not residents of the United States.

* * * * *

■ 5. Section 275.204–2 is amended by:

■ (a) Redesignating paragraph (e)(3) as (e)(3)(i); and

■ (b) Adding paragraphs (e)(3)(ii) and (l).

The additions read as follows:

§ 275.204–2 Books and records to be maintained by investment advisers.

* * * * *

(e) * * *

(3)(i) * * *

(ii) *Transition rule.* If you are an investment adviser to a private fund as that term is defined in § 275.203(b)(3)–1, and you were exempt from registration under section 203(b)(3) of the Act (15 U.S.C. 80b–3(b)(3)) prior to February 10, 2005, paragraph (e)(3)(i) of this section does not require you to maintain or preserve books and records that would otherwise be required to be maintained or preserved under the provisions of paragraph (a)(16) of this section to the extent those books and records pertain to the performance or rate of return of such private fund or other account you advise for any period ended prior to February 10, 2005, provided that you were not registered with the Commission as an investment adviser during such period, and provided further that you continue to preserve any books and records in your possession that pertain to the performance or rate of return of such private fund or other account for such period.

* * * * *

(l) *Records of private funds.* If an investment adviser subject to paragraph (a) of this section advises a private fund (as defined in § 275.203(b)(3)–1), and the adviser or any related person (as defined in Form ADV (17 CFR 279.1)) of the adviser acts as the private fund's general partner, managing member, or in a comparable capacity, the books and records of the private fund are records of the adviser for purposes of section 204 of the Act (15 U.S.C. 80b–4).

6. Section 275.205–3 is amended by redesignating paragraph (c) as (c)(1) and adding paragraph (c)(2) to read as follows:

§ 275.205–3 Exemption from the compensation prohibition of section 205(a)(1) for investment advisers.

* * * * *

(c)(1) * * *

(2) *Advisers to private funds with non-qualified investors.* If you are an investment adviser to a private investment company that is a private fund as that term is defined in § 275.203(b)(3)–1, and you were exempt from registration under section 203(b)(3) of the Act (15 U.S.C. 80b–3(b)(3)) prior to February 10, 2005, paragraph (b) of this section will not apply to the existing account of any equity owner of a private investment company who was an equity owner of that company prior to February 10, 2005.

(3) *Advisers to private funds with non-qualified clients.* If you are an investment adviser to a private investment company that is a private fund as that term is defined in § 275.203(b)(3)–1, and you were exempt from registration under section 203(b)(3) of the Act (15 U.S.C. 80b–3(b)(3)) prior to February 10, 2005, section 205(a)(1) of the Act (15 U.S.C. 80b–5(a)(1)) will not apply to any investment advisory contract you entered into prior to February 10, 2005, provided, however, that this paragraph will not apply with respect to any contract to which a private investment company is a party, and provided further that section 205(a)(1) of the Act will apply with respect to any natural person or company who is not a party to the contract prior to and becomes a party to the contract on or after February 10, 2005.

* * * * *

■ 7. Section 275.206(4)–2 is amended by revising paragraph (b)(3) and adding paragraph (c)(4) to read as follows:

§ 275.206(4)–2 Custody of funds or securities of clients by investment advisers.

* * * * *

(b) * * *

(3) *Limited partnerships subject to annual audit.* You are not required to comply with paragraph (a)(3) of this section with respect to the account of a

limited partnership (or limited liability company, or another type of pooled investment vehicle) that is subject to audit (as defined in section 2(d) of Article 1 of Regulation S–X (17 CFR 210.1–02(d)) at least annually and distributes its audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners (or members or other beneficial owners) within 120 days of the end of its fiscal year, or in the case of a fund of funds within 180 days of the end of its fiscal year; and

* * * * *

(c) * * *

(4) *Fund of funds* means a limited partnership (or limited liability company, or another type of pooled investment vehicle) that invests 10 percent or more of its total assets in other pooled investment vehicles that are not, and are not advised by, a related person (as defined in Form ADV (17 CFR 279.1)), of the limited partnership, its general partner, or its adviser.

■ 8. Section 275.222–2 is revised to read as follows:

§ 275.222–2 Definition of ''client'' for purposes of the national de minimis standard.

For purposes of section 222(d)(2) of the Act (15 U.S.C. 80b–18a(d)(2)), an investment adviser may rely upon the definition of ''client'' provided by section 275.203(b)(3)–1 without giving regard to paragraph (b)(6) of that section.

PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

■ 9. The authority citation for Part 279 continues to read as follows:

Authority: The Investment Advisers Act of 1940, 15 U.S.C. 80b–1, *et seq.*

■ 10. Form ADV (referenced in § 279.1) is amended by:

■ a. In Part 1A, Item 7, revising Item 7B; and

■ b. In Schedule D, revising Section 7.B.

The revisions read as follows:

Note: The text of Form ADV does not and this amendment will not appear in the Code of Federal Regulations.

Form ADV

* * * * *

Part 1A

* * * * *

Item 7 Financial Industry Affiliations

* * * * *

B. Are you or any related person a general partner in an investment-related limited partnership or manager of an investment-related limited liability company, or do you advise any other ''private fund,'' as defined under SEC rule 203(b)(3)–1? ☐ Yes ☐ No

If ''yes,'' for each limited partnership, limited liability company, or (if applicable) private fund, complete Section 7.B. of Schedule D. If, however, you are an SEC-registered adviser *and* you have related persons that are *SEC-registered advisers* who are the general partners of limited partnerships or the managers of limited liability companies, you do not have to complete Section 7.B. of Schedule D with respect to those related advisers' limited partnerships or limited liability companies.

To use this alternative procedure, you must state in the Miscellaneous Section of Schedule D: (1) that you have related SEC-registered investment advisers that manage limited partnerships or limited liability companies that are not listed in Section 7.B. of your Schedule D; (2) that complete and accurate information about those limited partnerships or limited liability companies is available in Section 7.B. of Schedule D of the Form ADVs of your related SEC-registered advisers; and (3) whether your clients are solicited to invest in any of those limited partnerships or limited liability companies.

* * * * *

Schedule D

* * * * *

SECTION 7.B. Limited Partnership or Other Private Fund Participation

You must complete a separate Schedule D Page 4 for each limited partnership in which you or a related person is a general partner, each limited liability company for which you or a related person is a manager, and each other private fund that you advise.

Check only one box:

☐ Add ☐ Delete ☐ Amend

_____

Name of Limited Partnership, Limited Liability Company, or other Private Fund:

_____

Name of General Partner or Manager:

If you are registered or registering with the SEC, is this a ''private fund'' as defined under SEC rule 203(b)(3)–1?

☐ Yes ☐ No

Are your clients solicited to invest in the limited partnership, limited liability company or other private fund?

☐ Yes ☐ No

Approximately what percentage of your clients have invested in this limited partnership, limited liability company, or other private fund?

_____%

Minimum investment commitment required of a limited partner, member, or other investor:

$_____

Current value of the total assets of the limited partnership, limited liability company, or other private fund:

$_____

Dated: December 2, 2004.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

Dissent of Commissioners Cynthia A. Glassman and Paul S. Atkins to the Registration Under the Advisers Act of Certain Hedge Fund Advisers

Four months ago, the majority proposed to regulate hedge fund advisers over our dissent.[1] We were nevertheless hopeful that a careful review of commentary on the proposal would convince the majority, instead of taking further action on this proposal, to consider better alternatives. Our hope was fueled by the fact that many commenters offered excellent insights and recommendations to the Commission. We are disappointed that the majority, unmoved by the chorus of credible concerns from diverse voices,[2] has determined to adopt the hedge fund registration rules largely as proposed.[3] As discussed below, we continue to agree that we need more information on hedge funds, but we disagree with the majority's solution.

Our main concerns with this rulemaking can be broadly divided into the following categories:

- There are many viable alternatives to this rulemaking that should have been considered.

The needed information about hedge funds can be obtained from other sources, including other regulators and market participants, as well as through a notice and filing requirement. The Commission should have collected and analyzed the existing information and determined what new information would be useful *before* imposing mandatory registration. Further, the Commission has failed to demonstrate that this is the least burdensome and most effective way to accomplish its objective.

- The pretext for the rule does not withstand scrutiny.

Just last year, the staff found that fraud was not rampant in the hedge fund industry, and that retailization was not a concern. Nonetheless, the majority repeatedly asserts

[1] Registration Under the Advisers Act of Certain Hedge Fund Advisers, Investment Advisers Act Release No. 2266 (July 20, 2004) [69 FR 45172 (July 28, 2004)] (''Proposing Release'').

[2] In addition to the many comments the Commission received, the diversity of voices is illustrated by the appearance of editorials opposing the rulemaking in the *New York Times, Wall Street Journal,* and *Washington Post. See Hands off Hedge Funds,* Wash. Post, B6, July 18, 2004; *Reforming Hedge Funds,* N.Y. Times, D12, June 27, 2004; *The SEC's Expanding Empire,* Wall St. J., A14, July 13, 2004.

[3] Registration Under the Advisers Act of Certain Hedge Fund Advisers, Investment Advisers Act Release No. 2333 (Dec. 2, 2004) (''Adopting Release'').

that these issues justify imposition of the rulemaking. The fallacy of the majority's approach is apparent when one notes that registration of hedge fund advisers would not have prevented the enforcement cases cited by the majority, and the rulemaking will have the perverse effect of promoting, rather than inhibiting, retailization.

• The Commission's limited resources will be diverted.

At the open meeting, Chairman Donaldson stated that a task force had been constituted to identify hedge fund risks and implied that the task force would develop a targeted examination model. However, the task force should have completed its work prior to the promulgation of this rulemaking, so that it could be specifically tailored to address actual, as opposed to hypothetical, concerns. Under this rulemaking, the Commission will have to allocate its limited resources to inspect more than 1,000 additional advisers. Our concerns about the misuse of resources were validated when, just two days after the open meeting, the staff stated that, if the Commission cannot undertake its new examination responsibilities, it has in its ''back pocket'' the ability to shift resources from oversight of small advisers.[4] This possible shift should have been raised during the open meeting and weighed by the Commission in deciding whether to adopt the rule.

Our concerns are addressed in detail below.

I. The Information That the Commission Needs can be Obtained From Other Sources

We share the majority's objective of getting better information about hedge funds and would support alternative measures such as pooling of information from Commission registrants and other government agencies and self-regulatory organizations that collect data on hedge funds, enhanced oversight of existing registrants, a census of all hedge funds, and requiring additional periodic and systematic information to be filed with us. Although the majority anticipates without specificity that ''registration would provide the Congress, the Commission and other government agencies with important information,'' Form ADV is unlikely to provide the information that the Commission needs. Before taking an action of the magnitude of this final rule, the Commission should have determined the information that it needs and worked with its fellow regulators and affected parties to obtain this information. Instead, the process by which the rule was proposed and adopted discouraged a true exchange of ideas about the proposed approach and alternatives.[5]

A. Coordination With Other Regulators Should Have Been a Prerequisite to Unilateral Commission Action

Before adopting this rulemaking, the Commission should have coordinated with other government entities to aggregate the information that is available. The majority correctly notes that such information is not gathered in one convenient place, but we could work with other regulators to improve our and other agencies' access to information.[6] The Commission also could explore ways of expanding the form that the Department of Treasury has proposed to require all unregistered advisers to file as part of its anti-money laundering program for investment advisers.[7]

The majority approved the rulemaking three weeks after Congressman Baker, Chairman of the House Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, asked the President's Working Group on Financial Markets (''PWG'')[8] to work out a data sharing agreement before the Commission proceeded with its rule.[9] Because the regulation of hedge funds has broad market implications, any regulatory requirement would be more appropriately addressed as part of a collaborative effort among the members of the PWG, all of whom apparently have concerns with our proposal.[10] In 1999 after the near collapse of Long Term Capital Management, the PWG issued a report that concluded that ''requiring hedge fund managers to register as investment advisers would not seem to be an appropriate method to monitor hedge fund activity.'' [11] We agree with Chairman Greenspan that nothing has changed since then to warrant a different conclusion.[12]

The majority justifies going forward in the face of such opposition by arguing that the

---

[4] *See* Robert Schmidt, *Hedge Fund Rule May Cause SEC to Drop Smaller Firms, Roye Says,* Bloomberg (Oct. 28, 2004).

[5] Such a major shift in the Commission's regulatory approach warranted a significantly longer comment and comment review period than we afforded it. The proposal appeared in the **Federal Register** on July 28, 2004, and comments were due by September 15, 2004. Concerned about the brevity of the comment period and its inopportune timing during the vacation month of August, ten commenters requested a reasonable extension, but no extension was granted.

Moreover, once the comment period closed, the staff did not prepare a formal summary analyzing the issues raised by the more than 160 comment letters, most of which opposed the rule. Such summaries are standard procedure for rulemakings of this significance, because the summaries help ensure that the comments are considered by the commissioners and staff. The abbreviated discussion of the comment letters in the adopting release is not a sufficient substitute for a comment summary that is prepared before drafting the release to assist the Commission in deciding whether to adopt a proposed rulemaking and, if so, whether to make any changes.

The majority seems to have concluded that it had already heard all perspectives at the Commission's roundtable on hedge funds in May of 2003 and through the subsequent staff study. See Securities and Exchange Commission, Hedge Fund Roundtable (May 14–15, 2003) (transcript and webcast available at: *http://www.sec.gov/spotlight/hedgefunds.htm*) (''Roundtable''); Implications of the Growth of Hedge Funds, Staff Report to the United States Securities and Exchange Commission (Sept. 2003) (available at: *http://www.sec.gov/news/studies/hedgefunds0903.pdf*) (''2003 Staff Hedge Fund Report''). However, the roundtable and staff study disproved the existence of the problems that some thought might be found in the hedge fund industry. Consequently, the public did not have sufficient notice that a rulemaking would be forthcoming, much less of the specifics of the proposed rulemaking.

[6] The Commodity Futures Trading Commission (''CFTC''), for example, has offered to enter into an information-sharing arrangement with the Commission and other relevant agencies. *See* Comment Letter of the CFTC (Oct. 22, 2004). The National Futures Association, which is a self-regulatory organization for the futures industry, likewise offered to share the information that it collects about hedge funds. *See* Comment Letter of the National Futures Association (Sept. 14, 2004).

[7] Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Investment Advisers, 68 FR 23646 (May 5, 2003). The proposed rule would apply to, among others, any adviser that has at least $30 million in assets under management and is exempt from registration under section 203(b)(3) of the Investment Advisers Act [15 U.S.C. 80b–3(b)(3)], unless it is otherwise required to have an anti-money laundering program and is subject to examination by a federal regulator. *See* section 103.50(a)(2) of the proposed rule. [31 CFR 103.50(a)(2)]. As proposed, the form is intended to identify unregistered advisers, but the Commission could work with the Department of Treasury to tailor the form to elicit the information that the Commission determines that it needs.

[8] The President's Working Group is made up the heads of the Treasury, the Federal Reserve Board, the CFTC, and the SEC.

[9] *See* Letter from Congressman Richard H. Baker to John Snow, Chairman of the President's Working Group on Financial Markets (Oct. 7, 2004). Oddly, the majority cites this letter, the existence of which we learned about the day before the Open Meeting for this rulemaking, in support of the proposition that ''During and after the comment period, our staff has continued to have discussions with other regulators relating to hedge fund adviser regulation.'' Adopting Release at n. 55.

[10] *See, e.g.*, Alan Greenspan, Chairman, Federal Reserve Board, Testimony before the Senate Banking, Housing and Urban Affairs Committee (July 20, 2004) (''My problem with the SEC's current initiative is that the initiative cannot accomplish what it seeks to accomplish. Fraud and market manipulation will be very difficult to detect from the information provided by registration under the 1940 Act.''); Comment Letter of the CFTC (Oct. 22, 2004) (requesting exemption for CFTC-registered advisers that ''would be complemented by a formal information sharing agreement between the CFTC and SEC related to CFTC-registered CPOs and CTAs''); Judith Burns, *Split SEC Set to Vote on Tighter Hedge Fund Oversight*, Dow Jones News Service, Oct. 25, 2004 (''Federal Reserve Chairman Alan Greenspan and Treasury Secretary John Snow worry that more regulation won't prevent fraud and could reduce benefits that hedge funds bring to markets.'').

[11] Hedge Funds, Leverage, and the Lessons of Long-Term Capital Management—Report of the President's Working Group on Financial Markets, at B–16 (Apr. 1999) (available at: *http://www.treas.gov/press/releases/reports/hedgfund.pdf*) (the Council of Economic Advisers, the Federal Deposit Insurance Corporation, the National Economic Council, the Federal Reserve Bank of New York, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision also participated in the study and supported its conclusions and recommendations). The majority contends that the report did not focus on issues relevant to the Commission's administration of the Advisers Act, but rather on ''the stability of financial markets and the exposure of banks and other financial institutions to the counterparty risks of dealing with highly leveraged entities.'' Adopting Release at n. 43. The Commission cannot protect the nation's securities markets without considering the effect of its rules on the stability of the financial markets.

[12] *See* Alan Greenspan, Chairman, Federal Reserve Board, Written Responses to Questions from Chairman Shelby in Connection with Testimony before the Senate Banking, Housing and Urban Affairs Committee, at 3 (July 20, 2004).

Commission alone among the PWG members bears the ''responsibility for the protection of investors and the oversight of our nation's securities markets,'' [13] but other regulators may be better suited to address some of the majority's specific areas of concern.[14] The majority, for example, did not consult the Department of Labor, which has primary jurisdiction over private pension plan advisers, about this rulemaking even though one of its justifications for the rulemaking is pension fund investment in hedge funds. The CFTC, with which many hedge fund advisers or sponsors are already registered, expressed serious concerns about duplicative regulation by the SEC and recommended an exemption for CFTC registrants.[15] Similarly, although the majority addressed a number of concerns raised with respect to offshore funds, they did not adequately address, through discussions with foreign regulators, commenters' concerns about potentially duplicative regulation.[16]

B. Before Proceeding With Registration, the Commission Should Have Enhanced Its Oversight of Existing Registrants

Rather than adding to its stable of registrants, the Commission could have obtained useful information by monitoring transactions through its existing registrants. The Commission, for example, could enhance its oversight of prime brokers to detect and deter fraud by their hedge fund clients and obtain more information about hedge fund advisers.[17] More generally, market surveillance is an effective, targeted way of finding fraud, and would allow us to leverage the knowledge and expertise of other self-regulatory organizations.[18]

C. Commenters Showed a Commendable Willingness To Help the Commission Obtain the Information We Need Through Mining Existing Information Resources or Developing New Ones

The commenters, the vast majority of which opposed mandatory registration, suggested a number of alternatives for ensuring that the Commission has ample information about hedge funds. Among the suggestions was requiring investment advisers that are exempt under sections (3)(c)(1) or (3)(c)(7) of the Investment Company Act of 1940 [19] or rely on the safe harbor in rule 203(b)(3)–1 under the Advisers Act [20] to file and annually update information statements with the Commission.[21] These information statements could include information such as the names of all unregistered funds advised, the names and qualifications of the key owners and employees of the adviser, assets under management, other types of accounts managed, a list of the prime brokers used by the adviser, and performance data. The majority's footnote addressing this approach dismisses this as a variant of another suggested approach—expanded Form D reporting.[22] The majority refused to consider either approach because both lack an examination component.[23] For the reasons stated below, we do not believe that the examination aspect of hedge fund regulation will deliver the benefits that the majority believes it will and we are concerned with the diversion of resources that examination will entail.

II. Mandatory Registration Does Not Address the Concerns Underlying the Rulemaking

The majority cites three main bases for its action: the growth of hedge fund assets, the growth in hedge fund fraud, and the broader exposure to hedge funds. None of these justifies the majority's action.

A. The Commission Should Not Necessarily Increase Its Regulatory Requirements on an Industry Simply Because It Has Grown

The majority points to the growth of the hedge fund industry as a concern underlying the action being taken. Given the industry's size,[24] the Commission has a basis for wanting more information about it, but the Commission should not assume that a greater level of regulation is needed in a flourishing industry with a wealthy and sophisticated investor base.

In the Proposing Release, the majority argued that registration would ''legitimiz[e] a growing and maturing industry that is currently perceived as operating in the shadows.''[25] The Adopting Release does not repeat this dramatic language, but the underlying belief that there is something improper about not registering voluntarily is evident.[26] The Commission should not

[13] Adopting Release at n. 43.

[14] As the Commission has explained elsewhere, the Commission's interest in a particular area does not preclude its working with other regulators. *See, e.g.*, SEC, 2002 Annual Report 1 (available at: *http://www.sec.gov/pdf/annrep02/ar02fm.pdf*) (''Though it is the primary overseer and regulator of the U.S. securities markets, the SEC works closely with many other institutions * * *''). The Adopting Release notes that the staff met with staff of various fellow regulators, but because these meetings were not documented in the comment file, it is difficult to discern what occurred at those meetings. *See* Adopting Release at n. 17.

[15] *See* Comment Letter of the CFTC (Oct. 22, 2004) (''in the interest of good government and in order to avoid duplicative regulation, the CFTC respectfully requests that the SEC provide a registration exemption for these CFTC registrants that do not hold themselves out to the general public as investment advisers.''). Many other commenters also recommended an exemption for CFTC-registered entities. The majority dismisses requests to exempt CFTC-registered commodity pool operators by arguing that Congress already addressed this concern by adding section 203(b)(6) to the Advisers Act in 2000 [15 U.S.C. 80b–3(b)(6)], but that section covers only commodity trading advisers, not commodity pool operators. *See* Adopting Release at text accompanying n. 128. We share the majority's hope that the staff will consult with the CFTC staff regarding examinations, but staff discussions at the implementation stage cannot substitute for discussions about the Commission's proposal prior to adoption. See Adopting Release at n. 130.

[16] Many commenters recommended that the Commission should not require the registration of certain advisers that are subject to oversight by foreign authorities. *See, e.g.*, Comment Letter of the European Commission (Sept. 15, 2004); Comment Letter of the Fédération Européenne des Fonds et Sociétés d'Investissement (Sept. 15, 2004); Comment Letter of the Financial Services Roundtable (Sept. 15, 2004); the International Bar Association (Sept. 14, 2004).

[17] *See, e.g.*, Alan Greenspan, Chairman, Federal Reserve Board, Written Responses to Questions from Chairman Shelby in Connection with Testimony before the Senate Banking, Housing and Urban Affairs Committee, (July 20, 2004) (''If there was a public policy reason to monitor hedge fund activity, the best method of doing so without raising liquidity concerns would be indirectly through oversight of those broker-dealers (so-called prime brokers) that clear, settle, and finance trades for hedge funds. Although the use of multiple prime brokers by the largest funds would complicate the monitoring of individual funds by this method, such monitoring could provide much useful information on the hedge funds sector as a whole.'').

[18] *See, e.g.*, Alan Greenspan, Chairman, Federal Reserve Board, Written Responses to Questions from Chairman Shelby in Connection with Testimony before the Senate Banking, Housing and Urban Affairs Committee (July 20, 2004) (''Concerns about market manipulation, whether by hedge funds or others, can best be addressed by enhanced market surveillance.'').

[19] 15 U.S.C. 80a–3(c)(1) and 15 U.S.C. 80a–3(c)(7).

[20] 17 CFR 275.203(b)(3)–1.

[21] A number of commenters suggested this approach or a similar annual census form for hedge fund advisers. *See, e.g.*, Comment Letter of the American Bar Association, Section of Business Law (Sept. 28, 2004); Comment Letter of Sheila C. Bair, Professor of Financial Regulatory Policy, University of Massachusetts—Amherst (Sept. 15, 2004); Comment Letter of the U.S. Chamber of Commerce (Sept. 15, 2004); Comment Letter of Kynikos Associates (Sept. 15, 2004); Comment Letter of the Managed Funds Association (Sept. 15, 2004); Comment Letter of Seward & Kissell LLP (Sept. 15, 2004); Comment Letter of Schulte Roth & Zabel, LLP (Sept. 15, 2004); Comment Letter of Tudor Investment Corp. (Sept. 15, 2004). Other commenters suggested requiring hedge fund advisers to file audited financial statements. *See, e.g.*, Comment Letter of Madison Capital Management LLC (Sept. 15, 2004); Comment Letter of James E. Mitchell (Sept. 1, 2004); Comment Letter of Joseph L. Vidich (Aug. 7, 2004); Comment Letter of Willkie, Farr & Gallagher (Sept. 13, 2004) (recommending self-executing exemptive application procedure for advisers that provide investors with audited financials and valuation disclosures).

[22] *See* Adopting Release at n. 150.

[23] *See* Adopting Release at text accompanying n. 154. The majority also concluded that it was not worthwhile for the staff to try to make use of the information generated by existing transactional reporting requirements. *See* Adopting Release at text following n. 155. This seems to be a premature conclusion, particularly in light of commenters' suggestion to tailor current forms so that they meet the Commission's information needs. *See, e.g.*, Comment Letter of Bryan Cave LLP (Aug. 16, 2004) (recommending extensive amendments to Regulation D and Form D and Suspicious Activity Reports); Comment Letter of Madison Capital Management LLC (Sept. 15, 2004); Comment Letter of Proskauer Rose LLP (Aug. 31, 2004); Comment Letter of Tudor Investment Corp. (Sept. 15, 2004).

[24] The majority estimates the hedge fund industry to be $870 billion, which is dwarfed by the approximately $23 trillion under management by registered advisers. *See* Adopting Release at text accompanying n. 19 and following n. 71.

[25] Proposing Release, *supra* n. 1, at text following n. 183.

[26] This belief manifests itself in the perfunctory manner in which the majority dismisses legitimate concerns from opposing commenters by challenging the commenters' integrity. *See, e.g.*, Adopting Release at text accompanying n. 87 (noting, that hedge fund advisers ''should be particularly sensitive to the consequences of getting caught if

Continued

encourage an adviser's registration status to be viewed as a proxy for the adviser's honesty. There are many legitimate reasons for a hedge fund adviser not to register.[27]

B. Registration Would Not Have Prevented the Violations in the Enforcement Cases Cited by the Majority

While we acknowledge that hedge fund fraud exists and should be taken seriously, it appears, based on our knowledge, that the majority overstates its relative significance. The 2003 Staff Hedge Fund Report did not find disproportionate involvement of hedge funds or their advisers in fraud.[28] We estimate that the cases cited by the majority during the past five years comprise less than two percent of total SEC cases in the same period. The CFTC similarly found that only three percent of all SEC and CFTC enforcement actions were against hedge funds or their advisers.[29]

Citing to forty-six cases in the Proposing Release and five additional cases in the Adopting Release, the majority is requiring advisers to the most sophisticated investors to register based on fraud cases, most of which were directed at the least sophisticated investors. These cases do not provide a justification for mandatory registration because, in most, the hedge fund advisers would have been too small to be registered under the new requirement,[30] were already registered,[31] or should have been registered.[32] Many were garden-variety fraudsters who could as easily have called their schemes something other than ''hedge funds.'' The majority argues that registration with the Commission permits it to screen registrants and deny registration to anyone who has been convicted of a felony or otherwise has a disciplinary history that warrants disqualification. Many of those implicated in our cases would not even have sufficient assets to be eligible for registration.[33] Others, whose sole objective was to defraud investors, likely would not even attempt to register, but would nevertheless perpetrate their frauds.[34]

The majority also points to the involvement of hedge funds in the recent market timing scandals as evidence of a need for registration. The illegal conduct occurred when advisers to mutual funds contravened their fund prospectuses by allowing hedge funds and others to engage in market timing. While the Commission also should pursue any securities law violations by hedge funds (and is doing so), it should not necessarily impugn hedge fund advisers for the *legally permissible* actions they took to enhance the performance of the hedge funds. Finally, to the extent hedge fund advisers committed illegal actions, it is difficult to believe that this rulemaking would have stopped them. Despite the Commission's examination authority over mutual fund advisers, all of whom must be registered under the Advisers Act, routine examinations did not uncover the illegal conduct. In addition, of the approximately 70 hedge fund advisers involved in these cases, at least 20 were registered.

In the hedge fund context, routine examinations will not be an effective tool for the Commission. The Commission already can invoke its subpoena power to investigate potential fraudulent abuses in hedge funds.[35] Certainly a perfectly-timed routine examination could expose fraud, but with so many registrants and so few examiners, it is unrealistic to anticipate that this will happen very often. Moreover, because hedge fund advisers tend to employ more complex investment strategies than the typical registered adviser, the Commission will have to incur substantial training costs in order to understand and oversee the newly registered hedge fund advisers.[36] Chairman Donaldson envisions being able ''to apply our manpower and expertise in an effective, risk-based system designed not only for this responsibility but ultimately as an underpinning for all examinations and

---

their conduct is unlawful. * * * This sensitivity, which may be reflected in the strength of the opposition among some hedge fund advisers to this rulemaking, suggests that the marginal benefits of our oversight may be substantial.''). *See also* William H. Donaldson, Chairman, SEC, Testimony before the Senate Banking Committee (July 15, 2004) (video testimony available at: *http://banking.senate.gov/index.cfm?Fuseaction=Hearings.Detail&HearingID=122*) (''I don't get much push back from people that are operating good funds. I don't get much push back from people who have nothing to hide.'').

[27] *See, e.g.*, Comment Letter of Amaranth Advisors LLC (Sept. 15, 2004) (hedge fund adviser explains that it does not operate in the shadows, but under the scrutiny of a number of regulators); Comment Letter of the Greenwich Roundtable (Sept. 15, 2004) (''The hedge fund industry is already a highly legitimate and professional industry. Sophisticated investors in the hedge fund community make significant allocation decisions based in large part on the rigorous due diligence examinations that they personally perform prior to making an investment.''); Comment Letter of the Managed Funds Association (Sept. 15, 2004) (detailing regulatory obligations to which hedge fund advisers are subject). The perception that hedge funds operate in the shadows might be attributable partially to the limitations to which hedge fund advisers are subject. *See, e.g.*, Testimony of Michael Neus, Principal and Chief General Counsel, Andor Capital Management, LLC, at the Hedge Fund Roundtable, *supra* n. 5 (May 14, 2004) (''it's a highly professional, highly organized industry which, because of restrictions on advertising or holding yourself out to the public, we are not capable of sharing with the general public * * *'').

[28] *See* 2003 Staff Hedge Fund Report, *supra* n. 5, at 73. The majority notes that it is ''not alone in [its] concerns regarding hedge fund frauds'' and cites the results of interviews with managers of European financial institutions about the state of the European Financial Market. *See* Adopting Release at n. 27 (citing Bank of New York, Restoring Broken Trust: A Pan European Study of the Causes of Declining Trust in the European Financial Services Industry and Analysis of the Actions Needed to Rebuild Investor Trust (July 2004). While interesting, the opinions expressed by these European managers are largely immaterial in the context of the U.S. industry, and it is not clear how today's rulemaking will address these concerns.

[29] *See* Testimony of Patrick J. McCarty, General Counsel of the CFTC, before the U.S. Senate Committee on Banking, Housing and Urban Affairs 1 (July 15, 2004). *See also* Comment Letter of the National Futures Association (Sept. 14, 2004) (NFA's experience with the hedge funds it oversees is ''consistent with the comparatively small number of CFTC and SEC enforcement actions involving commodity pool and hedge fund activities.'').

[30] Hedge fund advisers, like other advisers, generally will be *required* to register only if they have assets under management of $30 million or more and advisers with between $25 million and $30 million will be *permitted* to register. *See* Investment Advisers Act section 203A(a)(1) [15 U.S. 80b–3a(a)(1)] and rule 203A–1 [17 CFR 275.203A–1] thereunder.

[31] The majority states that ''[o]ur examination staff uncovered, during routine or sweep exams, five of the eight cases we brought against registered hedge fund advisers * * *.'' Adopting Release at n. 94 and accompanying text. One of those cases was uncovered during a sweep examination that was prompted by a civil complaint filed by the New York Attorney General. *See* In the Matter of Alliance Capital Management, L.P., Investment Advisers Act Release No. 2205 (Dec. 18, 2003). In another, the problem was not discovered until seven years after it began. *See* In the Matter of Portfolio Advisory Services, LLC and Cedd L. Moses, Investment Advisers Act Release No. 2038 (June 20, 2002). The Commission cannot rely on registration to unearth violations in a prompt and predictable manner.

[32] In our dissent to the Proposing Release, we discussed these 46 cases in detail. *See* Proposing Release, *supra* n. 1, at 45197–98. The advisers implicated in the five newly-identified cases likely would fall outside the scope of the rulemaking. *See* SEC v. Haligiannis, et al, Litigation Release No. 18853 (Aug. 25, 2004) (having raised $27 million over eight years, the hedge fund's president and general partners likely would not have been required to register); SEC v. Scott B. Kaye, *et al.*, Litigation Release No. 18845 (Aug. 24, 2004) (having raised only $1.9 million, the adviser likely would not have been required to register); SEC v. Gary M. Kornman, Litigation Release No. 18836 (Aug. 18, 2004) (individual that used inside information to make trades on behalf of hedge funds was owner of broker-dealer registered with the Commission); SEC v. Anthony P. Postiglione, Jr., *et al.*, Litigation Release No. 18824 (Aug. 9, 2004) (having raised approximately $5 million, the adviser likely would not have been required to register); SEC v. Adam G. Kruger and Kruger, Miller, and Tummillo, Inc., Investment Advisers Act Release No. 2297 (Sept. 15, 2004) (having raised approximately $1 million, the adviser likely would not have been required to register).

[33] The majority anticipates that hedge fund investors will demand that even new hedge fund advisers register. These advisers will be able to register even before they have $25 million under management if they have a reasonable expectation of meeting the $25 million threshold within 120 days. *See* rule 203A–2(d) [17 CFR 275.203A–2(d)]. It is not realistic to assume that all new advisers would register. Reaching $25 million in assets under management within four months is likely to be an unrealistic goal for many.

[34] *See also SEC* v. *Sanjay Saxena,* Litigation Release No. 16641 (Aug. 2, 2000) (having already been barred by the Commission from acting as an investment adviser, the defendant used his wife as a front for his advisory activity).

[35] The Commission, for example, employed its subpoena power in order to impose a broad document request on unregistered hedge fund advisers to enable the staff to gather information for the 2003 Staff Hedge Fund Report. *See supra* n. 5.

[36] *See, e.g.*, Comment Letter of W. Hardy Callcott, Bingham McCutchen LLP (Sept. 15, 2004) (anticipating that addition of hedge fund advisers to examination pool could disproportionately slow the examination cycle for all advisers because ''it is likely to take a substantial amount of time and effort for [] examiners to understand what they are seeing—hedge fund trading strategies and operations are often far more complex than those at mutual funds and retail-oriented investment advisers'').

inspections conducted by the Commission.''[37] However, the Commission has not yet demonstrated the effectiveness of this new approach.[38] More specifically, the move towards risk-based oversight will not be effective if we have not identified relevant risk factors.[39]

The majority contends that, even if examinations do not routinely *detect* fraud, the threat of an examination will *deter* fraudulent activity by hedge fund advisers.[40] Any deterrent effect, however, is muted by the fact that the Commission lacks the resources necessary to conduct frequent, comprehensive hedge fund adviser examinations, and our lack of resources is a matter of public record.[41] The Chairman has publicly announced that the Commission is rethinking its inspection model, which historically has focused on site visits and information requests.[42] The new approach will not be centered around routine inspections. Heavy sanctions for fraudulent behavior are a more effective and cheaper deterrent than the specter of an examination every several years.[43] In making these observations, we are not questioning the need for a Commission examination program. Rather, we are suggesting that the Commission should not assume a task that is now handled by the market, particularly since it is a task the Commission is not equipped to perform.

C. Retail Investors' Exposure to Hedge Funds Is Limited and They Can Be Protected Through More Effective Means Than Registration

The majority speaks ominously of the ''retailization'' of hedge funds, *i.e.*, their increasing accessibility through pension funds and funds of funds to unsophisticated investors of moderate means. The 2003 Staff Hedge Fund Report, however, found no retailization.[44] Moreover, the Report's conclusion is consistent with the views expressed at the Commission's May 2003 Roundtable, at which 60 panelists, including representatives of federal, state and foreign government regulators, securities industry professionals, and academics testified.[45] Hedge fund advisers appear willing to take steps to preclude retailization.[46] Raising the accreditation standards for hedge fund investors, for example, would reduce the number of high net worth individual investors, which is estimated already at fewer than 200,000, to an even smaller universe of investors. Alternatively, we could require registration for funds that allow relatively small investments.

Concern about the exposure of retirees through their pension funds, a cornerstone of the majority's retailization argument, is unwarranted. Although pension fund investment in hedge funds has grown in recent years, just one percent of the more than $6.4 trillion invested in U.S. pension funds is currently invested in hedge funds.[47] Pension fund investments are only eight percent of total hedge fund investments.[48] For every pension fund dollar invested in hedge funds, approximately three pension fund dollars are invested in other private investment funds,[49] yet the rulemaking carefully seeks to avoid reaching them. More generally, pension funds, as part of a risk diversification strategy, invest in hedge funds and other investments in which retirees might not be able to invest directly. Some of these investment vehicles, such as off-shore investment vehicles, venture capital funds, and real estate investment trusts, are not advised by advisers registered with the Commission.

Pension funds, along with the universities and charitable organizations that the majority cites as contributors to the trend towards retailization, are managed by fiduciaries, who typically are highly-skilled.[50] These fiduciaries are responsible for determining whether to invest in hedge funds, the types of hedge funds in which to invest, and how to weigh risk and transparency issues in making these determinations.[51] Neither the information available on Form ADV nor the possibility that a particular hedge fund adviser will be subject to an inspection would substantially reduce these fiduciaries' due diligence obligations.

The majority also worries about retail investors' exposure to hedge funds through funds of hedge funds. Advisers so far have set investment minimums between $25,000 and $1 million.[52] There are a number of ways aside from universal registration to address concerns about retail exposure to these funds. The Commission could require the funds of funds that are targeted to retail

---

[37] Chairman William H. Donaldson, Remarks at Open Meeting: Registration of Hedge Fund Advisers (Oct. 26, 2004).

[38] *See* Comment Letter of W. Hardy Callcott, Bingham McCutchen LLP (Sept. 15, 2004) (''The Commission should not rely on a risk assessment model to replace regular cycle examinations—certainly not until such a model has been rigorously tested and has a track record of effective implementation.'').

[39] As Chairman Greenspan noted: Even should SEC's proposed risk evaluation surveillance of hedge funds detect possible trading irregularities, which I doubt frankly, those irregularities will likely be idiosyncratic and of mainly historic interest, because by the time of detection, hedge funds would have long since moved on to different strategies.

Alan Greenspan, Chairman, Federal Reserve Board, Testimony before the Senate Banking, Housing and Urban Affairs Committee (July 20, 2004).

[40] *See* Adopting Release at text accompanying nn. 87–88. Because examinations take place so infrequently, the marginal increase in the chance of getting caught will not change the fraudster's calculus significantly. Further, the majority, to be consistent in its deterrence analysis, should take into account the shift of resources away from other types of advisers and hence the resulting decrease in deterrence for those advisers, particularly because they see the Commission's focus on hedge fund advisers as an area of emerging risk.

[41] As Chairman Donaldson noted when testifying before Congress this year, the Commission has only 495 staff conducting examinations of approximately 8,000 mutual funds, managed in over 900 fund complexes, as well as more than 8,000 investment advisers. *See* Testimony of William H. Donaldson, Chairman, Securities and Exchange Commission, before the House Subcommittee on Commerce, Justice, State, and the Judiciary, Committee on Appropriations (Mar. 31, 2004) (''During most of the period from 1998 to early 2003, the SEC's examination program for funds and advisers had approximately 370 members on its staff (including examiners, supervisors, and support staff). Routine examinations were conducted every five years. In the last two years, program staffing was increased by one-third, to approximately 495 employees. With this staffing increase, the SEC has increased the frequency of examinations of funds and advisers posing the greatest compliance risks, and is conducting more examinations targeted to areas of emerging compliance risk.'').

[42] Testimony of William H. Donaldson, Chairman, SEC, before the Senate Committee on Banking, Housing and Urban Affairs (July 15, 2004) (''I have asked the staff to develop an enhanced risk-based approach to oversight and examination of our investment adviser registrants, including hedge fund advisers.'').

[43] Periodic examinations would likely have no deterrent effect on scam artists, who, under the guise of operating a hedge fund set out to steal money from unwitting investors, because these types of individuals will simply not register.

[44] 2003 Staff Hedge Fund Report, *supra* n. 5, at 80 (''To date, however, the staff has not uncovered evidence of significant numbers of retail investors in hedge funds.'').

[45] *See, e.g.*, Testimony of Robert Schulman, Chairman and CEO, Tremont Asset Management, at the Roundtable, *supra* n. 5 (May 14, 2004) (''It is not a massive flow of money from retail or high net worth investors using registered products. That's not what's fueled the growth here to date. It may come to be that, but that's not what it's been today.'').

[46] *See, e.g.*, Comment Letter of the Managed Fund Association (Sept. 15, 2004) (noting the validity of the Commission's concern about the increased number of persons qualifying as individual investors and recommending an adjustment of the accredited investor standard); Comment Letter of Porter, Felleman, Inc. (Aug. 16, 2004); Comment Letter of Tudor Investment Corp. (Sept. 15, 2004). And if, as the majority notes, hedge fund inflows already are so rapid that hedge fund advisers have more to invest than they can handle, then they will not need to look to retail investors. *See* Adopting Release at n. 21 and accompanying text.

[47] *See* Greenwich Associates, Press Release, *Alternative Investments May Disappoint Dabblers* (Jan. 21, 2004) (available at: *http://www.greenwich.com*).

[48] This assumes that $72 billion of pension money is invested in hedge funds, which are estimated to have total assets of $870 billion. *See* Adopting Release at n. 38 and text accompanying n. 19. The majority does not tell us what proportion of pension fund investments are invested in hedge funds without registered advisers.

[49] *See* Hewitt Investment Group, *In Brief: Immunization—Theory and Practice* 5 (July 2004) (available at: *http://www.hewittinvest.com/pdf/InBrief_Immunization.pdf*) (citing *Greenwich Associates Market Characteristics 2003 Report*) (based on asset allocation of private pension funds). *See also* Comment Letter of the National Venture Capital Association (Sept. 15, 2004) (noting that pension funds, foundations and university endowments have long invested in venture capital funds).

[50] The Department of Labor oversees the conduct of private pension plan advisers. In the public pension fund context, state law requires that the pension fund adviser, often an elected official, act for the benefit of the pensioners.

[51] *See, e.g.*, Transcript of Chronicle of Higher Education Colloquy with John S. Griswold of the Commonfund Group, (May 27, 2004) (available at: *http://chronicle.com/colloquylive/2004/05/endowments/*) (noting the role alternative investments, including hedge funds, play in diversifying endowment portfolios, reducing portfolio risk, and boosting returns).

[52] *See* 2003 Hedge Fund Report, *supra* n. 5, at 69.

investors, and all of their component funds, to have registered advisers.[53] Alternatively, the Commission could prohibit these funds from being publicly offered or place heightened restrictions on investors.

III. The Majority's Approach Will Have Detrimental Effects on Investors, Advisers, and the Markets

A. The New Rule Will Necessitate a Dangerous Diversion of Resources

In order to administer the new requirement, the Commission will have to divert resources from the protection of unsophisticated investors, including more than 90 million mutual fund investors, to an estimated 200,000 individual and institutional hedge fund investors. This seems unwise so soon after we made the case that we did not have enough staff to oversee the existing pool of registered advisers and funds. In fact, just two days after the majority adopted this rulemaking, the Director of the Division of Investment Management reportedly said that an option that the Commission has in its ''back pocket'' is raising the threshold registration level to $40 million.[54] If the majority was seriously contemplating raising the registration threshold in connection with the rulemaking, it should have sought specific comment on the implications of such a change.[55]

The majority argues that all investors, sophisticated and not, are entitled to protection under the Advisers Act. Indeed, all investors do enjoy the protection of the Act's antifraud provisions. But, as Congress recognized in 1996 in connection with the adoption of Investment Company Act section 3(c)(7), ''[financially sophisticated] investors can evaluate on their own behalf matters such as the level of a fund's management fees, governance provisions, transactions with affiliates, investment risk, leverage, and redemption rights.''[56] In contrast to mutual fund investors, hedge fund investors have not been conditioned to rely on Commission oversight.[57] They can perform due diligence (or hire someone else to do so for them), review audit reports or third-party internal control reports, and enlist help if they suspect fraud or malfeasance.[58] By adopting the registration requirement, the Commission has upset the private-public balance and taken on a task that it might not have adequate resources to perform.[59]

B. The Commission Has Failed To Demonstrate That This Is the Least Burdensome and Most Effective Way To Accomplish Its Objective

In addition to being costly to the Commission, the new registration requirement will be costly to affected advisers, and these costs will be passed on to investors. The majority approaches the costs of its action with a remarkable casualness and tries to shift responsibility for the cost-benefit analysis to commenters.[60] The majority accepts anecdotal evidence from those in support of the rulemaking, but rejects as complaints equivalent statements by those opposed.[61] The majority treats cost estimates provided by commenters as overestimates.[62] The majority failed to aggregate the initial costs associated with registration and did not estimate ongoing costs of compliance.[63]

The majority points to the fact that advisers that are already registered, including hedge fund advisers, are able to bear the costs associated with registration.[64] Yet the majority also argues that its action will level the playing field between hedge fund advisers by imposing the costs on currently unregistered advisers that are borne now only by voluntary registrants. Costs of registration vary across firms.[65] Currently, if the benefits of registration, such as wider appeal to pension funds and other investors, do not outweigh the costs, then hedge fund advisers do not register.[66] Costs are likely to be

---

[53] *See, e.g.*, Comment Letter of Leon M. Metzger (Sept. 15, 2004).

[54] *See supra* n. 1. Another option discussed in the Adopting Release is asking Congress for more funding, a request Congress might be loathe to fulfill absent assurances the new funds would not again be applied to expand our regulatory reach. *See* Adopting Release at Section V.

[55] Although both the Proposing and Adopting Releases mentioned raising the threshold for registration ''to a slightly higher amount'' as a possible way of compensating for the increase in registered advisers resulting from the rulemaking, the Proposing Release did not solicit comment on whether this was an appropriate reallocation of resources. *See* Proposing Release, *supra* n. 1, at section V and Adopting Release at section V.

[56] S.R. 104–293, at 10 (June 26, 1996).

[57] *See, e.g.*, Comment Letter of the Greenwich Roundtable (Sept. 15, 2004) (nonprofit organization made up of private and institutional investors opposed the rulemaking), Comment Letter of Rodney C. Pitts (Sept. 15, 2004) (hedge fund investor suggesting that Commission resources should not be diverted to protect the relatively small number of hedge fund investors), Comment Letter of Myra Tatum, Pointer Management Co. (Aug. 26, 2004) (manager of fund of funds noting that mandatory registration will not benefit investors; fund of funds manager already conducts extensive due diligence and ongoing monitoring of hedge fund managers). The majority cites a survey conducted by the Hennessee Group in support of its rulemaking. *See* Hennessee Group, 2004 Hennessee Hedge Fund Survey of Foundations and Endowments (submitted as a comment letter for this rulemaking). While 59 percent of the 46 respondents supported the rulemaking, foundations and endowments opposing the rulemaking were larger, more heavily invested in hedge funds, and had more years of experience in hedge fund investment than entities that favored the rulemaking. *See id.*

[58] As one commenter pointed out, ''the ''institutionalization'' of the hedge fund market has had many salutary effects on the industry [because] [m]ost such institutions require funds to complete voluminous questionnaires about management, investment procedures, and operational and risk controls.'' Comment Letter of Schulte, Roth & Zabel LLP (Sept. 15, 2004). Moreover, reports by auditors are a commonly-used method of demonstrating the integrity of internal controls. *See, e.g.*, Codification of Accounting Standards and Procedures, Statement on Auditing Standards No. 70, *Service Organizations. See also* Comment Letter of Blanco Partners LP (Sept. 13, 2004) (''We feel that having the highest quality attorneys, auditors and prime[] brokers is a selling point for our fund.''). In other contexts, the Commission views favorably the use of outside control reports. *See, e.g.*, Fair Administration and Governance of Self-Regulatory Organizations; Disclosure and Regulatory Reporting by Self-Regulatory Organizations; Recordkeeping Requirements for Self-Regulatory Organizations; Ownership and Voting Limitations for Members of Self-Regulatory Organizations; Ownership Reporting Requirements for Members of Self-Regulatory Organizations; Listing and Trading of Affiliated Securities by a Self-Regulatory Organization, Securities Exchange Act Release No. 50699 (Nov. 18, 2004).

[59] *See, e.g.*, Comment Letter of Sheila C. Bair, Dean's Professor of Financial Regulatory Policy, University of Massachusetts-Amherst (Sept. 15, 2004) (''By promising a 'culture of compliance' through registration, the SEC may be encouraging investors to take a 'free ride', reducing the amount of due diligence they would otherwise conduct on their own. The first line of defense for sophisticated investors should be their own due diligence, not SEC compliance measures, which are already seriously strained.''); Comment Letter of W. Hardy Callcott, Bingham McCutchen LLP (Sept. 15, 2004) (''When *not* promised that the SEC will oversee the adviser, hedge fund investors have been able through private ordering to negotiate adequate protections for themselves—protections apparently at least as effective as those provided by SEC registration and oversight.''), Comment Letter of the U.S. Chamber of Commerce (''[C]ounterparty surveillance (*e.g.*, extended pre-investment due diligence by investors and discipline imposed by lenders) is today pervasive among institutions and other sophisticated [private investment fund] investors.''); Comment Letter of Price Meadows Inc. (Sept. 15, 2004) (noting that market pressures are enhancing investor protection as reflected in the increasing percentage of hedge funds that are audited or rely on third-party administration).

[60] *See, e.g.*, Adopting Release at text accompanying n. 61 (''But commenters have not persuaded us that requiring hedge fund advisers to register under the Act, requiring them to develop a compliance infrastructure, or subjecting them to our examination authority will impose undue burdens on them or interfere significantly with their operations.''). The majority bolstered the cost-benefit analysis and the discussion of alternatives in the final release three weeks after the vote to approve the rulemaking. Such issues should have been thoroughly explored prior to the vote.

[61] *Compare* Adopting Release at n. 64 and accompanying text (relying on the ''persuasive testimonials'' of two commenters who did not provide empirical data to conclude that registration is not overly burdensome) *with* Adopting Release at text following n. 70 (''The bare assertions of adverse consequences of registration under the Advisers Act offered by many commenters opposed to our proposed rule, and the anecdotal evidence offered by others, simply do not stand up to scrutiny.'').

[62] *See, e.g.*, Adopting Release at nn. 344–46 and accompanying text.

[63] In fact, the only cost estimates offered by the majority in its cost-benefit analysis are per-firm costs of $20,000 for professional fees and $25,000 for internal costs that firms would incur in establishing the required compliance infrastructure and aggregate costs of $31 to $57 million. *See* Adopting Release at n. 333 and accompanying text.

[64] *See* Adopting Release at text accompanying n. 320.

[65] *See, e.g.*, Comment Letter of Proskauer Rose LLP (Aug. 31, 2004) (''[F]or certain advisers the benefits of registration exceed the costs and for others the reverse is true, and [] the gulf can be substantial.''). If the majority is correct in its cost estimates, it should be satisfied in simply letting the trend of voluntary registration continue.

[66] Mandating across-the-board registration only serves to eliminate any benefit registered advisers enjoyed in being able to distinguish themselves from unregistered advisers.

particularly onerous for small advisers.[67] According to some, registration costs will be even more burdensome for small hedge fund advisers than they are for other small advisers.[68]

The majority's cost-benefit analysis does not provide a realistic assessment of the direct costs associated with registration.[69] Even the Investment Counsel Association of America (''ICAA''), which supports the majority's action, took issue with the majority's minimization of costs.[70] Advisers must file Form ADV, and are likely to seek the assistance of an attorney because it is a public disclosure form.[71] Once registered, advisers face numerous substantive requirements, including recordkeeping, custody, and compliance requirements, all of which impose costs.[72] The majority failed to offer any quantitative estimate for the costs associated with the requirement to have a chief compliance officer.[73] Hosting a Commission examination team can be very costly, particularly in terms of the opportunity cost of those who must comply with increasingly burdensome document requests and stand ready to answer questions.[74]

In addition to the direct costs of complying with Commission rules, there are likely to be indirect costs as hedge funds advisers are dissuaded from employing complex investment strategies that they cannot explain to Commission examiners. Questions about those strategies are likely since the majority believes there to be substantial conflicts related to ''management strategies, fee structures, use of fund brokerage and other aspects of hedge fund management.'' [75] As one commenter explained, ''there is no doubt that hedge fund managers would abandon a lawful strategy that the Commission takes exception with rather than face the controversy and the associated distractions generated by the Commission's position.'' [76] The effects might be felt by the market as a whole.[77] Advisers might even limit their businesses in order to avoid registering.[78]

The majority reasons that the ''costs appear small relative to the scale of the industry.'' [79] Further, the majority argues, hedge fund advisers' fees provide them with ''a

[67] *See, e.g.*, Comment Letters of Blanco Partners LP (Sept. 13, 2004) (small advisers will be disproportionately burdened); Venkat Swarna (Sept. 14, 2004) (''We estimate the annual compliance costs of a state or federal registration to be in the range of 20,000 to 25,000. These compliance costs would be prohibitive to a small advisor like ours, as these costs alone constitute a sizeable percentage of the portfolio of the fund we would be managing in our case more than 1[%]''); Joseph L. Vidich (Aug. 7, 2004) (''In a one or two person firm, with 10 million under management, the annual cost of compliance could easily fall between 25,000 and 50,000, which represents twenty five to fifty percent of the firms asset management fee.''). *See also Hedge Fund Regulation May Force Consolidation,* PipeLine 3 (June 15, 2003) (reporting study findings that registration would impose significant burdens on small hedge funds in the range of $50,000 to $100,000 annually) (citing Sanford C. Bernstein & Co., *The Hedge Fund Industry—Products, Services, or Capabilities?* (May 19, 2003); Arden Dale, *Small Mutual-Fund Firms Cry Uncle—New Rules Protect Investors, but They Can be a Burden; Cost of a Compliance Cop,* Wall St. J., C15, Sept. 13, 2004 (reporting difficulty of mutual fund advisers that have less than a few billion dollars under management to bear the costs of regulatory requirements, including the Commission's compliance requirement).

[68] *See, e.g.*, Comment Letter of Blanco Partners LP (Sept. 13, 2004) (contending that registration will burden small hedge fund advisers more heavily than the average small adviser); Comment Letters of the International Swaps and Derivatives Association (Sept. 15, 2004) and Guy Judkowski, Hedgehog Capital (explaining that, in contrast to many other small advisers, some small hedge fund advisers deliberately remain small in order to effectively pursue a particular strategy).

[69] Even proponents of registration acknowledge that its costs will be significant enough to deter some advisers from entering the business. *See, e.g.*, Ron Orol, *Regulation? Bring it on,* TheDeal.com, Oct. 11, 2004 (interview of Steven Holzman, the managing partner of Vantis Capital Management LLC, who wrote two comment letters cited repeatedly in support of registration) (Mr. Holzman predicted that registration would help his business by raising barriers to entry and anticipated that ''[w]ith registration, we will have half as many new funds starting up next year * * *.''). Nonetheless, the majority cites Mr. Holzman for the proposition that barriers to entry are low and concludes that ''thus the cost of compliance with these rules should not present significant additional barriers to entry for new hedge fund advisers.'' Adopting Release at nn. 121–22 and accompanying text.

[70] *See* Comment Letter of the ICAA (Sept. 14, 2004) (''The fact is that investment adviser regulation and compliance have become increasingly complex and costly.''). *See also* Comment Letter of Davis, Polk & Wardwell (Sept. 15, 2004) (noting that the costs of registration and compliance are ''substantial and increasing'' and will be passed on to investors).

[71] *See, e.g.*, Comment Letter of the Managed Funds Association (Sept. 15, 2004) (reporting that one MFA member incurred over $75,000 in staff time in connection with the preparation of Form ADV).

[72] *See, e.g.,* Comment Letter of Guy P. Lander (Sept. 15, 2004) (reporting that client anticipates spending more than $300,000 in the first year to come into compliance with the rulemaking); Comment Letter of the Managed Funds Association (Sept. 15, 2004) (MFA members report incurring more than $300,000 in outside legal and other expenses associated with registration and compliance requirements); Comment Letter of C. Peter Marin, Superior Capital Management LLC (Sept. 8, 2004) (estimating that compliance costs will be 15–20% of revenues of adviser to small hedge fund); Comment Letter of Millrace Asset Group (Sept. 15, 2004) (hedge fund adviser anticipates having to increase staff from four to five to handle compliance under the rulemaking); Comment Letter of Seward & Kissel LLP (Sept. 15, 2004) (''To properly fulfill the breadth of compliance requirements under the Advisers Act, many advisers would be required to hire at least one additional professional at a cost far greater than the estimate provided.''). The majority did not attempt to estimate ongoing compliance and examination costs because of the difficulty of doing so, dismisses the estimates it received as ''not representative,'' and instead offers the observation that ''one registered hedge fund adviser commented that the firm itself derived benefit from the examination process.'' Adopting Release at IV.B.3.

[73] The majority explains this failure and its rejection of commenters' estimates by noting that advisers are not required to hire someone to fill the role and the chief compliance officer can have responsibilities. *See* Adopting Release at text following n. 335. The majority did not attempt to estimate the real, quantifiable cost of the requirement on firms, which must allocate at least a portion of an employee's time to handling the increased compliance functions. *See* Adopting Release at Section IV.B.2.

[74] *See, e.g.*, David R. Sawyer (Sidley, Austin, Brown and Wood) (Sept. 14, 2004) (reporting that two clients, hedge fund advisers, spent between $300,000 and $500,000 preparing for and hosting examiners, without including opportunity costs).

[75] Adopting Release at n. 116. The staff, in its hedge fund report, noted: ''We are concerned about our inability to examine hedge fund advisers and evaluate the effect of the strategies used in managing hedge funds on our financial markets.'' 2003 Staff Hedge Fund Report, *supra* n., at 11. Certainly, then, hedge fund advisers can anticipate that the staff will be looking into, and perhaps regulating, such strategies.

[76] Comment Letter of Guy P. Lander (Sept. 15, 2004). *See also* Comment Letter of the U.S. Chamber of Commerce (Sept. 15, 2004) (advisers might avoid innovative strategies in order to avoid Commission scrutiny).

[77] *See, e.g.*, Alan Greenspan, Chairman, Federal Reserve Board, Testimony before the Senate Banking, Housing and Urban Affairs Committee (July 20, 2004) (''Should the existing proposal fail in achieving its goal, pressure will become irresistible to expand SEC's regulatory reach in an endeavor to accomplish what it set out to do. Hedge fund arbitrageurs are required to move flexibly and expeditiously if they are to succeed. If placed under increasing restrictions, many will leave the industry, to the significant detriment of our economy.''). *See also* Comment Letter of the International Swaps and Derivatives Association (Sept. 15, 2004) (registration will reduce the number of entrants into the hedge fund industry and force others offshore, which will harm the derivatives industry and the market as a whole); Comment Letter of the Financial Services Roundtable (Sept. 15, 2004) (rulemaking might deter ''the types of innovative and active trading that serve the marketplace as a whole''); Comment Letter of the Managed Funds Association (Sept. 15, 2004) (the rulemaking ''has the potential to create inefficiency and instability in our capital markets by stifling the willingness of hedge funds to act as shock absorbers and provide risk capital in times of market instability''); Comment Letter of Seward & Kissel LLP (Sept. 15, 2004) (rulemaking could raise barriers to entry for new advisers); Comment Letter of Tudor Investment Corp. (Sept. 15, 2004). The majority, in faulting commenters opposing the rule for failing to demonstrate ''that hedge funds managed by registered advisers play a diminished role in the financial markets compared to hedge funds managed by unregistered advisers,'' fails to recognize that the effects of registration might be different for different advisers. Adopting Release at text accompanying n. 71.

[78] The majority's attempt to characterize this as a positive potential effect of the rulemaking is not persuasive. *See* Adopting Release at Section VII (acknowledging that investors might not be able to select the adviser of their choice, but noting that ''a hedge fund adviser's decision not to expand its business may make it easier for other advisers to enter the market.'').

[79] Adopting Release at text accompanying n. 118. It is difficult to discern how the majority made such a determination without making an estimate of the costs. The majority also argues that, absent registration, hedge fund advisers might not understand how beneficial a strong compliance program is to their business. *See* Adopting Release at text accompanying n. 117. Our intervention is unnecessary to solve this problem; the market will punish advisers who provide less compliance controls than investors want. *See, e.g.*, Comment Letter of Leon M. Metzger (Sept. 15, 2004) (''the Commission may want to consider whether the growing movement toward voluntary registration will accomplish the goals of mandatory registration.'').

substantial cash flow.''[80] It is not the Commission's job to make value judgments regarding the propriety of hedge fund advisers' management fees, which investors have agreed to pay and which presumably reflect the risks of establishing a hedge fund and the high costs of attracting talented managers. Resources used to pay for compliance with new regulatory mandates cannot be used for other purposes, such as hiring new employees or purchasing outside research. Thus, unless the Commission determines that the benefits of imposing the requirements justify the costs, the Commission should not impose the costs.

C. The Rulemaking May Encourage Retailization

The majority's proposal ironically may stimulate retailization. First, pension funds and other institutional investors, who indirectly invest in hedge funds on behalf of individuals, might invest more money in hedge funds as a result of the rulemaking. Because such investment vehicles tend to limit hedge fund investments to those with registered advisers, the mandatory registration would expand the potential universe and encourage even more investment in hedge funds, which the majority suggests puts retail investors at risk. Second, if all hedge fund advisers are registered, there is likely to be grassroots demand for access to hedge funds by retail investors.[81] Section 208(a) of the Advisers Act prohibits advisers from representing or implying that they are ''sponsored, recommended, or approved, or that their abilities or qualifications have in any respect been passed upon'' by the government.[82] Registered advisers, however, may advertise themselves as SEC-registered (and anecdotal evidence suggests that they do). Those who are not familiar with the Commission's role likely will not understand how little this means, particularly because the majority has argued that registration will ''legitimize'' hedge funds.

IV. The Majority's Approach Makes Arbitrary Distinctions Between Funds

A. The Definition of ''private funds'' Covered by the Rule Is Unsuitable

''Private funds'' are defined in the new rule on the basis of three characteristics. A ''private fund'' is a company: (1) That would be subject to regulation under the Investment Company Act but for the exception, from the definition of ''investment company'' provided in either section 3(c)(1) or 3(c)(7) of the Investment Company Act; (2) that permits investors to redeem their interests in the fund within two years of purchasing them; and (3) the interests of which are offered based on the investment advisory skills, ability or expertise of the investment adviser.[83] This definition is arbitrary and not reflective of a relevant difference among different types of private investment companies.[84]

The redemption period is the only criterion that would distinguish most hedge funds from most other types of private funds.[85] Even this criterion will pull into the rule other types of private investment funds, which the majority does not deem at this time to be in need of regulation.[86] More generally, at a time when there is already a trend towards longer lock-ups, this criterion will encourage advisers to extend their redemption periods beyond two years in order to avoid registration.[87] Therefore, it will be more difficult for investors, once they have made the decision to invest in a hedge fund, to ''vote'' on the quality and integrity of the hedge fund manager by leaving the fund.[88] A definition that looked, for example, to portfolio content or frequency of trading rather than redemption period would likely be more precise.[89]

B. If the Majority's Rationale for Regulation of Hedge Fund Advisers Is Sound, Then It Applies Equally to Advisers to Private Equity and Venture Capital Funds

We asked in our dissent to the proposal whether there was a basis for excluding advisers to venture capital and private equity funds. Valuation issues, for example, arise in the private equity and venture capital funds, just as they do in hedge funds.[90] The National Venture Capital Association (''NVCA'') filed a comment letter that explained that, while there are meaningful bases upon which to distinguish venture capital funds from hedge funds, the grounds on which the majority distinguished them are not meaningful. Fearing that these same justifications could be used in the future to require venture capital advisers to register, the NVCA opposed the proposal.[91] The majority continues to maintain that advisers to venture capital and private equity funds should remain beyond the scope of this rulemaking because they have not been implicated in as many enforcement actions as advisers to hedge funds have been.[92] We share the NVCA's concern that the majority has not meaningfully differentiated between hedge funds and other private investment funds. Just as the majority's justifications do not support the registration of hedge funds, they do not compel registration of any other type of private investment fund.

V. In Taking This Action, the Majority Has Departed From Regulatory and Statutory Precedent

In order to carve out hedge fund advisers as a subset of advisers to private investment

[80] Adopting Release at text accompanying n. 119.

[81] *See, e.g.*, Comment Letter of Madison Capital Management LLC (Sept. 15, 2004) (predicting that the rulemaking will have the effect of inducing hedge funds to admit retail investors).

[82] 15 U.S.C. 80b–8(a).

[83] *See* amended rule 203(b)(3)–1(d).

[84] *See, e.g.*, Comment Letter of the CFA Institute Center for Financial Market Integrity (Sept. 30, 2004) (noting that the two year redemption criterion ''would seem to us to be somewhat arbitrary''); Comment Letter of Madison Capital Management LLC (Sept. 15, 2004) (''the majority's 'private fund' centered regulatory scheme creates an arbitrary distinction among funds''); Comment Letter of the North American Securities Administrators Association (''NASAA feels that the definition of 'Private Fund' is ineffective at distinguishing hedge funds from private equity, venture capital and commodity pools.'').

[85] *See, e.g.*, Comment Letter of Gibson, Dunn & Crutcher LLP (Sept. 13, 2004) (''this component is the *only* factor in the Rule itself that can be relied upon to exempt traditional private equity and venture capital funds'').

[86] Comment Letter of the Financial Services Roundtable (Sept. 15, 2004) (rule will reach some private equity and real estate fund advisers); Commenter Letter of Gunderson Dettmer Stough Villeneuve Franklin & Hachigian, LLP. (Sept. 15, 2004) (requesting narrower definition of ''Private fund'' to avoid including other types of investment vehicles).

[87] *See, e.g.*, Comment Letter of Ellington Management Group LLC (Sept. 15, 2004) (''The industry 'buzz'; is that, in fact, many hedge fund managers wishing to avoid registration will be trying to institute two-year lockups exactly for this purpose.''); Comment Letter of the Greenwich Roundtable (Sept. 15, 2004); Comment Letter of Jeffrey R. Neufeld (Sept. 15, 2004).

[88] The majority inappropriately looks to ease of redeemability as evidence that ''hedge fund advisers are effectively providing advisory services to the fund's investors.'' *See* Adopting Release at n. 237.

[89] *See, e.g.*, Comment Letter of the Greenwich Roundtable (Sept. 15, 2004) (''If the intention of the Rule is to specifically exclude venture capital and private equity funds, then those funds can more easily be excluded without harming genuine hedge fund investors. We would suggest instead that the Rule apply a test that focuses on the marketability of a fund's holdings, rather than on an investor's willingness to lock-up an investment.''); Comment Letter of Kynikos Associates (Sept. 15, 2004) (recommending distinguishing funds on the basis of ''investment characteristics''); Comment Letter of the North American Securities Administrators Association (recommending a test based on frequency with which securities in fund are traded). *See also* Comment Letter of Ellington Management Group LLC (Sept. 15, 2004) (recommending distinguishing hedge funds from other types of private investment funds by looking at how the fund employs net asset value in determining management fees and setting purchase price and redemption fees). The majority explains that it rejected this approach in order to prevent advisers from altering their investment strategies to avoid registration. *See* Adopting Release at n. 225. It is much easier for advisers to alter their redemption period in order to avoid registration.

[90] *See, e.g.*, Comment Letter of Kynikos Associates (Sept. 15, 2004) (noting that while venture capital and private equity funds are ''somewhat different'' from hedge funds, the Commission's concerns, including particularly valuation, are nevertheless applicable); Comment Letter of Leon M. Metzger (Sept. 15, 2004) (interim valuations matter for other types of private funds, *e.g.*, for purposes of the valuation of a deceased investor's estate); Comment Letter of the Committee on Private Investment Funds, The Association of the Bar of The City of New York (Sept. 15, 2004) (although of ''more limited relevance,'' in the venture capital and private equity context, valuation is important for purposes such as investor reporting, and marketing follow-on funds).

[91] Comment Letter of the National Venture Capital Association (Sept. 15, 2004) (''NVCA believes that the [proposing] Release and the proposed rule create a risk of future burdensome regulation on venture capital that outweighs any investor protection benefit that would come from the proposed rule.'').

[92] The majority also argues that the third prong of the definition, which limits ''private funds'' to those that are marketed based on the skills, ability, and expertise of the adviser, ''confirm[] the direct link between the adviser's management services and the investors.'' Adopting Release at text preceding n. 168. If this reasoning is sound with respect to hedge funds, the same link exists between investors in venture capital and private equity funds and the advisers of those funds.

companies for registration, the majority has redefined ''client'' solely for this particular subset of advisers and then only to determine their eligibility to rely on section 203(b)(3). That section exempts from registration any adviser who during the past year has had fewer than fifteen clients and who does not hold himself out to the public as an investment adviser and does not act as an adviser to investment companies or business development companies.[93] Traditionally, for purposes of section 203(b)(3), advisers counted the funds, not the investors in those funds, as clients. The safe harbor in rule 203(b)(3)–1, which deems ''the legal organization * * * that receives investment advice based on its investment objectives rather than the individual investment objectives of its [owners],'' confirms the propriety of this approach.[94] The majority, however, has now (i) amended rule 203(b)(3)–1 to deprive advisers to ''private funds'' of the safe harbor for counting clients afforded by that rule and (ii) added new rule 203(b)(3)–2 to require advisers to count each owner of a ''private fund'' towards the threshold of 14 clients for purposes of determining the availability of the private adviser exemption of section 203(b)(3) of the Act.

The majority's action marks a departure from the Commission's established approach of determining who an adviser's client is, namely by looking at whether or not the adviser is tailoring the advice to the financial situation and objectives of the individual investors or is simply providing advice to an entity in which individuals share the profits.[95] The core of the advisory relationship is the provision of individualized advice tailored to the needs and financial situation of the client. Thus, in 1997, when the Commission created a safe harbor to enable investment advisers to group clients together, it included safeguards to ensure that the adviser continued to treat each investor, not the group, as a client.[96] As the Commission explained:

A client of an investment adviser typically is provided with individualized advice that is based on the client's financial situation and investment objectives. In contrast, the investment adviser of an investment company need not consider the individual needs of the company's shareholders when making investment decisions, and thus has no obligation to ensure that each security purchased for the company's portfolio is an appropriate investment for each shareholder.[97]

An adviser to a hedge fund is not expected to tailor its advice to the needs of individual owners of the fund, who do not necessarily have identical financial situations or objectives.[98]

Not only does the majority's action awkwardly depart from the established approach for identifying an adviser's clients, but the majority rejected compelling challenges to the Commission's statutory authority for this action.[99] When Congress first adopted the Investment Advisers Act in 1940, it did not look through investment companies and treat the underlying shareholders as the client. Rather, the Advisers Act treated the company itself as the client.[100] In this vein, section 203(b) of the Act as originally enacted exempted from registration ''any investment adviser whose only clients are investment companies and insurance companies.''[101] In 1970, when Congress, acting on the Commission's recommendation, amended the Act to require advisers to investment companies to register, it determined that ''the shareholders of investment companies should have the same protections now provided for clients of investment advisers who obtain investment advice on an individual basis.''[102] Advisers to *privately placed* investment companies, however, were not affected by the change. These advisers could still rely on the exemption from registration in section 203(b)(3) for advisers who do not hold themselves out generally to the public as advisers and have fewer than 15 clients.

The Commission assumes that removing the exemption would simply effect Congress's unspoken intent that any adviser who manages a significantly large asset pool must register. The majority points for support to the legislative history of Investment Company Act section 3(c)(1), which exempts investment companies with fewer than 100 owners.[103] But the legislative history of that section suggests that Congress understood that there would be asset pools, some of them large, that were not reached by the statute.[104] Congress has *not* amended section 203(b)(3) to require hedge fund advisers to register despite being aware that many hedge fund advisers are advising large pools of money without being registered. In fact, just eight years ago, Congress, recognizing ''the important role that these pools can play in facilitating capital formation for U.S. companies,'' made the formation of large private pools easier.[105] Congress

[93] 15 U.S.C. 80b–3(b)(3). When Congress amended section 203(b)(3) in 1980 to preclude looking through business development companies in counting clients for purposes of that section, Congress did not ''intend to affect adversely the status of investment advisers which are not registered under the Act.'' H.R. Rep. No. 96–1341, at 62 (1980).

[94] The Commission explained that this safe harbor was ''not intended to specify the exclusive method for a limited partnership, rather than each limited partner, to be counted as a 'client' for purposes of section 203(b)(3) of the Act.'' Definition of ''Client'' of an Investment Adviser for Certain Purposes Relating to Limited Partnerships, Investment Advisers Act Release No. 983 (July 12, 1985) [50 FR 29206 (July 18, 1985)].

[95] *See, e.g.*, Definition of ''Client'' for Certain Purposes Relating to Limited Partnerships, Investment Advisers Act Release No. 956 (Feb. 25, 1985) [50 FR 8740 (Mar. 5, 1985)] (''Where an adviser to an investment pool manages the assets of the pool on the basis of the investment objectives of participants as a group, it appears appropriate to view the pool—rather than each participant—as a client of the adviser.'').

[96] *See* Status of Investment Advisory Programs under the Investment Company Act of 1940, Investment Company Act Release No. 22579 (Mar. 24, 1997) [62 FR 15098 (Mar. 31, 1997)] (adopting rule 3a–4 under the Investment Company Act [17 CFR 270.3a–4(a)] to provide a nonexclusive safe harbor from the definition of investment company for certain programs under which investment advisory services are provided on a discretionary basis to a large number of advisory clients having relatively small amounts to invest). Among the safeguards in the rule is a requirement that the sponsor of the program must obtain sufficient information from each client to be able to provide individualized investment advice to the client and periodically update the information. *See* rule 3a–4(a)(2). The majority, in support of its approach, posits a situation in which a group of individual clients of an adviser is combined into a hedge fund in order to avoid application of the Advisers Act. The majority's hypothetical example does not tell us whether the investors continue to receive personalized advice. *See* Adopting Release at text accompanying nn. 177–78. If they do not, there is nothing inappropriate about the adviser's characterizing the group as an unregistered investment company; they *should* be characterized as such, so long as they meet the applicable criteria to be classified as a private investment company.

[97] Status of Investment Advisory Programs under the Investment Company Act of 1940, Investment Company Act Release No. 22579 (Mar. 24, 1997) [62 FR 15098 (Mar. 31, 1997)].

[98] In instances in which an entity is merely a legal artifice, advisers, of course, are prohibited from counting it, rather than its investors, as clients in order to avoid registration. *See* section 208(d) of the Advisers Act [15 U.S.C. 80b–8d] (making it ''unlawful for any person indirectly * * * to do any act or thing which it would be unlawful for such person to do directly.''). This does not describe the hedge funds the advisers of which are the intended targets of the new rulemaking.

[99] *See, e.g.*, Comment Letters of Schulte Roth & Zabel LLP (Sept. 15, 2004); U.S. Chamber of Commerce (Sept. 15, 2004); Willkie, Farr & Gallagher (Sept. 13, 2004), Wilmer Cutler Pickering Hale and Dorr, LLP (Sept. 8, 2004).

[100] The majority speculates that Congress might not have intended for the legal entity to be treated as the client in the hedge fund context as it is in the investment company context. *See* Adopting Release at n. 171. But for their ability to rely on statutory exemptions from the definition of ''investment company'' under the Investment Company Act, hedge funds generally would fit within the definition. The approach of treating the entity, not the investors, as the client is equally appropriate in both cases.

[101] Investment Advisers Act, Section 203(b), Pub. L. 76–768, 54 Stat. 847, 850 (1940).

[102] *See* Investment Company Act Amendments of 1970, H.R. Rep. No. 91–1382, at 39 (1970).

[103] *See* Adopting Release at n. 139.

[104] Investment Trusts and Investment Companies: Hearings on S. 3580 before a Subcommitteee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess. 179 (1940) (David Schenker, Chief Counsel of the Investment Trust Study, explained: ''The total assets play no part in the determination as to whether a company is a public investment company or a private investment company * * *.'').

[105] S. Rep. 104–293, at 10 (1996).

added section 3(c)(7) to the Investment Company Act to permit the formation of unregistered pools of an unlimited number of highly sophisticated investors.[106] The Committee report faulted ''regulatory restrictions on these private pools'' for driving American investors offshore.[107] The fact that many advisers to such pools were not registered under the Advisers Act was certainly known to Congress and allowing them to continue in their unregistered state was entirely consistent with Congress's objective of minimizing regulatory restrictions on such pools of assets.

VI. Conclusion

When we dissented from this rulemaking at the proposal stage, we asked for comment on a wide range of issues. We were interested in exploring different ways of getting more information about hedge funds, including working with other regulators and enhancing Commission oversight of existing registrants. Commenters responded with legitimate concerns about the costs and unintended consequences and offered their cooperation and a number of more feasible alternatives for addressing the Commission's concerns.

As the commenters pointed out, mandatory registration is an inappropriate response to the concerns underlying this rulemaking. The growth of the industry might support our call for more information, but it is not a valid justification for regulation. Registration is not likely to deter or lessen substantially the harm of fraudulent activities of the type cited by the majority. The majority has failed to demonstrate that retailization is a problem, let alone that mandatory, universal registration would be the appropriate solution. Not only is the majority's rulemaking a poor solution for the problems that the majority cites, but it gives rise to unintended consequences. Among these are the imposition of substantial direct and opportunity costs on hedge fund advisers and their investors, and increased retailization. Moreover, implementing the rulemaking diverts Commission resources from the protection of retail investors. The Commission, in carrying out its mission, should apply its limited resources towards their highest and best use.

The majority also has failed to draw legitimate distinctions between hedge funds and other types of private investment pools that would justify different regulatory schemes. Questions about the wisdom of the majority's approach are compounded by questions about the propriety of this approach in light of legislative and regulatory precedent.

We hoped that the Commission would accord serious consideration to objections to their proposal. Today's rulemaking, which is the wrong solution to an undefined problem, disappoints those hopes and leaves better solutions unexplored.

For all of the foregoing reasons, we respectfully dissent.

Dated: December 2, 2004.

Cynthia A. Glassman,

Commissioner.

Paul S. Atkins,

Commissioner.

[FR Doc. 04–26879 Filed 12–9–04; 8:45 am]

BILLING CODE 8010–01–P

[106] 15 U.S.C. 80a–3(c)(7).

[107] S. Rep. 104–293, at 10 (1996).



Federal Register

Friday,

December 10, 2004

Part V

Department of Housing and Urban Development

Waivers Granted to and Alternative Requirements for CDBG Disaster Recovery Grantees Under the Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4959–N–01]

Waivers Granted to and Alternative Requirements for CDBG Disaster Recovery Grantees Under the Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005

AGENCY: Office of the Secretary, HUD.

ACTION: Notice of allocation method, waivers granted, alternative requirements applied, and statutory program requirements.

SUMMARY: This notice advises the public of the allocation method for grant funds, the list of grantees and proposed grant amounts, and the waivers of regulations and statutory provisions granted to CDBG disaster recovery grantees for the purpose of assisting in the recovery from the federally declared disasters that occurred between August 31, 2003 and October 1, 2004. As described in the **SUPPLEMENTARY INFORMATION** section of this notice, HUD is authorized by statute to waive statutory and regulatory requirements and specify alternative requirements for this purpose. This notice describes the fund allocation basis, lists the provisions being waived and alternative requirements specified, and notes statutory changes affecting program design and implementation.

DATES: *Effective Date:* December 15, 2004.

FOR FURTHER INFORMATION CONTACT: Jan C. Opper, Director, Disaster Recovery and Special Issues, Office of Block Grant Assistance, Department of Housing and Urban Development, Room 7286, 451 Seventh Street, SW., Washington, DC 20410, telephone number (202) 708–3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at (800) 877–8339. FAX inquiries may be sent to Mr. Opper at (202) 401–2044. (Except for the ''800'' number, these telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION:

Authority To Grant Waivers

The Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005 (Pub. L. 108–324, approved October 13, 2004) appropriates $150 million in Community Development Block Grant funds for disaster relief, long-term recovery, and mitigation directly related to the effects of the covered disasters. The Act authorizes the Secretary to waive, or specify alternative requirements for, any provision of any statute or regulation that the Secretary administers in connection with the obligation by the Secretary or use by the recipient of these funds, except for requirements related to fair housing, nondiscrimination, labor standards, and the environment, upon a finding that such waiver is required to facilitate the use of such funds and would not be inconsistent with the overall purpose of the statute.

The Secretary finds that the following waivers and alternative requirements are necessary to facilitate the use of these funds for their required purposes. The Secretary also finds that such uses of funds, as described below, are not inconsistent with the overall purpose of Title I of the Housing and Community Development Act of 1974, as amended, or the Cranston-Gonzalez National Affordable Housing Act, as amended.

Under the requirements of the HUD Reform Act, regulatory waivers must be justified and published in the **Federal Register**. The Department is also using this notice to provide information about other ways in which the requirements for this grant vary from regular CDBG program rules. Therefore, HUD is using this notice to make public alternative requirements and to note the applicability of disaster recovery-related statutory provisions. Compiling this information in a single notice creates a helpful resource for grant administrators and HUD field staff.

Except as described in this notice for states, statutory and regulatory provisions governing the Community Development Block Grant program for states, including those at 24 CFR part 570 subpart I, shall apply to the use of these funds. Except as described in this notice for Indian tribes, the statutory and regulatory provisions governing the Indian Community Development Block Grant program for Indian tribes and not related to the funding application and selection process will apply, including those at 24 CFR 1003 *et seq.*

Allocations

Public Law 108–324 (signed October 13, 2004) provides $150 million of supplemental appropriation for the CDBG program for:

> use only for disaster relief, long-term recovery, and mitigation in communities affected by disasters designated by the President between August 31, 2003 and October 1, 2004, except those activities reimbursable by the Federal Emergency Management Agency or available through the Small Business Administration. * * *

The law further notes:

> That all funds under this heading shall be awarded by the Secretary to states (including Indian tribes for all purposes under this heading) to be administered by each state in conjunction with its community development block grants program: Provided further, That notwithstanding 42 U.S.C. 5306(d)(2), states are authorized to provide such assistance to entitlement communities.

HUD has developed an allocation method based on data available from the Small Business Administration (SBA) and the Federal Emergency Management Agency (FEMA) on unmet housing, business, and public assistance needs for all designated areas in covered major disaster declarations. To receive funding, a state must submit a plan in accordance with this notice describing how funds will be used to address its greatest unmet need(s) and listing expected accomplishments. HUD may reallocate to other funded states any funds not used by a state or recaptured from a state.

The Congressional conference report (H.Rep.108–773) directs HUD to provide funds ''to areas facing the greatest need.'' Thus, the allocation reflects the relative recovery needs among the grantees having disasters that received Presidential declarations between August 31, 2003 and October 1, 2004. This weighting is designed to direct funds to the areas of greatest need, with an emphasis on housing.

The basic allocation formula is:

- 50 percent of the funds go toward unmet housing needs;
- 25 percent of the funds go toward unmet business needs;
- 25 percent of the funds go toward unmet public assistance needs.

Each state will receive its allocation based on its proportion of the unmet need aggregated from all covered disasters in that state relative to the sum of the unmet need for all states with declared disasters.

In addition to allocating the funds based on proportion of unmet need, HUD has established a minimum grant threshold. The minimum grant amount was set to ensure that grantees would receive sufficient funding to make significant progress toward the statutory objective of long-term disaster recovery. If any state would have otherwise been allocated less than $1.5 million under the allocation formula described above, it will not receive a grant allocation and the remaining funds will be reallocated proportionate to need to the grantees receiving grants greater or equal to $1.5 million.

The proposed allocations are as follows:

State	Disaster type	Amount reserved
Alabama	Hurricane Ivan (FEMA–DR–1549)	$10,965,311
California	Wildfires (1498). San Simeon earthquake (1505), flooding from levee break (1529)	10,547,928
Florida	Hurricane Charley (1539)	
	Hurricane Frances (1545)	
	Hurricane Ivan (1551)	
	Hurricane Jeanne (1561)	
	Subtotal Florida	100,915,626
Maryland	Hurricane Isabel (1492)	2,737,133
	Hurricane Isabel (1490), Tropical Storm Frances (1546),	
North Carolina	Hurricane Ivan (1553)	4,569,982
Ohio	Landslide, mudslides, severe storm, flooding (1507, 1519, 1556)	1,971,541
Pennsylvania	Tropical Storms Henri & Isabel (1497), severe storms & flooding (1538), Tropical Depressions Frances & Ivan (1555 & 1557).	2,528,243
Puerto Rico	Severe storms, flooding, mudslides, & landslides (1501), Tropical Storm Jeanne (1552)	7,998,964
Virginia	Hurricane Isabel (1491), severe storms and flooding (1502), severe storms, tornadoes & flooding (1525), Tropical Depression Gaston (1544).	5,724,016
West Virginia	Hurricane Isabel (1496), severe storms, flooding, landslides (1500, 1522, 1536, 1538)	2,041,256

HUD will invite each state named above to submit an Action Plan for Disaster Recovery in accordance with this notice.

The Department is compelled to enforce the provision of the appropriations statute that requires funds be used only for disaster relief, long-term recovery, and mitigation. The Department is also compelled to follow the conference report direction that funds be directed to areas with greatest need. Each grantee will describe in its Action Plan for Disaster Recovery how each use of funds meets these requirements. HUD will monitor compliance with this direction and may be compelled to consider disallowing expenditures if it finds uses of funds are not disaster-related or are clearly not for greatest needs. HUD encourages grantees to contact HUD field offices for guidance in complying with these requirements during development of their Action Plans for Disaster Recovery or if they have any questions regarding meeting these requirements.

The appropriations act treats Indian tribes as states for ''all purposes under this heading.'' As a result, the balance of this Notice will use the term ''grantee'' to mean a state or Indian tribe receiving a disaster recovery grant under this Notice. The terms ''state'' and ''Indian tribe'' will be used when necessary to distinguish between the two.

Waiver Justification

This section of the notice briefly describes the necessary basis for each waiver and provides an explanation of related alternative requirements, if additional explanation is necessary. This *Waiver Justification* section also highlights some of the statutory items and alternative requirements described in the *Applicable Rules, Statutes, Waivers and Alternative Requirements* section that follows.

Each state eligible for a disaster recovery grant receives annual CDBG allocations, has a consolidated plan, a citizen participation plan, a monitoring plan, and has made CDBG certifications. Indian tribes have regular experience operating within CDBG program requirements based on the same statute. HUD encourages each CDBG disaster recovery grantee to carry out CDBG disaster recovery activities in the context of its ongoing community development program to the extent feasible (for example, by selecting activities consistent with the consolidated plan, by providing overall benefit to at least 70 percent low- and moderate-income persons, and by holding hearings or meetings to solicit public comment).

The waivers, alternative requirements, and statutory changes apply only to the CDBG supplemental disaster recovery funds appropriated in Public Law 108–324. They provide additional flexibility in program design and implementation and implement statutory requirements unique to this appropriation.

Pre-Grant Process

The first group of waivers and alternative requirements concerns the pre-grant process, including citizen participation, the Action Plan for Disaster Recovery, fund distribution, and the overall benefit criteria.

Pursuant to explicit authority in the appropriations act, an overall benefit waiver allows for up to 50 percent of the grant to assist activities under the urgent need or prevention or elimination of slums and blight national objectives, rather than the 30 percent allowed in the regulation. The Housing and Community Development Act requires grantees to give maximum feasible priority to funding activities that benefit persons of low and moderate income, prevent or eliminate slums and blight, or meet community needs of particular urgency. Because major disaster damage to community development and housing is without regard to income, and income-producing jobs are often lost for a period of time following a disaster, HUD is waiving this requirement to give grantees maximum flexibility to carry out recovery activities within the confines of the CDBG program national objectives. The requirement that every activity meet one of the three national objectives is not waived.

The regulatory waiver allowing distribution of funds by a state to entitlement communities and Indian tribes is consistent with the provision of the appropriations law that specifically allows distribution of disaster recovery grant funds to entitlement communities and is also consistent with waivers granted for previous similar disaster recovery cases.

HUD is waiving the requirement for consistency with the consolidated plan because the effects of a major disaster usually alter a grantee's priorities for meeting housing, employment, and infrastructure needs. HUD is limiting the scope of the waiver for consistency with the consolidated plan; it applies only until the grantee first updates its consolidated plan following the disaster.

HUD is waiving the action plans requirements and substituting a streamlined Action Plan for Disaster Recovery. These actions will allow rapid implementation of disaster recovery grant programs and ensure conformance with provisions of the appropriations act. Where possible, the streamlined disaster recovery Action Plan, including certifications, does not repeat common action plan elements the

grantee has already committed to carry out as part of its annual CDBG submission.

The citizen participation waiver and alternative requirements will permit a speedier public process, but one that still provides for public notice, appraisal, examination, and comment on the activities proposed for the use of CDBG disaster recovery grant funds. The waiver removes the requirement at both the grantee and state grant recipient levels for public hearings or meetings as the method for disseminating information or collecting citizen comments.

Eligibility and Allowable Costs

The requirements under this heading in the *Applicable Rules, Statutes, Waivers, and Alternative Requirements* section include activity eligibility waivers, alternative requirements, and notes about the applicability of grant-related disaster recovery provisions of law. Justification for the waivers follows.

The waiver that allows new housing construction and payment of up to 100 percent of a housing down payment is necessary following major disasters in which large numbers of affordable housing units have been damaged or destroyed, as is the case in many of the disasters eligible under this notice, particularly those in Florida.

The limited waiver of the anti-pirating clause allows the flexibility to provide assistance to a business located in another state if the business was displaced from the grantee's jurisdiction by the disaster and the business wishes to return. This waiver is necessary to allow a grantee affected by a major disaster to rebuild its employment base.

The waiver of the state match for program administration requirement is provided so that the state has the flexibility to direct money to other recovery needs rather than being restricted to using the funding for administration.

Relocation Requirements

HUD is providing a limited waiver of the relocation requirements. HUD will consider providing additional waivers on a case-by-case basis if a grantee chooses to fund a flood buyout program with both HUD and FEMA funds and requires the waivers to develop a workable program design.

HUD is waiving the one-for-one replacement of low- and moderate-income housing units demolished or converted using CDBG funds requirement for housing units damaged by one or more disasters. HUD is waiving this requirement because it does not take into account the large, sudden changes a major disaster may cause to the local housing stock or local economy. Further, the requirement does not take into account the threats to public health and safety and to economic revitalization that may be caused by the presence of disaster-damaged structures that are unsuitable for rehabilitation. As it stands, the requirement would impede disaster recovery and discourage grantees from acquiring, converting, or demolishing disaster-damaged housing because of excessive costs that would result from replacing all such units within the specified timeframe.

Reporting

HUD is waiving the annual reporting requirement because the Congressional conferees requested quarterly reports from HUD on activities funded with these grants. To ensure that HUD can comply with this request, HUD is requiring each grantee to report quarterly to HUD using the online Disaster Recovery Grant Reporting system.

Match

There are no waivers in this section.

Certifications

HUD is waiving the standard certifications and substituting alternative certifications. The alternative certifications are tailored to CDBG disaster recovery grants and remove certifications and references that are redundant or appropriate to the annual CDBG formula program.

Applicable Rules, Statutes, Waivers, and Alternative Requirements

Pre-grant Process

1. *General note.* Prerequisites to a grantee's receipt of CDBG disaster recovery assistance include adoption of a citizen participation plan; publication of its proposed Action Plan for Disaster Recovery; public notice and comment; and submission to HUD of an Action Plan for Disaster Recovery, including certifications. Except as described in this notice for states, statutory and regulatory provisions governing the Community Development Block Grant program for states, including those at 24 CFR 570 subpart I, shall apply to the use of these funds. Except as described in this notice for Indian tribes, the statutory and regulatory provisions governing the Indian Community Development Block Grant program for Indian tribes and not related to the funding application and selection process will apply, including those at 24 CFR 1003 *et seq.*

2. *Overall Benefit waiver and alternative requirement.* The requirements at 42 U.S.C. 5301(c), 42 U.S.C. 5304(b)(3)(A), 24 CFR 570.484 (for states), and 24 CFR 1003.208 (for tribes) that 70 percent of funds are for activities that benefit low- and moderate-income persons are waived to stipulate that at least 50 percent of disaster recovery grant funds are for activities that benefit low and moderate income persons.

3. *Consolidated Plan waiver.* Requirements at 42 U.S.C. 12706 and 24 CFR 91.325(a)(6), that housing activities undertaken with CDBG funds be consistent with the strategic plan, are waived. Further, 24 CFR 570.903, which requires HUD to annually review grantee performance under the consistency criteria, is also waived. The waiver of consistency with the consolidated plan applies only until the grantee first updates the consolidated plan priorities following the disaster or until the completion of all grant activities, whichever comes first.

4. *Citizen participation waiver and alternative requirement.* Provisions of 42 U.S.C. 5304(a)(2) and (3), 42 U.S.C. 12707, 24 CFR 570.486, 24 CFR 1003.604, and 24 CFR 91.115(b) with respect to citizen participation requirements are waived and replaced by the requirements below. The streamlined requirements do not mandate public hearings at either the state or local government level, but do require providing a reasonable opportunity for citizen comment and ongoing citizen access to information about the use of grant funds. The streamlined citizen participation requirements for this grant are:

a. Before the grantee adopts the action plan (or a part of an action plan) for this grant or any substantial amendment to this grant, the grantee will publish the proposed plan or amendment (including the information required in this notice for an Action Plan for Disaster Recovery). The manner of publication (including prominent posting on the state, local, or other relevant Web site) must afford citizens, affected local governments and other interested parties a reasonable opportunity to examine the plan or amendment's contents. Subsequent to publication, the grantee must provide a reasonable time period and method(s) (including electronic submission) for receiving comments on the plan or substantial amendment. The grantee's plans to minimize displacement of persons or entities and to assist any persons or entities displaced must be published with the action plan.

b. In the action plan, each grantee will specify the criteria for determining what changes in the grantee's activities constitute a substantial amendment to the plan. At a minimum, adding or deleting an activity or changing the planned beneficiaries of an activity will constitute a substantial change. Any action plan may be modified or amended by the grantee in accordance with the same procedures required in this notice for the preparation and submission of an Action Plan for Disaster Recovery.

c. The grantee must consider all comments received on the action plan or any substantial amendment and submit to HUD a summary of those comments and the grantee's response with the action plan or substantial amendment.

d. The grantee must make the action plan, any substantial amendments, and all performance reports available to the public. In addition, the grantee must make these documents available in a form accessible to persons with disabilities. During the term of this grant, the grantee will provide citizens, affected local governments, and other interested parties reasonable and timely access to information and records relating to the action plan and the grantee's use of this grant, including posting such information to the Internet.

e. The grantee will provide a timely written response to every citizen complaint. Such response will be provided within 15 working days of the complaint, if practicable.

5. *Action Plan waiver and alternative requirement.* The requirements at 42 U.S.C. 12705(a)(2), 42 U.S.C. 5304(a)(1), 42 U.S.C. 5304(m), 42 U.S.C. 5306(d)(2)(C)(iii), 24 CFR 1003.604, and 24 CFR 91.320 are waived for these disaster recovery grants. Each grantee must submit to HUD an Action Plan for Disaster Recovery that describes:

a. The greatest recovery needs resulting from the covered disaster that have not been addressed by insurance proceeds, federal assistance or any other funding source;

b. The grantee's overall plan for disaster recovery;

c. Expected Federal, non-Federal public, and private resources, and their relationship, if any, to activities to be funded with CDBG disaster recovery assistance; and

d. The state's method of distribution. The method of distribution shall include a description of:

(1) All criteria used to select applications from local governments for funding, including the relative importance of the criteria (does not apply to tribal grantees), and including a description of how the disaster recovery grant resources will be allocated to areas of greatest need among all funding categories and the threshold factors and grant size limits that are to be applied, or

(2) The projected uses for the CDBG disaster recovery funds by project, program or activity and geographic area, and

(3) How the allocation method or use of funds (project, program or activity) described in accordance with subparagraphs (A) or (B) above will result in uses of grant funds related to disaster relief or recovery from specific effects of the disaster(s); and

(4) Sufficient information so that units of general local government will be able to understand and comment on the action plan and be able to prepare responsive applications (does not apply to tribal grantees).

e. Monitoring standards and procedures (if a state will apply those already developed for the consolidated plan under section 24 CFR 91.330, so affirm);

f. Required certifications (see the applicable *Certifications* section of this notice);

g. The specific sources from which the match requirement (see the *Non-Federal Public Matching Funds Requirement* section of this notice) will be achieved; and

h. A completed and executed Federal form SF–424.

6. *Waiver and alternative requirement for distribution to CDBG metropolitan cities and urban counties.* The appropriations law allows a grantee to distribute disaster recovery grant funds to metropolitan cities and urban counties (*i.e.*, ''entitlement communities''). Section 5302(a)(7) of title 42, *United States Code* (definition of ''nonentitlement area'') and provisions of 24 CFR part 570 that would prohibit states electing to receive CDBG funds from distributing such funds to units of general local government in entitlement communities and to Indian tribes, are waived, including 24 CFR 570.480(a), to the extent that such provisions limit the distribution of funds to units of general local government located in entitlement areas and to Indian tribes. The appropriations law supersedes the statutory distribution prohibition at 42 U.S.C. 5306(d)(1) and (2)(A). Alternatively, the state is required to distribute funds without regard to a local government or Indian tribe status under any other CDBG program.

Eligibility and Allowable Costs

7. *Note that use of grant funds must relate to the covered disaster.* In addition to being eligible under 42 U.S.C. 5305(a) or this notice and meeting a CDBG national objective, activities funded under this notice must also be related to disaster relief, long-term recovery, and mitigation in communities affected by Presidentially declared disasters occurring between August 31, 2003, and September 30, 2004.

8. *Note on duplication of benefits and disaster impact.* Pursuant to the appropriations act and the Robert T. Stafford Disaster Assistance and Emergency Relief Act (42 U.S.C. 5155), no entity may receive disaster recovery grant assistance with respect to any part of a disaster loss that is reimbursable by FEMA or eligible for Small Business Administration (SBA) assistance or as to which it has received financial assistance under any other program or from insurance or any other source. For example, a grantee may not use funds under this notice for activity costs that are reimbursable or for which funds are made available by FEMA or SBA. Further, the grantee may not provide CDBG disaster recovery grant assistance to a project or activity underway prior to a Presidential disaster declaration during the time period specified in the appropriations act unless the disaster directly impacted the project.

9. *Program income alternative requirement.* If, under 24 CFR 570.489(e)(3) a state determines that a state grant recipient is continuing a disaster recovery grant assisted activity from which program income is derived, it must permit the recipient to retain the program income. For such continuing activities, the program income will retain its CDBG disaster recovery grant identity and be covered by this notice. However, if the state does not make such a determination, then program income earned by the activity will be regular CDBG program income under the provisions of 24 CFR 570.489(e) and disaster recovery grant requirements and waivers will no longer apply.

For Indian tribes that are state grant recipients or HUD grantees, the regulations at 24 CFR 1003.503 will govern program income generated by a disaster recovery grant activity. Program income generated by disaster recovery grant activities will retain its CDBG disaster recovery grant identity and be covered by this notice until the state or HUD, as applicable, closes out its grant with the tribe.

If a grantee receives disaster recovery grant program income (*e.g.*, if a state

requires a state grant recipient to remit the funds to the state), the program income will retain its CDBG disaster recovery grant identity and be covered by this notice until the HUD closes out the disaster recovery grant to the state.

10. *Housing-related eligibility waivers.* Section 5305(a) of title 42, *United States Code* and 24 CFR 570.482(a) through (d) are waived to the extent necessary to allow down payment assistance for up to 100% of the down payment (42 U.S.C. 5305(a)(24)(D)) and to allow new housing construction.

11. *Waiver and modification of the anti-pirating clause to permit assistance to help a business return.* Section 5305(h) of title 42 *United States Code* is hereby waived only to allow the grantee to provide assistance under this grant to any business that was operating in the covered disaster area before the incident date of a Presidentially declared disaster between August 31, 2003, and September 30, 2004, and has since moved in whole or in part from the affected area to continue business.

12. *Note on reimbursement of CDBG formula funds.* The appropriations law authorizes the use of CDBG disaster recovery grant funds to reimburse expenditures incurred from the regular CDBG program allocation used to achieve the same purposes as the disaster recovery grant appropriation.

13. *Waiver of the limitation on planning and administrative costs and alternative requirement.* Section 5306(d)(3)(A) of title 42 *United States Code* and 24 CFR 570.489(a)(1) concerning the use of disaster recovery grant funds for state administrative costs, including the matching funds requirements are waived. The amount of grant funds used to pay administrative costs incurred by a state in carrying out its responsibilities under this notice shall not exceed 2 percent of the aggregate of the state's disaster recovery grant. The grantee may use no more than 20 percent of the sum of any CDBG disaster recovery grant, plus program income, for planning and program administrative costs, including administration and planning by state grant recipients.

Relocation Requirements

15. *Waiver of one-for-one replacement of units damaged by disaster.* One-for-one replacement requirements at 42 U.S.C. 5304(d)(2) and 24 CFR 570.488, 570.606(c) and 42.375(a) are waived for low- and moderate-income dwelling units (1) damaged by the disaster, (2) for which CDBG funds are used for demolition, and (3) which are not suitable for rehabilitation. These requirements are waived provided the grantee assures HUD it will use all resources at its disposal to ensure no displaced homeowner will be denied access to decent, safe and sanitary suitable replacement housing because he or she has not received sufficient financial assistance. Also, state grant recipients must provide such assurances to the state.

16. *Notes on flood buyouts:*

a. Payment of pre-flood values for buyouts. HUD disaster recovery state grant recipients and Indian tribes have the discretion to pay pre-flood or post-flood values for the acquisition of properties located in a flood way or floodplain. In using CDBG disaster recovery funds for such acquisitions, the grantee must uniformly apply whichever valuation method it chooses.

b. Ownership and maintenance of acquired property. Any property acquired with disaster recovery grants funds being used to match FEMA Section 404 Hazard Mitigation Grant Program funds is subject to section 404(b)(2) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, which requires that such property be dedicated and maintained in perpetuity for a use that is compatible with open space, recreational, or wetlands management practices. In addition, with minor exceptions, no new structure may be erected on the property and no subsequent application for Federal disaster assistance may be made for any purpose. The acquiring entity may want to lease such property to adjacent property owners or other parties for compatible uses in return for a maintenance agreement. Although Federal policy encourages leasing rather than selling such property, the property may be sold. In all cases, a deed restriction or covenant running with the land must require that the property be dedicated and maintained for compatible uses in perpetuity.

c. Future Federal assistance to owners remaining in floodplain.

(1) Section 582 of the National Flood Insurance Reform Act of 1994, as amended, (42 U.S.C. 5154(a)) prohibits flood disaster assistance in certain circumstances. In general, it provides that no Federal disaster relief assistance made available in a flood disaster area may be used to make a payment (including any loan assistance payment) to a person for repair, replacement, or restoration for damage to any personal, residential, or commercial property, if that person at any time has received flood disaster assistance that was conditional on the person first having obtained flood insurance under applicable Federal law and the person has subsequently failed to obtain and maintain flood insurance as required under applicable Federal law on such property. (Section 582 is self-implementing without regulations.) This means that a grantee may not provide disaster assistance for the above-mentioned repair, replacement, or restoration to a person that has failed to meet this requirement.

(2) Section 582 also implies a responsibility for a grantee that receives CDBG disaster recovery funds or that, under 42 U.S.C. 5321, designates annually appropriated CDBG funds for disaster recovery. That responsibility is to inform property owners receiving disaster assistance that triggers the flood insurance purchase requirement that they have a statutory responsibility to notify any transferee of the requirement to obtain and maintain flood insurance, and that the transferring owner may be liable if he or she fails to do so. These requirements are described below.

(3) Duty to notify. In the event of the transfer of any property described in paragraph e., the transferor shall, not later than the date on which such transfer occurs, notify the transferee in writing of the requirements to:

(a) Obtain flood insurance in accordance with applicable Federal law with respect to such property, if the property is not so insured as of the date on which the property is transferred; and

(b) Maintain flood insurance in accordance with applicable Federal law with respect to such property. Such written notification shall be contained in documents evidencing the transfer of ownership of the property.

(4) Failure to notify. If a transferor fails to provide notice as described above and, subsequent to the transfer of the property:

(a) The transferee fails to obtain or maintain flood insurance, in accordance with applicable Federal law, with respect to the property;

(b) The property is damaged by a flood disaster; and

(c) Federal disaster relief assistance is provided for the repair, replacement, or restoration of the property as a result of such damage, the transferor must reimburse the Federal Government in an amount equal to the amount of the Federal disaster relief assistance provided with respect to the property.

d. The notification requirements apply to personal, commercial, or residential property for which Federal disaster relief assistance made available in a flood disaster area has been provided, prior to the date on which the property is transferred, for repair, replacement, or restoration of the

property, if such assistance was conditioned upon obtaining flood insurance in accordance with applicable Federal law with respect to such property.

e. The term ''Federal disaster relief assistance'' applies to HUD or other Federal assistance for disaster relief in ''flood disaster areas.'' The prohibition in subparagraph (1) above applies only when the new disaster relief assistance was given for a loss caused by flooding. It does not apply to disaster assistance caused by other sources (*i.e.*, earthquakes, fire, wind, etc.). The term ''flood disaster area'' is defined in section 582(d)(2) to include an area receiving a Presidential declaration of a major disaster or emergency as a result of flood conditions.

Reporting

17. *Waiver of performance evaluation report and alternative requirement.* The requirements for submission of a Performance Evaluation Report (PER) pursuant to 42 U.S.C. 12708 and 24 CFR 91.520 are waived.

The alternative requirement is that

a. Each grantee must enter its Action Plan for Disaster Recovery into HUD's Web-based Disaster Recovery Grant Reporting (DRGR) system. As additional detail about uses of funds becomes available to the grantee, the grantee must enter this detail into DRGR, in sufficient detail to serve as the basis for acceptable performance reports.

b. Each grantee must submit a quarterly performance report, as HUD prescribes, no later than 30 days following each calendar quarter, beginning after the first full calendar quarter after grant award and continuing until all funds have been expended and that expenditure reported. Each quarterly report will include information about the uses of funds including (but not limited to) the project name, activity, location, national objective, funds budgeted and expended, the funding source and total amount of any non-CDBG disaster funds (including matching funds), numbers of properties and housing units, beginning and ending dates of activities, and numbers of low- and moderate-income persons or households benefiting. Quarterly reports must be submitted using HUD's Web-based Disaster Recovery Grant Reporting (DRGR) system. At least annually (*i.e.*, with every fourth submission), the report shall include a financial reconciliation of funds budgeted and expended, calculation of administrative and public service limitations, and of the overall percent of benefit to low- and moderate-income persons.

18. *Information collection approval note.* HUD has approval from OMB for information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). OMB approval is under OMB control number 2506–0165, which expires August 31, 2007. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

Non-Federal Public Matching Funds Requirement

19. *Match note.* In accordance with the appropriations act (Pub. L. 108–324) each grantee shall provide not less than 10 percent in non-Federal public matching funds or its equivalent value (other than administrative costs) for any HUD disaster recovery grant funds it receives from that appropriation. Each grantee will provide match payments that meet the following criteria.

a. Match contributions must be made to disaster recovery activities related to covered disasters.

b. Match may be provided by any public entity from non-Federal cash (*e.g.*, general or dedicated revenues), real estate, or other similar assets owned or controlled by the public entity or the value of public improvements and public facilities activities, or force account undertaken.

c. Match funds must be reasonably valued. For example, base the value of cash grants on the dollar value of the grant; value below market interest rate loans on the present discounted cash value of the amount of subsidy; value taxes forgiven for future years based on the present discounted cash value of the revenue foregone; and value a donation of real estate based on a professional appraisal.

d. The grantee must make match contributions before all CDBG disaster recovery grant funds are expended. Match contributions must total not less than 10 percent of the disaster recovery grant funds drawn from the grantee's line of credit, excluding funds drawn for administrative and planning costs.

e. Grantees may not count administrative and planning costs toward the required non-Federal public matching funds or equivalent value.

f. Contributions that have been or will be counted as satisfying a matching requirement of another Federal grant or award, including any other disaster recovery grant, may not count as satisfying the matching contribution requirement for a HUD Disaster Recovery grant.

g. Match contributions must be contributed permanently to a disaster-related activity. To receive match credit for the full amount of a loan made with non-Federal public funds to a disaster recovery funded activity, all repayment, interest, or other return on the loan must be treated as CDBG program income.

h. The following are examples that do not count toward meeting a grantee's matching contribution requirement:

(1) Contributions made with or derived from Federal resources of funds, regardless of when the Federal resources or funds were received or expended. CDBG funds (defined at 24 CFR 570.3) are Federal funds for this purpose;

(2) Contributions made with private resources or funds, regardless of when the private resources or funds were received or expended;

(3) The interest rate subsidy attributable to the Federal tax exemption on financing or the value attributable to Federal tax credits;

i. Contributions are credited at time the contribution is made and reported to HUD quarterly, as follows:

(1) Credit a cash contribution when the funds are expended for a disaster-related activity or at the time the grantee awards disaster recovery grant funds if the activity was completed before the award of CDBG disaster recovery funds.

(2) Credit the subsidy value of a below-market interest rate loan at the time of the loan closing.

(3) Credit the value of state or local taxes, fees, or other charges that are normally and customarily imposed but waived, foregone, or deferred at the time the grantee or state grant recipient or other public entity officially waives, forgoes, or defers the taxes, fees, or other charges.

(4) Credit the value of donated land or other real property at the time ownership of the property is transferred to the public entity carrying out the disaster-recovery-grant-assisted or disaster-related activity.

(5) Credit the direct cost of relocation payments and services at the time that the payments and services are provided.

j. For projects involving more than one grantee, the grantee that makes the match contribution may decide to retain the match credit or permit the other grantee to claim the credit.

Certifications

20. *Certifications for state governments, waiver and alternative requirement.* Section 91.325 of title 24 *Code of Federal Regulations* is waived. Each state must make the following certifications prior to receiving a CDBG disaster recovery grant:

a. The state certifies that it will affirmatively further fair housing, which means that it will conduct an analysis to identify impediments to fair housing choice within the state, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard. (*See* 24 CFR 570.487(b)(2)(ii).)

b. The state certifies that it has in effect and is following a residential anti-displacement and relocation assistance plan in connection with any activity assisted with funding under the CDBG program.

c. The state certifies that it is complying with requirements regarding drug-free workplace required by 24 CFR part 24, subpart F, together with the appropriate forms.

d. The state certifies its compliance with restrictions on lobbying required by 24 CFR part 87, together with disclosure forms, if required by that part.

e. The state certifies that the Action Plan for Disaster Recovery is authorized under state law and that the state possesses the legal authority to carry out the program for which it is seeking funding, in accordance with applicable HUD regulations and this notice.

f. The state certifies that it will comply with the acquisition and relocation requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and implementing regulations at 49 CFR part 24, except where waivers or alternative requirements are provided for this grant.

g. The state certifies that it will comply with section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u), and implementing regulations at 24 CFR part 135.

h. The state certifies that it is following a detailed citizen participation plan that satisfies the requirements of 24 CFR 91.115 (except as provided for in notices providing waivers and alternative requirements for this grant), and that each unit of general local government that is receiving assistance from the state is following a detailed citizen participation plan that satisfies the requirements of Sec. 570.486 (except as provided for in notices providing waivers and alternative requirements for this grant).

i. The state certifies that:

(1) It has consulted with affected units of local government in counties designated in covered major disaster declarations in the nonentitlement, entitlement and tribal areas of the state in determining the method of distribution of funding; and

(2) Each unit of general local government to be distributed funds will be required to identify its disaster recovery needs, including the needs of low-income and moderate-income families, and the disaster recovery activities to be undertaken to meet these needs.

j. The state certifies that it has complied with each of the following criteria:

(1) Funds will be used solely for disaster relief, long-term recovery, and mitigation related to a major disaster declared by the President between August 31, 2003, and October 1, 2004.

(2) Funds will be provided to areas facing the greatest need.

(3) With respect to activities expected to be assisted with CDBG disaster recovery funds, the action plan has been developed so as to give the maximum feasible priority to activities that will benefit low- and moderate-income families.

(4) The aggregate use of CDBG disaster recovery funds shall principally benefit low- and moderate-income families in a manner that ensures that at least 50 percent of the amount is expended for activities that benefit such persons during the designated period.

(5) The state will not attempt to recover any capital costs of public improvements assisted with CDBG disaster recovery grant funds, by assessing any amount against properties owned and occupied by persons of low- and moderate-income, including any fee charged or assessment made as a condition of obtaining access to such public improvements, unless (A) disaster recovery grant funds are used to pay the proportion of such fee or assessment that relates to the capital costs of such public improvements that are financed from revenue sources other that under this title; or (B) for purposes of assessing any amount against properties owned and occupied by persons of moderate income, the grantee certifies to the Secretary that it lacks sufficient CDBG funds (in any form) to comply with the requirements of clause (A).

k. The state certifies that the grant will be conducted and administered in conformity with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and the Fair Housing Act (42 U.S.C. 3601–3619) and implementing regulations.

l. The state certifies that it will require units of general local government that receive grant funds to certify that they have adopted and are enforcing:

(1) A policy prohibiting the use of excessive force by law enforcement agencies within its jurisdiction against any individuals engaged in non-violent civil rights demonstrations; and

(2) A policy of enforcing applicable state and local laws against physically barring entrance to or exit from a facility or location that is the subject of such non-violent civil rights demonstrations within its jurisdiction.

m. The state certifies that each state grant recipient has the capacity to carry out disaster recovery activities in a timely manner, or the state has a plan to increase the capacity of any state grant recipient(s) who lacks such capacity.

n. The state certifies that it will comply with applicable laws.

21. *Certifications for Indian tribes, waiver and alternative requirement.* Instead of following paragraph 20, above, each Indian tribe will make the following certifications.

a. The tribe certifies that it will comply with the requirements of Title II of Public Law 90–284 (25 U.S.C. 1301) (the Indian Civil Rights Act) and any applicable anti-discrimination laws.

b. The tribe certifies that it will provide the drug-free workplace required by 24 CFR part 24, subpart F.

c. The tribe certifies that it will comply with restrictions on lobbying required by 24 CFR part 87, together with disclosure forms, if required by that part.

d. The tribe certifies that it possesses the legal authority to apply for the disaster recovery grant and execute the proposed program.

e. Except as waived, that it will comply with the acquisition and relocation requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and implementing regulations at 49 CFR part 24.

f. Prior to submission of its application to HUD, that it has met the citizen participation requirements of this notice.

g. The Action Plan for Disaster Recovery has been developed so that more than 50 percent of the funds received under this grant will be used for activities that benefit low- and moderate-income persons (as the term '''activities benefiting low- and moderate-income persons''' is used at 24 CFR 570.483(b)).

h. The tribe certifies that it will comply with all applicable laws.

Duration of Funding

The appropriation accounting provisions in 31 U.S.C. 1551–1557, added by section 1405 of the National Defense Authorization Act for Fiscal Year 1991 (Pub. L. 101–510), limit the availability of certain appropriations for

expenditure. This limitation may not be waived. HUD may place shorter deadlines on the expenditure of those funds by grant agreement conditions.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers for the 1999 HUD Disaster Recovery Initiative are as follows: 14.219; 14.228.

Finding of No Significant Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The Finding of No Significant Impact is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Office of the Rules Docket Clerk, Office of General Counsel, Department of Housing and Urban Development, Room 10276, 451 Seventh Street, SW., Washington, DC 20410–0500.

Dated: December 6, 2004.

Roy A. Bernardi,

Deputy Secretary.

[FR Doc. 04–27201 Filed 12–8–04; 10:18 am]

BILLING CODE 4210–32–P

Reader Aids

Federal Register

Vol. 69, No. 237

Friday, December 10, 2004

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6064**
Public Laws Update Service (numbers, dates, etc.)	**741–6043**
TTY for the deaf-and-hard-of-hearing	**741–6086**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **http://www.gpoaccess.gov/nara/index.html**

Federal Register information and research tools, including Public Inspection List, indexes, and links to GPO Access are located at: **http://www.archives.gov/federal_register/**

E-mail

FEDREGTOC-L (Federal Register Table of Contents LISTSERV) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, 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.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC-L and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATE, DECEMBER

69805–70050 1
70051–70178 2
70179–70350 3
70351–70536 6
70537–70870 7
70871–71338 8
71339–71690 9
71691–73008 10

CFR PARTS AFFECTED DURING DECEMBER

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.

3 CFR

Proclamations:
7850 70351
7851 70353
7852 71689

Executive Orders:
12473 (Amended by EO 13365) 71333
13286 (See EO 13362) 70173
13289 (See EO 13363) 70175
13303 (Amended by EO 13364) 70177
13315 (See EO 13364) 70177
13350 (See EO 13364) 70177
13362 70173
13363 70175
13364 70177
13365 71333

Administrative Orders:
Memorandums:
Memorandum of October 21, 2004 70349

5 CFR

317 70355
352 70355
359 70355
451 70355
530 70355
531 70355
534 70355
575 70355
841 69805
842 69805
843 69805

6 CFR

Proposed Rules:
5 70402

7 CFR

210 ..... 70871, 70872
220 70872
319 71691
354 71660
905 70874
1005 71697
1006 71697
1007 71697
1464 70367
1775 70877
1951 70883

Proposed Rules:
319 71736
929 69996
930 71744
983 71749
989 71753

9 CFR

166 70179
430 70051

11 CFR

Proposed Rules:
300 71388

12 CFR

Proposed Rules:
226 70925

13 CFR

121 70180

Proposed Rules:
121 70197

14 CFR

23 70885
39 ..... 69807, 69810, 70368, 70537, 70539, 71339, 71340, 71342, 71344, 71347, 71349, 71351, 71353
71 ..... 70053, 70185, 70371, 70372, 70541, 70542, 71701, 71702
73 70887

Proposed Rules:
39 ..... 69829, 69832, 69834, 69836, 69838, 69842, 69844, 70202, 70204, 70564, 70566, 70568, 70571, 70574, 70936, 70938
71 ..... 70208, 71756

15 CFR

732 71356
734 71356
740 71356
742 71356
744 71356
750 69814
772 71356
806 70543

Proposed Rules:
710 70754
711 70754
712 70754
713 70754
714 70754
715 70754
716 70754
717 70754
718 70754
719 70754
720 70754
721 70754
722 70754
723 70754
724 70754
725 70754
726 70754

727.....70754
728.....70754
729.....70754

17 CFR

240.....70852
248.....71322
275.....72054
279.....72054
Proposed Rules:
240.....71126, 71256
242.....71126
249.....71126

18 CFR

11.....71364
Proposed Rules:
Ch. 1.....70077

21 CFR

1.....71562, 71655
11.....71562
510.....70053
520.....70053
522.....70054, 70055
558.....70056
880.....70702
Proposed Rules:
165.....70082
1301.....70576

22 CFR

122.....70888
129.....70888

23 CFR

655.....69815

24 CFR

570.....70864
Proposed Rules:
206.....70244
2004.....70868
3280.....70016

25 CFR

Proposed Rules:
542.....69847

26 CFR

1.....70547, 70550
25.....70547
31.....69819, 70547
53.....70547
55.....70547
156.....70547
301.....70547
602.....70547, 70550
Proposed Rules:
1.....70578, 71757
26.....70404
301.....71757

27 CFR

9.....70889, 71372

29 CFR

1926.....70373
4011.....69820
4022.....69820
4044.....69821

30 CFR

18.....70752
938.....71528, 71551

33 CFR

100.....70551, 70552
117.....70057, 70059, 70373, 71704, 71706
165.....70374, 71708, 71709
Proposed Rules:
100.....70578
110.....71758
117.....70091, 70209
165.....70211, 71758

35 CFR

Ch. I.....71375

36 CFR

13.....70061
242.....70074
Proposed Rules:
242.....70940

37 CFR

201.....70377
253.....69822

40 CFR

9.....70552
52.....69823, 70893, 70895, 71375, 71712
180.....70897, 71714
271.....70898
712.....70552
Proposed Rules:
52.....69863, 70944, 70945, 71390, 71764
60.....69864, 71472
63.....69864
271.....70946
272.....71391
721.....70404

41 CFR

Proposed Rules:
51-2.....70214
51-3.....70214
51-4.....70214

42 CFR

Proposed Rules:
1001.....71766

43 CFR

44.....70557
1880.....70557

44 CFR

64.....70377
65.....70185, 71718
67.....70191, 70192, 71721

45 CFR

Proposed Rules:
650.....71395

47 CFR

0.....70316
1.....70378, 72020
2.....71380, 72020
4.....70316
11.....72020
15.....71380, 72020
18.....70562
21.....72020
27.....70378, 72020
63.....70316
64.....71383
73.....71384, 71385, 71386, 71387, 72020
74.....70378, 72020
76.....72020
78.....72020
79.....72020
90.....70378
101.....70378, 72020
Proposed Rules:
1.....72046
27.....72046
73.....71396

49 CFR

171.....70902
173.....70902
174.....70902
175.....70902
176.....70902
177.....70902
178.....70902
571.....70904
585.....70904
586.....70904
589.....70904
590.....70904
596.....70904
597.....70904
Proposed Rules:
572.....70947
1507.....71767

50 CFR

14.....70379
17.....70382, 71723
100.....70074
222.....69826
223.....69826
300.....71731
622.....70196
635.....70396, 71732, 71735
648.....70919, 70923
679.....69828, 70924
Proposed Rules:
17.....69878, 70412, 70580, 70971, 71284
20.....71770
100.....70940
226.....71880
229.....70094
635.....71771
648.....70414
660.....70973
679.....70589, 70605, 70974

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT DECEMBER 10, 2004

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Milk marketing orders:

Appalachian, Florida, and Southeast; published 12-10-04

AGRICULTURE DEPARTMENT

Animal and Plant Health Inspection Service

Plant-related quarantine, foreign:

Fruits and vegetables; movement and importation; published 11-10-04

ENVIRONMENTAL PROTECTION AGENCY

Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:

Azoxystrobin, etc.; published 12-10-04

FEDERAL COMMUNICATIONS COMMISSION

Radio stations; table of assignments:

Georgia; published 11-8-04

New Jersey; published 11-8-04

Texas; published 11-8-04

HOMELAND SECURITY DEPARTMENT

Coast Guard

Ports and waterways safety:

Lake Michigan—

Chicago Captain of Port Zone, IL; security zone; published 12-10-04

Puget Sound, WA, Captain of Port Zone; security zones; published 12-10-04

INTERIOR DEPARTMENT

National Park Service

Special regulations:

Yellowstone and Grand Teton National Parks and John D. Rockefeller, Jr. Memorial Parkway, WY; winter visitation and recreational use management; published 11-10-04

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness directives:

Saab; published 11-5-04

TREASURY DEPARTMENT

Comptroller of the Currency

Practice and procedure:

Civil money penalty inflation adjustments; published 11-10-04

RULES GOING INTO EFFECT DECEMBER 11, 2004

HOMELAND SECURITY DEPARTMENT

Coast Guard

Regattas and marine parades:

Eastport Yacht Club Lights Parade; published 12-7-04

Olde Towne Holiday Music Festival Fireworks Show; published 12-7-04

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Beef promotion and research; comments due by 12-13-04; published 11-12-04 [FR 04-25198]

Cotton classing, testing and standards:

Classification services to growers; 2004 user fees; Open for comments until further notice; published 5-28-04 [FR 04-12138]

AGRICULTURE DEPARTMENT

Rural Business-Cooperative Service

Special programs:

Farm Security and Rural Investment Act of 2002; implementation—

Renewable Energy Systems and Energy Efficiency Improvements, Grant, Guaranteed Loan, and Direct Loan Program; comments due by 12-15-04; published 11-15-04 [FR 04-25239]

COMMERCE DEPARTMENT

Industry and Security Bureau

Export administration regulations:

Knowledge and red flags; definition and guidance revisions; safe harbor; comments due by 12-15-04; published 11-15-04 [FR 04-25309]

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Civil procedures; comments due by 12-13-04; published 10-12-04 [FR 04-22598]

Fishery conservation and management:

Alaska; fisheries of Exclusive Economic Zone—

Bering Sea and Aleutian Islands king and tanner crab; comments due by 12-13-04; published 10-29-04 [FR 04-24103]

Caribbean, Gulf, and South Atlantic fisheries—

Gulf of Mexico reef fish; comments due by 12-16-04; published 11-16-04 [FR 04-25429]

Magnuson-Stevens Act provisions—

Pacific Coast groundfish; fishing capacity reduction program.; comments due by 12-16-04; published 11-16-04 [FR 04-25428]

Marine mammals:

Taking and importation—

Kodiak Island, AK; rocket launches at Kodiak Launch Complex; pinnipeds; comments due by 12-13-04; published 10-29-04 [FR 04-24234]

COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA

Semi-annual agenda; Open for comments until further notice; published 12-22-03 [FR 03-25121]

ENERGY DEPARTMENT

Meetings:

Environmental Management Site-Specific Advisory Board—

Oak Ridge Reservation, TN; Open for comments until further notice; published 11-19-04 [FR 04-25693]

ENERGY DEPARTMENT

Energy Efficiency and Renewable Energy Office

Commercial and industrial equipment; energy efficiency program:

Test procedures and efficiency standards—

Commercial packaged boilers; Open for comments until further notice; published 10-21-04 [FR 04-17730]

ENERGY DEPARTMENT

Federal Energy Regulatory Commission

Alaska Natural Gas Pipeline Act:

Conduct of open seasons for natural gas transportation projects; comments due by 12-17-04; published 11-23-04 [FR 04-25933]

Electric rate and corporate regulation filings:

Virginia Electric & Power Co. et al.; Open for comments until further notice; published 10-1-03 [FR 03-24818]

ENVIRONMENTAL PROTECTION AGENCY

Air quality implementation plans; approval and promulgation; various States:

California; comments due by 12-16-04; published 11-16-04 [FR 04-25301]

Illinois; comments due by 12-13-04; published 11-12-04 [FR 04-24916]

Iowa; comments due by 12-13-04; published 11-12-04 [FR 04-24918]

Environmental statements; availability, etc.:

Coastal nonpoint pollution control program—

Minnesota and Texas; Open for comments until further notice; published 10-16-03 [FR 03-26087]

Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:

Mepanipyrim; comments due by 12-13-04; published 10-13-04 [FR 04-22963]

Toxic substances:

Enzymes and proteins; nomenclature inventory; comments due by 12-15-04; published 11-15-04 [FR 04-25307]

Water pollution control:

National Pollutant Discharge Elimination System—

Concentrated animal feeding operations in New Mexico and Oklahoma; general permit for discharges; Open for comments until further notice; published 12-7-04 [FR 04-26817]

Water pollution; effluent guidelines for point source categories:

Meat and poultry products processing facilities; Open for comments until further notice; published 9-8-04 [FR 04-12017]

FARM CREDIT ADMINISTRATION

Farm credit system:
Borrower rights; comments due by 12-16-04; published 11-16-04 [FR 04-25397]

FEDERAL COMMUNICATIONS COMMISSION

Radio stations; table of assignments:
Alabama and Mississippi; comments due by 12-13-04; published 11-17-04 [FR 04-25511]
Minnesota and Oklahoma; comments due by 12-16-04; published 11-10-04 [FR 04-25058]
Oklahoma and Texas; comments due by 12-16-04; published 11-10-04 [FR 04-25061]
Wyoming; comments due by 12-16-04; published 11-10-04 [FR 04-25057]

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

Food additives:
Mannitol; comments due by 12-15-04; published 11-15-04 [FR 04-25243]

Reports and guidance documents; availability, etc.:
Evaluating safety of antimicrobial new animal drugs with regard to their microbiological effects on bacteria of human health concern; Open for comments until further notice; published 10-27-03 [FR 03-27113]
Medical devices—
Dental noble metal alloys and base metal alloys; Class II special controls; Open for comments until further notice; published 8-23-04 [FR 04-19179]

HOMELAND SECURITY DEPARTMENT

Coast Guard

Anchorage regulations:
Maryland; comments due by 12-13-04; published 10-12-04 [FR 04-22745]

Drawbridge operations:
Delaware; comments due by 12-13-04; published 10-12-04 [FR 04-22850]

HOUSING AND URBAN DEVELOPMENT DEPARTMENT

Mortgage and loan insurance programs:
Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac)—
Government-sponsored enterprises housing goals (2005-2008 CYs); comments due by 12-17-04; published 11-2-04 [FR 04-24100]

INTERIOR DEPARTMENT

Fish and Wildlife Service

Endangered and threatened species permit applications
Recovery plans—
Paiute cutthroat trout; Open for comments until further notice; published 9-10-04 [FR 04-20517]

Endangered and threatened species:
Critical habitat designations—
Buena Vista Lake shrew; comments due by 12-15-04; published 11-30-04 [FR 04-26472]
Southwestern willow flycatcher; comments due by 12-13-04; published 10-12-04 [FR 04-22394]
Ute ladies'-tresses orchid; five-year review; comments due by 12-13-04; published 10-12-04 [FR 04-22735]

INTERIOR DEPARTMENT

Surface Mining Reclamation and Enforcement Office

Abandoned mine land reclamation:
Coal production fees and fee allocation
Republication; comments due by 12-16-04; published 11-29-04 [FR 04-26195]

NUCLEAR REGULATORY COMMISSION

Environmental statements; availability, etc.:
Fort Wayne State Developmental Center; Open for comments until further notice; published 5-10-04 [FR 04-10516]

PERSONNEL MANAGEMENT OFFICE

Post-employment restrictions; notification; comments due by 12-14-04; published 10-15-04 [FR 04-23194]

POSTAL RATE COMMISSION

Practice and procedure:
Postal service; definition; comments due by 12-15-04; published 11-18-04 [FR 04-25567]

SMALL BUSINESS ADMINISTRATION

Disaster loan areas:
Maine; Open for comments until further notice; published 2-17-04 [FR 04-03374]

OFFICE OF UNITED STATES TRADE REPRESENTATIVE

Trade Representative, Office of United States

Generalized System of Preferences:
2003 Annual Product Review, 2002 Annual Country Practices Review, and previously deferred product decisions; petitions disposition; Open for comments until further notice; published 7-6-04 [FR 04-15361]

TRANSPORTATION DEPARTMENT

Economic regulations:
Commuter air carrier registrations; elimination; comments due by 12-13-04; published 10-28-04 [FR 04-23859]

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airmen certification:
Second-in-command pilot type rating; comments due by 12-16-04; published 11-16-04 [FR 04-25415]

Airworthiness directives:
Airbus; comments due by 12-17-04; published 11-22-04 [FR 04-25793]
Boeing; comments due by 12-13-04; published 10-29-04 [FR 04-24220]
Dornier; comments due by 12-13-04; published 11-12-04 [FR 04-25192]
EXTRA Flugzeugbau GmbH; comments due by 12-15-04; published 11-12-04 [FR 04-25193]
Gippsland Aeronautics Pty. Ltd.; comments due by 12-15-04; published 11-8-04 [FR 04-24819]
Glaser-Dirks Flugzeugbau GmbH; comments due by 12-13-04; published 11-8-04 [FR 04-24818]
Gulfstream; comments due by 12-17-04; published 10-18-04 [FR 04-23027]
Hartzell Propeller Inc.; comments due by 12-13-04; published 10-14-04 [FR 04-22728]
McDonnell Douglas; comments due by 12-13-04; published 10-27-04 [FR 04-24032]
Class D airspace; comments due by 12-15-04; published 11-8-04 [FR 04-24848]
VOR Federal airways; comments due by 12-13-04; published 10-28-04 [FR 04-24146]

TRANSPORTATION DEPARTMENT

Research and Special Programs Administration

Hazardous materials:
Transportation—
Compressed oxygen, other oxidizing gases, and chemical oxygen generators on aircraft; comments due by 12-13-04; published 8-4-04 [FR 04-17747]

TREASURY DEPARTMENT

Internal Revenue Service

Income taxes:
Purchase price allocation in deemed and actual asset acquisitions; nuclear decommissioning funds treatment; cross-reference; comments due by 12-15-04; published 9-16-04 [FR 04-20915]

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal_register/public_laws/public_laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 1350/P.L. 108–446

Individuals with Disabilities Education Improvement Act of 2004 (Dec. 3, 2004; 118 Stat. 2647)

Last List December 8, 2004

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.