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# Presidential Documents

**Title 3—**

## The President

**Memorandum of June 6, 2011**

## Designation of Officers of the Overseas Private Investment Corporation To Act as President of the Overseas Private Investment Corporation

**Memorandum for the President of the Overseas Private Investment Corporation**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.* (the "Act"), it is hereby ordered that:

**Section 1.** *Order of Succession.* Subject to the provisions of section 2 of this memorandum, and to the limitations set forth in the Act, the following officers of the Overseas Private Investment Corporation (OPIC), in the order listed, shall act as and perform the functions and duties of the office of the President of OPIC during any period in which the President of OPIC has died, resigned, or otherwise become unable to perform the functions and duties of the office of the President of OPIC:

(a) Executive Vice President;

(b) Vice President and General Counsel;

(c) Vice President and Chief Financial Officer;

(d) Chief of Staff;

(e) Vice President, Investment Policy;

(f) Vice President, External Affairs;

(g) Vice President, Investment Funds;

(h) Vice President, Insurance;

(i) Vice President, Structured Finance; and

(j) Vice President, Small and Medium Enterprise Finance.

**Sec. 2.** *Exceptions.* (a) No individual who is serving in an office listed in section 1(a)–(j) of this memorandum in an acting capacity shall, by virtue of so serving, act as President of OPIC pursuant to this memorandum.

(b) No individual who is serving in an office listed in section 1 of this memorandum shall act as President of OPIC unless that individual is otherwise eligible to so serve under the Act.

(c) Notwithstanding the provisions of this memorandum, the President retains discretion, to the extent permitted by law, to depart from this memorandum in designating an acting President of OPIC.

**Sec. 3.** The Presidential Memorandum of January 16, 2009 (Designation of Officers to Act as President of the Overseas Private Investment Corporation), is hereby revoked.

**Sec. 4.** This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

**Sec. 5.** You are authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
*Washington, June 6, 2011*

[FR Doc. 2011–14474
Filed 6–8–11; 8:45 am]
Billing code 3210–01–P

# Rules and Regulations

Federal Register
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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 ENERGY

### 10 CFR Part 217

**[RIN 1901–AB28]**

## Energy Priorities and Allocations System Regulations

**AGENCY:** Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** This final rule establishes standards and procedures by which the Department of Energy (DOE) may require that certain contracts or orders that promote the national defense be given priority over other contracts or orders. This rule also sets new standards and procedures by which DOE may allocate materials, services and facilities to promote the national defense. DOE is publishing this rule to comply with a requirement of the Defense Production Act Reauthorization of 2009 to publish regulations providing standards and procedures for prioritization of contracts and orders and for allocation of materials, services and facilities to promote the national defense.

**DATES:** This rule is effective on July 11, 2011.

**ADDRESSES:** Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to Dr. Kenneth Friedman, Office of Infrastructure Security and Energy Restoration, U.S. Department of Energy, Room 1E–256, 1000 Independence Avenue, SW., Washington, DC 20585 and to Christine Kymn at *Christine_J._Kymn@omb.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** Dr. Kenneth Friedman, Office of Infrastructure Security and Energy Restoration, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585; (202) 536–0379 (*GC–76EPAS@hq.doe.gov*). Lot H. Cooke, Office of the General Counsel (GC–76), U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585; (202) 586–0503 (*GC–76EPAS@hq.doe.gov*).

**SUPPLEMENTARY INFORMATION:**

### Background

This rule expands upon 10 CFR part 216, the Department of Energy's (DOE) Energy Priorities and Allocations System (EPAS) regulations.

10 CFR Part 216 implements DOE's administration of priorities and allocations actions in order to maximize domestic energy supplies pursuant to its authority under Section 101(c) of the Defense Production Act (50 U.S.C. app. Section 2071 *et seq.*) (DPA) as delegated by Executive Order 12919 (June 3, 1994). These regulations, codified at 10 CFR part 217, implement DOE's administration of priorities and allocations in order to promote the national defense pursuant to its DPA authorities other than section 101(c). The EPAS has two principal components: Priorities and allocations. Under the priorities component, certain contracts between the government and private parties or between private parties for the production or delivery of industrial resources are required to be given priority over other contracts to facilitate expedited delivery in promotion of the U.S. national defense. Under the allocations component, materials, services, and facilities may be allocated to promote the national defense. For both components, the term "national defense" is defined broadly and can include critical infrastructure protection and restoration, emergency preparedness, and recovery from natural disasters.

On September 30, 2009, the Defense Production Act Reauthorization of 2009 (Pub. L. 111–67, 123 Stat. 2006, September 30, 2009) (DPAR) was enacted. The DPAR requires all agencies to which the President has delegated priorities and allocations authority under Title I of the DPA to publish final rules establishing standards and procedures by which that authority will be used to promote the national defense in both emergency and nonemergency situations. The DPAR also requires all such agencies to consult "as appropriate and to the extent practicable to develop a consistent and unified Federal priorities and allocations system." (123 Stat. 2006, at 2009). This rule is one of several rules to be published to implement the provisions of the DPAR. The final rules of the agencies with DPAR authorities, which are the Departments of Commerce, Energy, Transportation, Health and Human Services, Defense, and Agriculture, will comprise the Federal Priorities and Allocations System.

DOE published its proposed EPAS rule on July 16, 2010 (75 FR 41405). DOE solicited public comment on the proposed rule, but no comments were received. DOE now publishes this final rule pursuant to the provision of the DPAR noted above. DOE believes that its existing rules at 10 CFR part 216 satisfy the DPAR's requirement that agencies have standards and procedures in place to implement the DPA's 101(c) authorities. However, in the interest of promoting a unified priorities and allocations system, and to implement DOE's DPA authorities other than those set forth in section 101(c), DOE sets forth this EPAS rule. DOE's EPAS provisions are consistent with the Federal Priorities and Allocations System regulations being issued by other agencies. The specific proposals in this rule are more fully described below.

### Analysis of the Priorities and Allocations System

*Subpart A*

Subpart A sets forth the purpose of the regulation.

Section 217.1 states the purpose of the EPAS, which provides guidance and procedures for use of the DPA priorities and allocations authority (other than the authorities set forth in section 101(c)) with respect to all forms of energy necessary or appropriate to promote the national defense.

Section 217.2 provides an overview of the EPAS program. This section describes briefly all aspects of the EPAS, including the resource jurisdiction of other agencies delegated priorities and allocations authority under the DPA.

*Subpart B*

The "Definitions" section appears in section 217.20 in Subpart B and provides definitions for the relevant regulatory terms.

*Subpart C*

Subpart C, titled "Placement of Rated Orders," reflects the fact that the subpart

addresses only DOE's priorities authorities; allocations authorities are addressed in Subpart E.

Section 217.30, "Delegation of Authority," describes fully the President's delegations to the Department of Energy. It also describes the items subject to DOE's jurisdiction and notes that the Department of Commerce has delegated certain authorities to DOE. This provision facilitates public understanding of the role that each delegate agency plays in the overall priorities and allocations system.

Section 217.31, "Priority ratings," describes the different levels of priority and program symbols used when rating an order.

Section 217.32, "Elements of a rated order," describes in detail what each rated order must include, consisting of the appropriate priority rating, delivery date information, signatures and required language.

Language in section 217.33, "Acceptance and rejection of rated orders," details when orders placed by DOE may or must be accepted or rejected, and what the procedures are for both, including customer notification requirements and certain exceptions for emergency preparedness conditions.

Specifically, persons must accept or reject rated orders for emergency response-related approved programs within two days of receipt of the order. DOE establishes the shorter time limit in which the recipient must respond to a rated order issued in connection with an emergency response related program because such programs would involve disaster assistance, emergency response or similar activities. DOE believes that the exigent circumstances inherent in such activities justify requiring a shorter response time.

Section 217.34, "Preferential scheduling," details procedures in cases where a person receives two or more conflicting rated orders. If a person is unable to resolve such a conflict, this section refers them to special priorities assistance as provided in sections 217.40 through 217.44.

Language in section 217.35, "Extension of priority ratings," requires a person to use rated orders with suppliers to obtain items or services needed to fill a rated order. This allows the priority rating to "extend" from contractor to subcontractor to supplier throughout the entire procurement chain.

Section 217.36, "Changes or cancellations of priority ratings and rated orders," provides procedures for changing or cancelling a rated order, both by DOE or other persons who placed the order.

Section 217.37, "Use of rated orders," lists what items must be rated. It also introduces the use of certain program identification symbols used when rated orders may be combined, and details the procedures for combining two or more rated orders, as well as rated and unrated orders.

Section 217.38, "Limitations on placing rated orders," prohibits the use of rated orders in a list of specific circumstances. This section also specifically excludes the use of rated orders for resources within the resource jurisdiction of agencies other than DOE with DPA priorities and allocations authority.

*Subpart D*

Subpart D "Special Priorities Assistance" describes instances in which DOE can provide assistance in resolving matters related to priority rated contracts and orders.

Section 217.40 "General provisions" illustrates when and how DOE can provide special priorities assistance, and provides specific DOE points of contact and the form to be used for requesting such assistance. Special priorities assistance may generally be requested for any reason.

Section 217.41, "Requests for priority rating authority," directs persons to the Department of Energy or Department of Commerce (DOC), as appropriate, to request priority rating authority in the event a rated order is likely to be delayed. This section also identifies circumstances in which DOE or DOC, as appropriate, may authorize a person to place a priority rating on an order to a supplier in advance of the issuance of a rated prime contract, and lists factors the agencies will consider in deciding whether to grant this authority.

Section 217.42, "Examples of assistance," provides a number of examples of when special priorities assistance may be provided, although it may generally be provided for any reason.

Section 217.43 lists the criteria for granting assistance, and section 217.44 lists instances in which assistance may not be provided (*i.e.,* to secure a price advantage).

*Subpart E*

Subpart E, "Allocation Actions," provides the public with detailed information on the procedures governing allocations actions. Allocations actions would most likely be used in extreme circumstances, such as in response to a national emergency.

Sections 217.50 through 217.52 describe allocations and when and how allocation orders may be used. Specifically, allocation orders may be used only if priorities authority would not provide a sufficient supply of material, services or facilities for national defense requirements, or when use of priorities authority would cause a severe and prolonged disruption in the supply of resources available to support normal U.S. economic activities. Allocation orders would not be used to ration materials or services at the retail level. Allocation orders will be distributed equitably among the suppliers of the resource(s) being allocated and will not require any person to relinquish a disproportionate share of the civilian market. The standards set forth in sections 217.50 through 217.52 to ensure that allocation orders will be used only in situations where the circumstances justify such orders.

Section 217.53 describes the three types of allocation orders that DOE might issue, which are a set-aside, an allocation directive, and an allotment. A set-aside is an official action that requires a person to reserve resource capacity in anticipation of receipt of rated orders. An allocation directive is an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions (an allocation directive can require a person to stop or reduce production of an item, prohibit the use of selected items, divert supply of one type of product to another, or to supply a specific quantity, size, shape, and type of an item within a specific time period). An allotment is an official action that specifies the maximum quantity of an item authorized for use in a specific program or application. DOE establishes these three types of allocation orders because it believes that, collectively they describe the types of actions that might be taken in any situation in which allocation is justified.

Section 217.54, "Elements of an allocation order," sets forth the minimum elements of an allocation order. Those elements are:

(a) A detailed description of the required allocation action(s);

(b) Specific start and end calendar dates for each required allocation action;

(c) The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of the Secretary of Energy. The signature or use of the name certifies that the order is authorized under this regulation and that the

requirements of this regulation are being followed;

(d) A statement that reads in substance: "This is an allocation order certified for national defense use. [Insert the legal name of the person receiving the order] is required to comply with this order, in accordance with the provisions of the Energy Priorities and Allocations System regulation (10 CFR part 217), which is part of the Federal Priorities and Allocations System"; and

(e) A current copy of the Energy Priorities and Allocations System (10 CFR part 217).

DOE establishes these elements because it believes that they provide a proper balance between the need for standards to permit the public to recognize and understand an allocation order if one is issued, and the expectation that any actual allocation orders will have to be tailored to meet unforeseeable circumstances. The language of section 217.54 does not preclude DOE from including additional information in an allocation order if circumstances warrant doing so.

Section 217.55, "Mandatory acceptance of allocation orders," requires that an allocation order must be accepted if a person is capable of fulfilling the order. If a person is unable to comply fully with the required actions specific in an allocation order, the person must notify DOE immediately, explain the extent to which compliance is possible, and give reasons why full compliance is not possible. This section also states that a person may not discriminate against an allocation order in any manner, such as by charging higher prices or imposing terms and conditions different than what the person imposed on contracts or orders for the same resource(s) that were received prior to receiving the allocation order. DOE establishes section 217.55 to clarify that the limited circumstances and emergency situations that trigger issuance of an allocation order require immediate response to address the situation in an expedient fashion.

Section 217.56, "Changes or cancellations of an allocation order" provides that an allocation order may be changed or cancelled by the Department of Energy.

*Subpart F*

Subpart F, "Official Actions," provides the specific official actions the DOE may take to implement the provisions of this regulation. These official actions include Rating Authorizations, Directives, and Memoranda of Understanding.

Section 217.61, "Rating Authorizations," defines a rating authorization as an official action granting specific priority rating authority, and refers persons to section 217.21 to request such priority rating authority.

Section 217.62, "Directives," defines a directive as an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. This section details directive compliance for the public.

Section 217.63, "Letters and Memoranda of Understanding," defines a letter or memorandum of understanding as an official action that may be issued in resolving special priorities assistance cases to reflect an agreement reached by all parties, and explains its use.

*Subpart G*

Subpart G, "Compliance," provides DOE authority to enforce the administration of the DPA and other applicable statutes, this regulation, or an official action. This subpart provides that willful violations of the provisions of title I or section 705 of the DPA, this regulation, or a DOE official action, are criminal acts, punishable as provided in the DPA, and as set forth below in section 217.74.

Section 217.71, "Audits and investigations," details the procedures for official examinations of books, records, documents, and other writings and information to ensure that the provisions of the DPA and other applicable statutes, this regulation, and official actions have been properly followed. An audit or investigation may also include interviews and a systems evaluation to detect problems or failures in the implementation of this regulation.

Section 217.72, "Compulsory process," provides that if a person refuses to permit a duly authorized DOE representative to have access to necessary information, DOE may seek the institution of appropriate legal action, including ex parte application for an inspection warrant, in any forum of appropriate jurisdiction.

Sections 217.73 and 217.74 both provide procedures for notification of failure to comply with the DPA, these regulations, or DOE official actions, and the violations, penalties and remedies that may result.

Section 217.75, "Compliance Conflicts," requires that persons immediately contact DOE should compliance with the DPA, these regulations, or an official action prevent a person from filling a rated order or from complying with another provision of the DPA and other applicable statutes, this regulation, or an official action.

*Subpart H*

Section 217.80, "Adjustments, Exceptions, and Appeals," sets forth the procedures to request an adjustment or exception to the provisions of these regulations on the grounds of exceptional hardship or compliance would be contrary to the intent of the DPA. These requests must be submitted in writing to the DOE contact provided in this section.

Section 217.81, "Appeals," provides the procedures, timing and contact information for appealing a decision made on a request for relief in the previous section.

*Subpart I*

Subpart I, "Miscellaneous Provisions," addresses a number of remaining issues, including protection against claims, records and reports, applicability issues, and communications.

Section 217.90, "Protection against claims," provides that a person shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any part of this regulation, or an official action.

Section 217.91, "Records and reports," requires that persons make and preserve for at least three years, accurate and complete records of any transaction covered by this regulation or an official action. Various requirements and procedures regarding such records are provided in this section. The confidentiality provisions of the DPA governing the submission of information pursuant to the DPA and these regulations are also set forth.

Section 217.92, "Applicability of this regulation and official actions," provides the jurisdictional applicability of this regulation and official actions.

Section 217.93, "Communications," provides a DOE point of contact for all communications regarding this regulation.

**Public Comments Received**

DOE received no comments on its proposed EPAS regulation. DOE finalizes its proposed regulation without change.

*A. Review Under Executive Order 12866*

This rule has been determined to be significant for purposes of Executive Order 12866.

*B. Review Under the Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation

of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site, *http://www.gc.doe.gov.*

DOE reviewed today's final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003.

Number of Small Entities

Small entities include small businesses, small organizations and small governmental jurisdictions. For purposes of assessing the impacts of this final rule on small entities, a small business, as described in the Small Business Administration's Table of Small Business Size Standards Matched to North American Industry Classification System Codes (August 2008 Edition), has a maximum annual revenue of $ 33.5 million and a maximum of 1,500 employees (for some business categories, these number are lower). A small governmental jurisdiction is a government of a city, town, school district or special district with a population of less than 50,000. A small organization is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

This rule sets criteria under which DOE (or agencies to which DOE delegates authority) will authorize prioritization of certain orders or contracts as well as criteria under which DOE would issue orders allocating resources or production facilities. Because the rule affects commercial transactions, DOE believes that small organizations and small governmental jurisdictions are unlikely to be affected by this rule. To date, DOE has not exercised its existing allocations authority. As such, DOE has no basis on which to estimate the number of small businesses that may be affected by this rule.

Impact

The final rule has two principle components: Prioritization and allocation. Under prioritization, DOE or its Delegate Agency designates certain orders as one of two possible priority levels. Once so designated, such orders are referred to as "rated orders." The recipient of a rated order must give it priority over an unrated order or an order with a lower priority rating. A recipient of a rated order may place orders at the same priority level with suppliers and subcontractors for supplies and services necessary to fulfill the recipient's rated order and the suppliers and subcontractors must treat the request from the rated order recipient as a rated order with the same priority level as the original rated order. The rule does not require recipients to fulfill rated orders if the price or terms of sale are not consistent with the price or terms of sale of similar non-rated orders. The rule provides a defense from any liability for damages or penalties for actions taken in, or inactions required for, compliance with the rule.

Although rated orders could require a firm to fill one order prior to filling another, they would not necessarily require a reduction in the total volume of orders. The regulations would also not require the recipient of a rated order to reduce prices or provide rated orders with more favorable terms than a similar non-rated order. Under these circumstances, the economic effects on the rated order recipient of substituting one order for another are likely to be mutually offsetting, resulting in no net economic impact.

Allocations could be used to control the general distribution of materials or services in the civilian market. Specific allocation actions that DOE might take are as follows:

Set-aside: An official action that requires a person to reserve resource capacity in anticipation of receipt of rated orders.

Allocations directive: An official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. An allocation directive can require a person to stop or reduce production of an item, prohibit the use of selected items, or divert supply of one type of product to another, or to supply a specific quantity, size, shape, and type of an item within a specific time period.

Allotment: An official action that specifies the maximum quantity of an item authorized for use in a specific program or application.

DOE has not yet taken any actions under its existing allocations authority, and any future allocations actions would be used only in extraordinary circumstances. As required by section 101(b) of the Defense Production Act of 1950, as amended, (50 U.S.C. app. section 2071), hereinafter "DPA," and by Section 201(d) of Executive Order 12919 of June 3, 1994, as amended, DOE may implement allocations only if the Secretary of Energy makes, and the President approves, a finding "(1) that the material [or service] is a scarce and critical material [or service] essential to the national defense, and (2) that the requirements of the national defense for such material [or service] cannot otherwise be met without creating a significant dislocation of the normal distribution of such material [or service] in the civilian market to such a degree as to create appreciable hardship." The term "national defense" is defined to mean "programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any related activity. Such term includes emergency preparedness activities conducted pursuant to title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. section 5195 *et seq.*) and critical infrastructure protection and restoration.

Any allocation actions taken by DOE would also have to comply with Section 701(e) of the DPA (50 U.S.C. app. section 2151(e)), which provides that "small business concerns shall be accorded, to the extent practicable, a fair share of the such material [including services] in proportion to the share received by such business concerns under normal conditions, giving such special consideration as may be possible to emerging business concerns." Such a provision may even provide an economic benefit to small businesses.

Conclusion

Although DOE cannot determine precisely the number of small entities that would be affected by this rule, DOE believes that the overall impact on such entities would not be significant. In most instances, rated contracts would be fulfilled in addition to other (unrated) contracts and could actually increase the total amount of business of the firm that receives a rated contract.

Because allocations can be imposed only after an agency determination confirmed by the President, and because DOE has not yet used its allocations authority that has existed since passage of the Defense Production Act in 1950, one can expect allocations will be ordered only in particular circumstances. However, DOE believes that the requirement for a Presidential determination and the provisions of section 701 of the DPA indicate that any

impact on small business will not be significant.

DOE received no comments on the certification or economic impacts of the rule at the proposed rule stage.

Therefore, for the reasons set forth above, the Assistant General Counsel for Legislation, Regulation, and Energy Efficiency certifies that this rule will not have a significant economic impact on a substantial number of small entities.

*C. Review Under the Paperwork Reduction Act*

This rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB under control number 1910–5159. This requirement has been submitted to OMB for approval. Public reporting burden for submission of Form DOE F 544 (05–11) is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments on this burden estimate or any other aspects of the collection of information to Dr. Kenneth Friedman (see **ADDRESSES**), and by e-mail to *Christine_J._Kymn@omb.eop.gov*.

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

*D. Review Under Executive Order 13211*

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA) a Statement of Energy Effects for any proposed significant energy action. DOE determined that today's rule, which sets forth procedures for compliance with the Defense Production Act (separate from the procedures set forth at 10 CFR part 216), is not a "significant energy action" within the meaning of Executive Order 13211. The Administrator of the Office of Information and Regulatory Affairs at OMB also did not designate this action as a significant energy action. Therefore, DOE concludes that today's rule is not a significant energy action within the meaning of Executive Order 13211 and has not prepared a Statement of Energy Effects.

*E. Review Under Executive Order 13132*

DOE reviewed this rule pursuant to Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999), which imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. DOE also reviewed this rule pursuant to DOE's statement of policy describing the intergovernmental consultation process it will follow in the development of regulations that have federalism implications, 65 FR 13735 (March 14, 2000). DOE determined that the rule 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.

*F. Congressional Notification*

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this rulemaking. The report will state that it has been determined that the rule is a "major rule" as defined by 5 U.S.C. 804(2). DOE also will submit the supporting analyses to the Comptroller General in the U.S. Government Accountability Office (GAO) and make them available to each House of Congress.

*G. Approval of the Office of the Secretary*

The Secretary of Energy has approved publication of this notice of final rulemaking.

**List of Subjects in 10 CFR Part 217**

Administrative practice and procedure, Business and industry, Government contracts, National defense, Reporting and recordkeeping requirements, Strategic and critical materials.

Issued in Washington, DC on June 3, 2011.

**Patricia Hoffman,**

*Assistant Secretary, Electricity Delivery and Energy Reliability.*

For the reasons stated in the preamble, DOE amends chapter II of title 10 of the Code of Federal Regulations, by adding a new part 217 to read as set forth below:

## PART 217—ENERGY PRIORITIES AND ALLOCATIONS SYSTEM

**Subpart A—General**

Sec.

217.1 Purpose of this part.
217.2 Priorities and allocations authority.
217.3 Program eligibility.

**Subpart B—Definitions**

217.20 Definitions.

**Subpart C—Placement of Rated Orders**

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217.31 Priority ratings.
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217.34 Preferential scheduling.
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217.41 Requests for priority rating authority.
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217.90 Protection against claims.
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217.93 Communications.
Appendix I to Part 217—Sample Form DOE F 544 (05–11)

**Authority:** Defense Production Act of 1950, as amended, 50 U.S.C. App. 2061–2171; E.O. 12919, as amended, (59 FR 29525, June 7, 1994).

## Subpart A—General

### § 217.1 Purpose of this part.

This part provides guidance and procedures for use of the Defense Production Act section 101(a) priorities and allocations authority with respect to all forms of energy necessary or appropriate to promote the national defense. (The guidance and procedures in this part are consistent with the guidance and procedures provided in other regulations that, as a whole, form the Federal Priorities and Allocations System. Guidance and procedures for use of the Defense Production Act priorities and allocations authority with respect to other types of resources are provided for: Food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer; health resources; all forms of civil transportation (49 CFR Part 33); water resources; and all other materials, services, and facilities, including construction materials in the Defense Priorities and Allocations System (DPAS) regulation (15 CFR Part 700).) Department of Energy (DOE) regulations at 10 CFR Part 216 describe and establish the procedures to be used by DOE in considering and making certain findings required by section 101(c)(2)(A) of the Defense Production Act of 1950, as amended.

### § 217.2 Priorities and allocations authority.

(a) Section 201 of E.O. 12919 (59 FR 29525) delegates the President's authority under section 101 of the Defense Production Act to require acceptance and priority performance of contracts and orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, and to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense to:

(1) The Secretary of Agriculture with respect to food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer;

(2) The Secretary of Energy with respect to all forms of energy;

(3) The Secretary of Health and Human Services with respect to health resources;

(4) The Secretary of Transportation with respect to all forms of civil transportation;

(5) The Secretary of Defense with respect to water resources; and

(6) The Secretary of Commerce for all other materials, services, and facilities, including construction materials.

(b) Section 202 of E.O. 12919 states that the priorities and allocations authority delegated in section 201 of this order may be used only to support programs that have been determined in writing as necessary or appropriate to promote the national defense:

(1) By the Secretary of Defense with respect to military production and construction, military assistance to foreign nations, stockpiling, outer space, and directly related activities;

(2) By the Secretary of Energy with respect to energy production and construction, distribution and use, and directly related activities; and

(3) By the Secretary of Homeland Security with respect to essential civilian needs supporting national defense, including civil defense and continuity of government and directly related activities.

### § 217.3 Program eligibility.

Certain programs to promote the national defense are eligible for priorities and allocations support. These include programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, deploying and sustaining military forces, homeland security, stockpiling, space, and any directly related activity. Other eligible programs include emergency preparedness activities conducted pursuant to title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195 *et seq.*) and critical infrastructure protection and restoration.

## Subpart B—Definitions

### § 217.20 Definitions.

The following definitions pertain to all sections of this part:

*Allocation order* means an official action to control the distribution of materials, services, or facilities for a purpose deemed necessary or appropriate to promote the national defense.

*Allotment* means an official action that specifies the maximum quantity or use of a material, service, or facility authorized for a specific use to promote the national defense.

*Approved program* means a program determined by the Secretary of Defense, the Secretary of Energy, or the Secretary of Homeland Security to be necessary or appropriate to promote the national defense, in accordance with section 202 of E.O. 12919.

*Civil transportation* includes movement of persons and property by all modes of transportation in interstate, intrastate, or foreign commerce within the United States, its territories and possessions, and the District of Columbia, and, without limitation, related public storage and warehousing, ports, services, equipment and facilities, such as transportation carrier shop and repair facilities. However, "civil transportation" shall not include transportation owned or controlled by the Department of Defense, use of petroleum and gas pipelines, and coal slurry pipelines used only to supply energy production facilities directly. As applied herein, "civil transportation" shall include direction, control, and coordination of civil transportation capacity regardless of ownership.

*Construction* means the erection, addition, extension, or alteration of any building, structure, or project, using materials or products which are to be an integral and permanent part of the building, structure, or project. Construction does not include maintenance and repair.

*Critical infrastructure* means any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems and assets would have a debilitating impact on national security, including, but not limited to, national economic security and national public health or safety.

*Defense Production Act* means the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 *et seq.*).

*Delegate Agency* means a Federal government agency authorized by delegation from the Department of Energy to place priority ratings on contracts or orders needed to support approved programs.

*Directive* means an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions.

*Emergency preparedness* means all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard. Such term includes the following:

(1) Measures to be undertaken in preparation for anticipated hazards (including the establishment of appropriate organizations, operational plans, and supporting agreements, the recruitment and training of personnel, the conduct of research, the procurement and stockpiling of necessary materials and supplies, the provision of suitable warning systems,

the construction or preparation of shelters, shelter areas, and control centers, and, when appropriate, the nonmilitary evacuation of the civilian population).

(2) Measures to be undertaken during a hazard (including the enforcement of passive defense regulations prescribed by duly established military or civil authorities, the evacuation of personnel to shelter areas, the control of traffic and panic, and the control and use of lighting and civil communications).

(3) Measures to be undertaken following a hazard (including activities for fire fighting, rescue, emergency medical, health and sanitation services, monitoring for specific dangers of special weapons, unexploded bomb reconnaissance, essential debris clearance, emergency welfare measures, and immediately essential emergency repair or restoration of damaged vital facilities).

*Energy* means all forms of energy including petroleum, gas (both natural and manufactured), electricity, solid fuels (including all forms of coal, coke, coal chemicals, coal liquification, and coal gasification), and atomic energy, and the production, conservation, use, control, and distribution (including pipelines) of all of these forms of energy.

*Facilities* includes all types of buildings, structures, or other improvements to real property (but excluding farms, churches or other places of worship, and private dwelling houses), and services relating to the use of any such building, structure, or other improvement.

*Farm equipment* means equipment, machinery, and repair parts manufactured for use on farms in connection with the production or preparation for market use of food resources.

*Fertilizer* means any product or combination of products that contain one or more of the elements—nitrogen, phosphorus, and potassium—for use as a plant nutrient.

*Food resources* means all commodities and products, simple, mixed, or compound, or complements to such commodities or products, that are capable of being ingested by either human beings or animals, irrespective of other uses to which such commodities or products may be put, at all stages of processing from the raw commodity to the products thereof in vendible form for human or animal consumption. "Food resources" also means all starches, sugars, vegetable and animal or marine fats and oils, cotton, tobacco, wool, mohair, hemp, flax fiber, and naval stores, but does not mean any such material after it loses its identity as an agricultural commodity or agricultural product.

*Food resource facilities* means plants, machinery, vehicles (including on-farm), and other facilities required for the production, processing, distribution, and storage (including cold storage) of food resources, livestock and poultry feed and seed, and for the domestic distribution of farm equipment and fertilizer (excluding transportation thereof).

*Hazard* means an emergency or disaster resulting from:

(1) A natural disaster; or

(2) An accidental or human-caused event.

*Health resources* means drugs, biological products, medical devices, diagnostics, materials, facilities, health supplies, services and equipment required to diagnose, prevent the impairment of, improve, or restore the physical or mental health conditions of the population.

*Homeland security* includes efforts—

(1) To prevent terrorist attacks within the United States;

(2) To reduce the vulnerability of the United States to terrorism;

(3) To minimize damage from a terrorist attack in the United States; and

(4) To recover from a terrorist attack in the United States.

*Industrial resources* means all materials, services, and facilities, including construction materials, but not including: food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer; all forms of energy; health resources; all forms of civil transportation; and water resources.

*Item* means any raw, in process, or manufactured material, article, commodity, supply, equipment, component, accessory, part, assembly, or product of any kind, technical information, process, or service.

*Maintenance and repair and operating supplies* or *MRO*—

(1) "Maintenance" is the upkeep necessary to continue any plant, facility, or equipment in working condition.

(2) "Repair" is the restoration of any plant, facility, or equipment to working condition when it has been rendered unsafe or unfit for service by wear and tear, damage, or failure of parts.

(3) "Operating supplies" are any resources carried as operating supplies according to a person's established accounting practice. Operating supplies may include hand tools and expendable tools, jigs, dies, fixtures used on production equipment, lubricants, cleaners, chemicals and other expendable items.

(4) MRO does not include items produced or obtained for sale to other persons or for installation upon or attachment to the property of another person, or items required for the production of such items; items needed for the replacement of any plant, facility, or equipment; or items for the improvement of any plant, facility, or equipment by replacing items which are still in working condition with items of a new or different kind, quality, or design.

*Materials* includes—

(1) Any raw materials (including minerals, metals, and advanced processed materials), commodities, articles, components (including critical components), products, and items of supply; and

(2) Any technical information or services ancillary to the use of any such materials, commodities, articles, components, products, or items.

(3) Natural resources such as oil and gas.

*National defense* means programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195, *et seq.*) and critical infrastructure protection and restoration.

*Official action* means an action taken by the Department of Energy or another resource agency under the authority of the Defense Production Act, E.O. 12919, and this part or another regulation under the Federal Priorities and Allocations System. Such actions include the issuance of Rating Authorizations, Directives, Set Asides, Allotments, Letters of Understanding, Memoranda of Understanding, Demands for Information, Inspection Authorizations, and Administrative Subpoenas.

*Person* includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative thereof, or any State or local government or agency thereof.

*Rated order* means a prime contract, a subcontract, or a purchase order in support of an approved program issued in accordance with the provisions of this part.

*Resource agency* means any agency delegated priorities and allocations authority as specified in § 217.2.

*Secretary* means the Secretary of Energy.

*Services* includes any effort that is needed for or incidental to—

(1) The development, production, processing, distribution, delivery, or use of an industrial resource or a critical technology item;

(2) The construction of facilities;

(3) The movement of individuals and property by all modes of civil transportation; or

(4) Other national defense programs and activities.

*Set-aside* means an official action that requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders.

*Stafford Act* means title VI (Emergency Preparedness) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5195–5197g).

*Water resources* means all usable water, from all sources, within the jurisdiction of the United States, which can be managed, controlled, and allocated to meet emergency requirements.

## Subpart C—Placement of Rated Orders

### § 217.30 Delegations of authority.

(a) The priorities and allocations authorities of the President under Title I of the Defense Production Act with respect to all forms of energy have been delegated to the Secretary of Energy under E.O. 12919 of June 3, 1994 (59 FR 29525).

(b) The Department of Commerce has delegated authority to the Department of Energy to provide for extension of priority ratings for "industrial resources," as provided in § 261.35 of this part, to support rated orders for all forms of energy.

### § 217.31 Priority ratings.

(a) Levels of priority.

(1) There are two levels of priority established by the Energy Priorities and Allocations System regulations, identified by the rating symbols "DO" and "DX".

(2) All DO-rated orders have equal priority with each other and take precedence over unrated orders. All DX-rated orders have equal priority with each other and take precedence over DO-rated orders and unrated orders. (For resolution of conflicts among rated orders of equal priority, see § 217.34(c).)

(3) In addition, a Directive regarding priority treatment for a given item issued by the Department of Energy for that item takes precedence over any DX-rated order, DO-rated order, or unrated order, as stipulated in the Directive. (For a full discussion of Directives, see § 217.62.)

(b) Program identification symbols. Program identification symbols indicate which approved program is being supported by a rated order. The list of currently approved programs and their identification symbols are listed in Schedule 1, set forth as an Appendix to 15 CFR part 700. For example, DO–F3 identifies a domestic energy construction program. Additional programs may be approved under the procedures of E.O. 12919 at any time. Program identification symbols do not connote any priority.

(c) Priority ratings. A priority rating consists of the rating symbol—DO or DX—and the program identification symbol, such as F1, F2, or F3. Thus, a contract for a domestic energy construction program will contain a DO–F3 or DX–F3 priority rating.

### § 217.32 Elements of a rated order.

Each rated order must include:

(a) The appropriate priority rating (*e.g.* DO–F1 or DX–F1)

(b) A required delivery date or dates. The words "immediately" or "as soon as possible" do not constitute a delivery date. A "requirements contract", "basic ordering agreement", "prime vendor contract", or similar procurement document bearing a priority rating may contain no specific delivery date or dates and may provide for the furnishing of items or service from time to time or within a stated period against specific purchase orders, such as "calls", "requisitions", and "delivery orders". These purchase orders must specify a required delivery date or dates and are to be considered as rated as of the date of their receipt by the supplier and not as of the date of the original procurement document;

(c) The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of an individual authorized to sign rated orders for the person placing the order. The signature or use of the name certifies that the rated order is authorized under this part and that the requirements of this part are being followed; and

(d)(1) A statement that reads in substance:

This is a rated order certified for national defense use, and you are required to follow all the provisions of the Energy Priorities and Allocations System regulation at 10 CFR part 217.

(2) If the rated order is placed in support of emergency preparedness requirements and expedited action is necessary and appropriate to meet these requirements, the following sentences should be added following the statement set forth in paragraph (d)(1) of this section:

This rated order is placed for the purpose of emergency preparedness. It must be accepted or rejected within 2 days after receipt of the order if (1) The order is issued in response to a hazard that has occurred; or

(2) If the order is issued to prepare for an imminent hazard, as specified in EPAS Section 217.33(e), 10 CFR 217.33(e).

### § 217.33 Acceptance and rejection of rated orders.

(a) *Mandatory acceptance.* (1) Except as otherwise specified in this section, a person shall accept every rated order received and must fill such orders regardless of any other rated or unrated orders that have been accepted.

(2) A person shall not discriminate against rated orders in any manner such as by charging higher prices or by imposing different terms and conditions than for comparable unrated orders.

(b) *Mandatory rejection.* Unless otherwise directed by the Department of Energy for a rated order involving all forms of energy:

(1) A person shall not accept a rated order for delivery on a specific date if unable to fill the order by that date. However, the person must inform the customer of the earliest date on which delivery can be made and offer to accept the order on the basis of that date. Scheduling conflicts with previously accepted lower rated or unrated orders are not sufficient reason for rejection under this section.

(2) A person shall not accept a DO-rated order for delivery on a date which would interfere with delivery of any previously accepted DO- or DX-rated orders. However, the person must offer to accept the order based on the earliest delivery date otherwise possible.

(3) A person shall not accept a DX-rated order for delivery on a date which would interfere with delivery of any previously accepted DX-rated orders, but must offer to accept the order based on the earliest delivery date otherwise possible.

(4) If a person is unable to fill all of the rated orders of equal priority status received on the same day, the person must accept, based upon the earliest delivery dates, only those orders which can be filled, and reject the other orders. For example, a person must accept order A requiring delivery on December 15 before accepting order B requiring delivery on December 31. However, the person must offer to accept the rejected orders based on the earliest delivery dates otherwise possible.

(c) *Optional rejection.* Unless otherwise directed by the Department of Energy for a rated order involving all forms of energy, rated orders may be rejected in any of the following cases as long as a supplier does not discriminate among customers:

(1) If the person placing the order is unwilling or unable to meet regularly established terms of sale or payment;

(2) If the order is for an item not supplied or for a service not capable of being performed;

(3) If the order is for an item or service produced, acquired, or provided only for the supplier's own use for which no orders have been filled for two years prior to the date of receipt of the rated order. If, however, a supplier has sold some of these items or provided similar services, the supplier is obligated to accept rated orders up to that quantity or portion of production or service, whichever is greater, sold or provided within the past two years;

(4) If the person placing the rated order, other than the U.S. Government, makes the item or performs the service being ordered;

(5) If acceptance of a rated order or performance against a rated order would violate any other regulation, official action, or order of the Department of Energy, issued under the authority of the Defense Production Act or another relevant statute.

(d) *Customer notification requirements.* (1) Except as provided in this paragraph, a person must accept or reject a rated order in writing or electronically within fifteen (15) working days after receipt of a DO rated order and within ten (10) working days after receipt of a DX rated order. If the order is rejected, the person must give reasons in writing or electronically for the rejection.

(2) If a person has accepted a rated order and subsequently finds that shipment or performance will be delayed, the person must notify the customer immediately, give the reasons for the delay, and advise of a new shipment or performance date. If notification is given verbally, written or electronic confirmation must be provided within five (5) working days.

(e) *Exception for emergency preparedness conditions.* If the rated order is placed for the purpose of emergency preparedness, a person must accept or reject a rated order and transmit the acceptance or rejection in writing or in an electronic format within 2 days after receipt of the order if:

(1) The order is issued in response to a hazard that has occurred; or

(2) The order is issued to prepare for an imminent hazard.

**§ 217.34 Preferential scheduling.**

(a) A person must schedule operations, including the acquisition of all needed production items or services, in a timely manner to satisfy the delivery requirements of each rated order. Modifying production or delivery schedules is necessary only when required delivery dates for rated orders cannot otherwise be met.

(b) DO-rated orders must be given production preference over unrated orders, if necessary to meet required delivery dates, even if this requires the diversion of items being processed or ready for delivery or services being performed against unrated orders. Similarly, DX-rated orders must be given preference over DO-rated orders and unrated orders. (Examples: If a person receives a DO-rated order with a delivery date of June 3 and if meeting that date would mean delaying production or delivery of an item for an unrated order, the unrated order must be delayed. If a DX-rated order is received calling for delivery on July 15 and a person has a DO-rated order requiring delivery on June 2 and operations can be scheduled to meet both deliveries, there is no need to alter production schedules to give any additional preference to the DX-rated order.)

(c) Conflicting rated orders.

(1) If a person finds that delivery or performance against any accepted rated orders conflicts with the delivery or performance against other accepted rated orders of equal priority status, the person shall give precedence to the conflicting orders in the sequence in which they are to be delivered or performed (not to the receipt dates). If the conflicting orders are scheduled to be delivered or performed on the same day, the person shall give precedence to those orders that have the earliest receipt dates.

(2) If a person is unable to resolve rated order delivery or performance conflicts under this section, the person should promptly seek special priorities assistance as provided in §§ 217.40 through 217.44. If the person's customer objects to the rescheduling of delivery or performance of a rated order, the customer should promptly seek special priorities assistance as provided in §§ 217.40 through 217.44. For any rated order against which delivery or performance will be delayed, the person must notify the customer as provided in § 217.33.

(d) If a person is unable to purchase needed production items in time to fill a rated order by its required delivery date, the person must fill the rated order by using inventoried production items. A person who uses inventoried items to fill a rated order may replace those items with the use of a rated order as provided in § 217.37(b).

**§ 217.35 Extension of priority ratings.**

(a) A person must use rated orders with suppliers to obtain items or services needed to fill a rated order. The person must use the priority rating indicated on the customer's rated order, except as otherwise provided in this part or as directed by the Department of Energy. For example, if a person is in receipt of a DO–F1 rated order for an electric power sub-station, and needs to purchase a transformer for its manufacture, that person must use a DO–F1 rated order to obtain the needed transformer.

(b) The priority rating must be included on each successive order placed to obtain items or services needed to fill a customer's rated order. This continues from contractor to subcontractor to supplier throughout the entire procurement chain.

**§ 217.36 Changes or cancellations of priority ratings and rated orders.**

(a) The priority rating on a rated order may be changed or canceled by:

(1) An official action of the Department of Energy; or

(2) Written notification from the person who placed the rated order.

(b) If an unrated order is amended so as to make it a rated order, or a DO rating is changed to a DX rating, the supplier must give the appropriate preferential treatment to the order as of the date the change is received by the supplier.

(c) An amendment to a rated order that significantly alters a supplier's original production or delivery schedule shall constitute a new rated order as of the date of its receipt. The supplier must accept or reject the amended order according to the provisions of § 217.33.

(d) The following amendments do not constitute a new rated order: a change in shipping destination; a reduction in the total amount of the order; an increase in the total amount of the order which has negligible impact upon deliveries; a minor variation in size or design; or a change which is agreed upon between the supplier and the customer.

(e) If a person no longer needs items or services to fill a rated order, any rated orders placed with suppliers for the items or services, or the priority rating on those orders, must be canceled.

(f) When a priority rating is added to an unrated order, or is changed or canceled, all suppliers must be promptly notified in writing.

**§ 217.37 Use of rated orders.**

(a) A person must use rated orders to obtain:

(1) Items which will be physically incorporated into other items to fill rated orders, including that portion of such items normally consumed or converted into scrap or by-products in the course of processing;

(2) Containers or other packaging materials required to make delivery of the finished items against rated orders;

(3) Services, other than contracts of employment, needed to fill rated orders; and

(4) MRO needed to produce the finished items to fill rated orders.

(b) A person may use a rated order to replace inventoried items (including finished items) if such items were used to fill rated orders, as follows:

(1) The order must be placed within 90 days of the date of use of the inventory.

(2) A DO rating and the program identification symbol indicated on the customer's rated order must be used on the order. A DX rating may not be used even if the inventory was used to fill a DX-rated order.

(3) If the priority ratings on rated orders from one customer or several customers contain different program identification symbols, the rated orders may be combined. In this case, the program identification symbol "H1" must be used (*i.e.,* DO–H1).

(c) A person may combine DX- and DO-rated orders from one customer or several customers if the items or services covered by each level of priority are identified separately and clearly. If different program identification symbols are indicated on those rated orders of equal priority, the person must use the program identification symbol "H1" (*i.e.,* DO–H1 or DX–H1).

(d) Combining rated and unrated orders.

(1) A person may combine rated and unrated order quantities on one purchase order provided that:

(i) The rated quantities are separately and clearly identified; and

(ii) The four elements of a rated order, as required by § 217.32, are included on the order with the statement required in § 217.32(d) modified to read in substance:

This purchase order contains rated order quantities certified for national defense use, and you are required to follow all applicable provisions of the Energy Priorities and Allocations System regulations at 10 CFR part 217 only as it pertains to the rated quantities.

(2) A supplier must accept or reject the rated portion of the purchase order as provided in § 217.33 and give preferential treatment only to the rated quantities as required by this part. This part may not be used to require preferential treatment for the unrated portion of the order.

(3) Any supplier who believes that rated and unrated orders are being combined in a manner contrary to the intent of this part or in a fashion that causes undue or exceptional hardship may submit a request for adjustment or exception under § 217.80.

(e) A person may place a rated order for the minimum commercially procurable quantity even if the quantity needed to fill a rated order is less than that minimum. However, a person must combine rated orders as provided in paragraph (c) of this section, if possible, to obtain minimum procurable quantities.

(f) A person is not required to place a priority rating on an order for less than $50,000, or one-half of the Simplified Acquisition Threshold (as established in the Federal Acquisition Regulation (FAR) (see FAR section 2.101) or in other authorized acquisition regulatory or management systems) whichever amount is greater, provided that delivery can be obtained in a timely fashion without the use of the priority rating.

**§ 217.38 Limitations on placing rated orders.**

(a) General limitations.

(1) A person may not place a DO- or DX-rated order unless entitled to do so under this part.

(2) Rated orders may not be used to obtain:

(i) Delivery on a date earlier than needed;

(ii) A greater quantity of the item or services than needed, except to obtain a minimum procurable quantity. Separate rated orders may not be placed solely for the purpose of obtaining minimum procurable quantities on each order;

(iii) Items or services in advance of the receipt of a rated order, except as specifically authorized by the Department of Energy (see § 217.41(c) for information on obtaining authorization for a priority rating in advance of a rated order);

(iv) Items that are not needed to fill a rated order, except as specifically authorized by the Department of Energy, or as otherwise permitted by this part; or

(v) Any of the following items unless specific priority rating authority has been obtained from the Department of Energy, a Delegate Agency, or the Department of Commerce, as appropriate:

(A) Items for plant improvement, expansion, or construction, unless they will be physically incorporated into a construction project covered by a rated order; and

(B) Production or construction equipment or items to be used for the manufacture of production equipment. [For information on requesting priority rating authority, see § 217.21.]

(vi) Any items related to the development of chemical or biological warfare capabilities or the production of chemical or biological weapons, unless such development or production has been authorized by the President or the Secretary of Defense.

(b) Jurisdictional limitations.

(1) Unless authorized by the resource agency with jurisdiction, the provisions of this part are not applicable to the following resources:

(i) Food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer (Resource agency with jurisdiction—Department of Agriculture);

(ii) Health resources (Resource agency with jurisdiction—Department of Health and Human Services);

(iii) All forms of civil transportation (Resource agency with jurisdiction—Department of Transportation);

(iv) Water resources (Resource agency with jurisdiction—Department of Defense/U.S. Army Corps of Engineers); and

(v) Communications services (Resource agency with jurisdiction—National Communications System under E. O. 12472 of April 3, 1984).

## Subpart D—Special Priorities Assistance

**§ 217.40 General provisions.**

(a) The EPAS is designed to be largely self-executing. However, from time-to-time production or delivery problems will arise. In this event, a person should immediately contact the Office of Infrastructure Security and Energy Restoration, for guidance or assistance (Contact the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93). If the problem(s) cannot otherwise be resolved, special priorities assistance should be sought from the Department of Energy through the Office of Infrastructure Security and Energy Restoration (Contact the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93). If the Department of Energy is unable to resolve the problem

or to authorize the use of a priority rating and believes additional assistance is warranted, the Department of Energy may forward the request to another agency with resource jurisdiction, as appropriate, for action. Special priorities assistance is provided to alleviate problems that do arise.

(b) Special priorities assistance is available for any reason consistent with this part. Generally, special priorities assistance is provided to expedite deliveries, resolve delivery conflicts, place rated orders, locate suppliers, or to verify information supplied by customers and vendors. Special priorities assistance may also be used to request rating authority for items that are not normally eligible for priority treatment.

(c) A request for special priorities assistance or priority rating authority must be submitted on Form DOE F 544 (05–11) (OMB control number 1910–5159) to the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93. Form DOE F 544 (05–11) may be obtained from the Department of Energy or a Delegate Agency. A sample Form DOE F 544 (05–11) is attached at Appendix I to this part.

### § 217.41 Requests for priority rating authority.

(a) If a rated order is likely to be delayed because a person is unable to obtain items or services not normally rated under this part, the person may request the authority to use a priority rating in ordering the needed items or services.

(b) Rating authority for production or construction equipment.

(1) A request for priority rating authority for production or construction equipment must be submitted to the U.S. Department of Commerce on Form BIS–999.

(2) When the use of a priority rating is authorized for the procurement of production or construction equipment, a rated order may be used either to purchase or to lease such equipment. However, in the latter case, the equipment may be leased only from a person engaged in the business of leasing such equipment or from a person willing to lease rather than sell.

(c) Rating authority in advance of a rated prime contract. (1) In certain cases and upon specific request, the Department of Energy, in order to promote the national defense, may authorize or request the Department of Commerce to authorize, as appropriate, a person to place a priority rating on an order to a supplier in advance of the issuance of a rated prime contract. In these instances, the person requesting advance rating authority must obtain sponsorship of the request from the Department of Energy or the appropriate Delegate Agency. The person shall also assume any business risk associated with the placing of rated orders in the event the rated prime contract is not issued.

(2) The person must state the following in the request:

It is understood that the authorization of a priority rating in advance of our receiving a rated prime contract from the Department of Energy and our use of that priority rating with our suppliers in no way commits the Department of Energy, the Department of Commerce, or any other government agency to enter into a contract or order or to expend funds. Further, we understand that the Federal Government shall not be liable for any cancellation charges, termination costs, or other damages that may accrue if a rated prime contract is not eventually placed and, as a result, we must subsequently cancel orders placed with the use of the priority rating authorized as a result of this request.

(3) In reviewing requests for rating authority in advance of a rated prime contract, the Department of Energy or the Department of Commerce, as appropriate, will consider, among other things, the following criteria:

(i) The probability that the prime contract will be awarded;

(ii) The impact of the resulting rated orders on suppliers and on other authorized programs;

(iii) Whether the contractor is the sole source;

(iv) Whether the item being produced has a long lead time;

(v) The time period for which the rating is being requested.

(4) The Department of Energy or the Department of Commerce, as appropriate, may require periodic reports on the use of the rating authority granted under paragraph (c) of this section.

(5) If a rated prime contract is not issued, the person shall promptly notify all suppliers who have received rated orders pursuant to the advanced rating authority that the priority rating on those orders is cancelled.

### § 217.42 Examples of assistance.

(a) While special priorities assistance may be provided for any reason in support of this part, it is usually provided in situations where:

(1) A person is experiencing difficulty in obtaining delivery against a rated order by the required delivery date; or

(2) A person cannot locate a supplier for an item or service needed to fill a rated order.

(b) Other examples of special priorities assistance include:

(1) Ensuring that rated orders receive preferential treatment by suppliers;

(2) Resolving production or delivery conflicts between various rated orders;

(3) Assisting in placing rated orders with suppliers;

(4) Verifying the urgency of rated orders; and

(5) Determining the validity of rated orders.

### § 217.43 Criteria for assistance.

Requests for special priorities assistance should be timely, *i.e.,* the request has been submitted promptly and enough time exists for the Department of Energy, the Delegate Agency, or the Department of Commerce for industrial resources to effect a meaningful resolution to the problem, and must establish that:

(a) There is an urgent need for the item; and

(b) The applicant has made a reasonable effort to resolve the problem.

### § 217.44 Instances where assistance may not be provided.

Special priorities assistance is provided at the discretion of the Department of Energy, the Delegate Agencies, or the Department of Commerce when it is determined that such assistance is warranted to meet the objectives of this part. Examples where assistance may not be provided include situations when a person is attempting to:

(a) Secure a price advantage;

(b) Obtain delivery prior to the time required to fill a rated order;

(c) Gain competitive advantage;

(d) Disrupt an industry apportionment program in a manner designed to provide a person with an unwarranted share of scarce items; or

(e) Overcome a supplier's regularly established terms of sale or conditions of doing business.

## Subpart—Allocation Actions

### § 217.50 Policy.

(a) It is the policy of the Federal Government that the allocations authority under title I of the Defense Production Act may:

(1) Only be used when there is insufficient supply of a material, service, or facility to satisfy national defense supply requirements through the use of the priorities authority or when the use of the priorities authority would cause a severe and prolonged disruption in the supply of materials, services, or facilities available to support normal U.S. economic activities; and

(2) Not be used to ration materials or services at the retail level.

(b) Allocation orders, when used, will be distributed equitably among the suppliers of the materials, services, or facilities being allocated and not require any person to relinquish a disproportionate share of the civilian market.

**§ 217.51 General procedures.**

When the Department of Energy plans to execute its allocations authority to address a supply problem within its resource jurisdiction, the Department shall develop a plan that includes the following information:

(a) A copy of the written determination made, in accordance with section 202 of E.O. 12919, that the program or programs that would be supported by the allocation action are necessary or appropriate to promote the national defense;

(b) A detailed description of the situation to include any unusual events or circumstances that have created the requirement for an allocation action;

(c) A statement of the specific objective(s) of the allocation action;

(d) A list of the materials, services, or facilities to be allocated;

(e) A list of the sources of the materials, services, or facilities that will be subject to the allocation action;

(f) A detailed description of the provisions that will be included in the allocation orders, including the type(s) of allocation orders, the percentages or quantity of capacity or output to be allocated for each purpose, and the duration of the allocation action (*i.e.,* anticipated start and end dates);

(g) An evaluation of the impact of the proposed allocation action on the civilian market; and

(h) Proposed actions, if any, to mitigate disruptions to civilian market operations.

**§ 217.52 Controlling the general distribution of a material in the civilian market.**

No allocation action by the Department of Energy may be used to control the general distribution of a material in the civilian market, unless the Secretary of the Department of Energy has:

(a) Made a written finding that:

(1) Such material is a scarce and critical material essential to the national defense, and

(2) The requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship;

(b) Submitted the finding for the President's approval through the Assistant to the President for National Security Affairs; and

(c) The President has approved the finding.

**§ 217.53 Types of allocation orders.**

There are three types of allocation orders available for communicating allocation actions. These are:

(a) *Set-aside:* an official action that requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders;

(b) *Directive:* an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. For example, a directive can require a person to: stop or reduce production of an item; prohibit the use of selected materials, services, or facilities; or divert the use of materials, services, or facilities from one purpose to another; and

(c) *Allotment:* an official action that specifies the maximum quantity of a material, service, or facility authorized for a specific use.

**§ 217.54 Elements of an allocation order.**

Each allocation order must include:

(a) A detailed description of the required allocation action(s);

(b) Specific start and end calendar dates for each required allocation action;

(c) The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of the Secretary of Energy. The signature or use of the name certifies that the order is authorized under this part and that the requirements of this part are being followed;

(d) A statement that reads in substance: "This is an allocation order certified for national defense use. [Insert the legal name of the person receiving the order] is required to comply with this order, in accordance with the provisions of the Energy Priorities and Allocations System regulation (10 CFR part 217), which is part of the Federal Priorities and Allocations System"; and

(e) A current copy of the Energy Priorities and Allocations System regulation (10 CFR part 217).

**§ 217.55 Mandatory acceptance of an allocation order.**

(a) Except as otherwise specified in this section, a person shall accept and comply with every allocation order received.

(b) A person shall not discriminate against an allocation order in any manner such as by charging higher prices for materials, services, or facilities covered by the order or by imposing terms and conditions for contracts and orders involving allocated materials, services, or facilities that differ from the person's terms and conditions for contracts and orders for the materials, services, or facilities prior to receiving the allocation order.

(c) If a person is unable to comply fully with the required action(s) specified in an allocation order, the person must notify the Department of Energy immediately, explain the extent to which compliance is possible, and give the reasons why full compliance is not possible. If notification is given verbally, written or electronic confirmation must be provided within five (5) working days. Such notification does not release the person from complying with the order to the fullest extent possible, until the person is notified by the Department of Energy that the order has been changed or cancelled.

**§ 217.56 Changes or cancellations of an allocation order.**

An allocation order may be changed or canceled by an official action of the Department of Energy.

## Subpart F—Official Actions

**§ 217.60 General provisions.**

(a) The Department of Energy may take specific official actions to implement the provisions of this part.

(b) These official actions include Rating Authorizations, Directives, and Memoranda of Understanding.

**§ 217.61 Rating Authorizations.**

(a) A Rating Authorization is an official action granting specific priority rating authority that:

(1) Permits a person to place a priority rating on an order for an item or service not normally ratable under this part; or

(2) Authorizes a person to modify a priority rating on a specific order or series of contracts or orders.

(b) To request priority rating authority, see § 217.41.

**§ 217.62 Directives.**

(a) A Directive is an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions.

(b) A person must comply with each Directive issued. However, a person may not use or extend a Directive to obtain any items from a supplier, unless expressly authorized to do so in the Directive.

(c) A Priorities Directive takes precedence over all DX-rated orders,

DO-rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the Directive.

(d) An Allocations Directive takes precedence over all Priorities Directives, DX-rated orders, DO-rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the Directive.

**§ 217.63 Letters and Memoranda of Understanding.**

(a) A Letter or Memorandum of Understanding is an official action that may be issued in resolving special priorities assistance cases to reflect an agreement reached by all parties (the Department of Energy, the Department of Commerce (if applicable), a Delegate Agency (if applicable), the supplier, and the customer).

(b) A Letter or Memorandum of Understanding is not used to alter scheduling between rated orders, to authorize the use of priority ratings, to impose restrictions under this part. Rather, Letters or Memoranda of Understanding are used to confirm production or shipping schedules that do not require modifications to other rated orders.

## Subpart G—Compliance

**§ 217.70 General provisions.**

(a) The Department of Energy may take specific official actions for any reason necessary or appropriate to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or an official action. Such actions include Administrative Subpoenas, Demands for Information, and Inspection Authorizations.

(b) Any person who places or receives a rated order or an allocation order must comply with the provisions of this part.

(c) Willful violation of the provisions of title I or section 705 of the Defense Production Act and other applicable statutes, this part, or an official action of the Department of Energy is a criminal act, punishable as provided in the Defense Production Act and other applicable statutes, and as set forth in § 217.74 of this part.

**§ 217.71 Audits and investigations.**

(a) Audits and investigations are official examinations of books, records, documents, other writings and information to ensure that the provisions of the Defense Production Act and other applicable statutes, this part, and official actions have been properly followed. An audit or investigation may also include interviews and a systems evaluation to detect problems or failures in the implementation of this part.

(b) When undertaking an audit or investigation, the Department of Energy shall:

(1) Define the scope and purpose in the official action given to the person under investigation, and

(2) Have ascertained that the information sought or other adequate and authoritative data are not available from any Federal or other responsible agency.

(c) In administering this part, the Department of Energy may issue the following documents that constitute official actions:

(1) Administrative Subpoenas. An Administrative Subpoena requires a person to appear as a witness before an official designated by the Department of Energy to testify under oath on matters of which that person has knowledge relating to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or official actions. An Administrative Subpoena may also require the production of books, papers, records, documents and physical objects or property.

(2) Demands for Information. A Demand for Information requires a person to furnish to a duly authorized representative of the Department of Energy any information necessary or appropriate to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or official actions.

(3) Inspection Authorizations. An Inspection Authorization requires a person to permit a duly authorized representative of the Department of Energy to interview the person's employees or agents, to inspect books, records, documents, other writings, and information, including electronically-stored information, in the person's possession or control at the place where that person usually keeps them or otherwise, and to inspect a person's property when such interviews and inspections are necessary or appropriate to the enforcement or the administration of the Defense Production Act and related statutes, this part, or official actions.

(d) The production of books, records, documents, other writings, and information will not be required at any place other than where they are usually kept if, prior to the return date specified in the Administrative Subpoena or Demand for Information, a duly authorized official of the Department of Energy is furnished with copies of such material that are certified under oath to be true copies. As an alternative, a person may enter into a stipulation with a duly authorized official of Department of Energy as to the content of the material.

(e) An Administrative Subpoena, Demand for Information, or Inspection Authorization, shall include the name, title, or official position of the person to be served, the evidence sought to be adduced, and its general relevance to the scope and purpose of the audit, investigation, or other inquiry. If employees or agents are to be interviewed; if books, records, documents, other writings, or information are to be produced; or if property is to be inspected; the Administrative Subpoena, Demand for Information, or Inspection Authorization will describe them with particularity.

(f) Service of documents shall be made in the following manner:

(1) Service of a Demand for Information or Inspection Authorization shall be made personally, or by Certified Mail-Return Receipt Requested at the person's last known address. Service of an Administrative Subpoena shall be made personally. Personal service may also be made by leaving a copy of the document with someone at least 18 years old at the person's last known dwelling or place of business.

(2) Service upon other than an individual may be made by serving a partner, corporate officer, or a managing or general agent authorized by appointment or by law to accept service of process. If an agent is served, a copy of the document shall be mailed to the person named in the document.

(3) Any individual 18 years of age or over may serve an Administrative Subpoena, Demand for Information, or Inspection Authorization. When personal service is made, the individual making the service shall prepare an affidavit as to the manner in which service was made and the identity of the person served, and return the affidavit, and in the case of subpoenas, the original document, to the issuing officer. In case of failure to make service, the reasons for the failure shall be stated on the original document.

**§ 217.72 Compulsory process.**

(a) If a person refuses to permit a duly authorized representative of the Department of Energy to have access to any premises or source of information necessary to the administration or the enforcement of the Defense Production Act and other applicable statutes, this part, or official actions, the Department of Energy representative may seek compulsory process. Compulsory process means the institution of

appropriate legal action, including ex parte application for an inspection warrant or its equivalent, in any forum of appropriate jurisdiction.

(b) Compulsory process may be sought in advance of an audit, investigation, or other inquiry, if, in the judgment of the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93, there is reason to believe that a person will refuse to permit an audit, investigation, or other inquiry, or that other circumstances exist which make such process desirable or necessary.

**§ 217.73 Notification of failure to comply.**

(a) At the conclusion of an audit, investigation, or other inquiry, or at any other time, the Department of Energy may inform the person in writing where compliance with the requirements of the Defense Production Act and other applicable statutes, this part, or an official action were not met.

(b) In cases where the Department of Energy determines that failure to comply with the provisions of the Defense Production Act and other applicable statutes, this part, or an official action was inadvertent, the person may be informed in writing of the particulars involved and the corrective action to be taken. Failure to take corrective action may then be construed as a willful violation of the Defense Production Act and other applicable statutes, this part, or an official action.

**§ 217.74 Violations, penalties, and remedies.**

(a) Willful violation of the provisions of title I or sections 705 or 707 of the Defense Production Act, the priorities provisions of the Selective Service Act and related statutes (when applicable), this part, or an official action, is a crime and upon conviction, a person may be punished by fine or imprisonment, or both. The maximum penalties provided by the Defense Production Act are a $10,000 fine, or one year in prison, or both. The maximum penalties provided by the Selective Service Act and related statutes are a $50,000 fine, or three years in prison, or both.

(b) The Government may also seek an injunction from a court of appropriate jurisdiction to prohibit the continuance of any violation of, or to enforce compliance with, the Defense Production Act, this part, or an official action.

(c) In order to secure the effective enforcement of the Defense Production Act and other applicable statutes, this part, and official actions, the following are prohibited:

(1) No person may solicit, influence or permit another person to perform any act prohibited by, or to omit any act required by, the Defense Production Act and other applicable statutes, this part, or an official action.

(2) No person may conspire or act in concert with any other person to perform any act prohibited by, or to omit any act required by, the Defense Production Act and other applicable statutes, this part, or an official action.

(3) No person shall deliver any item if the person knows or has reason to believe that the item will be accepted, redelivered, held, or used in violation of the Defense Production Act and other applicable statutes, this part, or an official action. In such instances, the person must immediately notify the Department of Energy that, in accordance with this provision, delivery has not been made.

**§ 217.75 Compliance conflicts.**

If compliance with any provision of the Defense Production Act and other applicable statutes, this part, or an official action would prevent a person from filling a rated order or from complying with another provision of the Defense Production Act and other applicable statutes, this part, or an official action, the person must immediately notify the Department of Energy for resolution of the conflict.

## Subpart H—Adjustments, Exceptions, and Appeals

**§ 217.80 Adjustments or exceptions.**

(a) A person may submit a request to the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93, for an adjustment or exception on the ground that:

(1) A provision of this part or an official action results in an undue or exceptional hardship on that person not suffered generally by others in similar situations and circumstances; or

(2) The consequences of following a provision of this part or an official action is contrary to the intent of the Defense Production Act and other applicable statutes, or this part.

(b) Each request for adjustment or exception must be in writing and contain a complete statement of all the facts and circumstances related to the provision of this part or official action from which adjustment is sought and a full and precise statement of the reasons why relief should be provided.

(c) The submission of a request for adjustment or exception shall not relieve any person from the obligation of complying with the provision of this part or official action in question while the request is being considered unless such interim relief is granted in writing by the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93.

(d) A decision of the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93, under this section may be appealed to the Office of Infrastructure Security and Energy Restoration (For information on the appeal procedure, see § 217.81.)

**§ 217.81 Appeals.**

(a) Any person who has had a request for adjustment or exception denied by the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in section 217.93, under § 217.80, may appeal to the Office of Infrastructure Security and Energy Restoration who shall review and reconsider the denial.

(b)(1) Except as provided in this paragraph (b)(2), an appeal must be received by the Office of Infrastructure Security and Energy Restoration no later than 45 days after receipt of a written notice of denial from the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93. After this 45-day period, an appeal may be accepted at the discretion of the Office of Infrastructure Security and Energy Restoration for good cause shown.

(2) For requests for adjustment or exception involving rated orders placed for the purpose of emergency preparedness (see 217.14(d)), an appeal must be received by the Office of Infrastructure Security and Energy Restoration, no later than 15 days after receipt of a written notice of denial from the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93. Contract performance under the order shall not be stayed pending resolution of the appeal.

(c) Each appeal must be in writing and contain a complete statement of all the facts and circumstances related to the action appealed from and a full and precise statement of the reasons the decision should be modified or reversed.

(d) In addition to the written materials submitted in support of an appeal, an appellant may request, in writing, an opportunity for an informal hearing. This request may be granted or denied at the discretion of the Office of Infrastructure Security and Energy Restoration.

(e) When a hearing is granted, the Office of Infrastructure Security and

Energy Restoration may designate an employee to conduct the hearing and to prepare a report. The hearing officer shall determine all procedural questions and impose such time or other limitations deemed reasonable. In the event that the hearing officer decides that a printed transcript is necessary, all expenses shall be borne by the appellant.

(f) When determining an appeal, the Office of Infrastructure Security and Energy Restoration may consider all information submitted during the appeal as well as any recommendations, reports, or other relevant information and documents available to the Department of Energy or consult with any other persons or groups.

(g) The submission of an appeal under this section shall not relieve any person from the obligation of complying with the provision of this part or official action in question while the appeal is being considered unless such relief is granted in writing by the Office of Infrastructure Security and Energy Restoration.

(h) The decision of the Office of Infrastructure Security and Energy Restoration shall be made within five (5) days after receipt of the appeal, or within one (1) day for appeals pertaining to emergency preparedness and shall be the final administrative action. It shall be issued to the appellant in writing with a statement of the reasons for the decision.

## Subpart I—Miscellaneous Provisions

### § 217.90 Protection against claims.

A person shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of this part, or an official action, notwithstanding that such provision or action shall subsequently be declared invalid by judicial or other competent authority.

### § 217.91 Records and reports.

(a) Persons are required to make and preserve for at least three years, accurate and complete records of any transaction covered by this part or an official action.

(b) Records must be maintained in sufficient detail to permit the determination, upon examination, of whether each transaction complies with the provisions of this part or any official action. However, this part does not specify any particular method or system to be used.

(c) Records required to be maintained by this part must be made available for examination on demand by duly authorized representatives of the Department of Energy as provided in § 217.71.

(d) In addition, persons must develop, maintain, and submit any other records and reports to the Department of Energy that may be required for the administration of the Defense Production Act and other applicable statutes, and this part.

(e) Section 705(d) of the Defense Production Act, as implemented by E.O. 12919, provides that information obtained under this section which the Secretary deems confidential, or with reference to which a request for confidential treatment is made by the person furnishing such information, shall not be published or disclosed unless the Secretary determines that the withholding of this information is contrary to the interest of the national defense. Information required to be submitted to the Department of Energy in connection with the enforcement or administration of the Defense Production Act, this part, or an official action, is deemed to be confidential under section 705(d) of the Defense Production Act and shall be handled in accordance with applicable Federal law.

### § 217.92 Applicability of this part and official actions.

(a) This part and all official actions, unless specifically stated otherwise, apply to transactions in any state, territory, or possession of the United States and the District of Columbia.

(b) This part and all official actions apply not only to deliveries to other persons but also include deliveries to affiliates and subsidiaries of a person and deliveries from one branch, division, or section of a single entity to another branch, division, or section under common ownership or control.

(c) This part and its schedules shall not be construed to affect any administrative actions taken by the Department of Energy, or any outstanding contracts or orders placed pursuant to any of the regulations, orders, schedules or delegations of authority previously issued by the Department of Energy pursuant to authority granted to the President in the Defense Production Act. Such actions, contracts, or orders shall continue in full force and effect under this part unless modified or terminated by proper authority.

### § 217.93 Communications.

All communications concerning this part, including requests for copies of the regulation and explanatory information, requests for guidance or clarification, and requests for adjustment or exception shall be addressed to the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, Office of Infrastructure Security and Energy Restoration, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585; (202) 536–0379 (*GC–76EPAS@hq.doe.gov*).

## Appendix I to Part 217—Sample Form DOE F 544 (05–11)

| FORM DOE F 544 (05-11) DEPARTMENT OF ENERGY OFFICE OF ELECTRICITY | FOR DOE USE | OMB NO.1910-5159 |
|---|---|---|
| **REQUEST FOR SPECIAL PRIORITIES ASSISTANCE**<br>READ INSTRUCTIONS ON LAST PAGE<br>FILL OUT USING COMPUTER | CASE NO._____<br>RECEIVED_____<br>ASSIGNED TO_____ | |

Submission of a completed application is required to request special priorities assistance. See sections 217.40-44 of the Energy Priorities and Allocations System regulations (10 CFR Part 217). It is a criminal offense under 18 U.S.C. 1001 to make a willfully false statement or representation to any U.S. Government agency as to any matter within its jurisdiction. All company information furnished related to this application will be deemed business confidential under Sec. 705(d) of the Defense Production Act of 1950 [50 U.S.C. App.2155(d) which prohibits publication or disclosure of this information unless the President determines that withholding it is contrary to the interest of the national defense. The Department of Energy will assert the appropriate Freedom of Information Act (FOIA) exemptions if such information is the subject of FOIA requests. The unauthorized publication or disclosure of such information by Government personnel is prohibited by law. Violators are subject to fine and/or imprisonment.

**OMB Burden Disclosure Statement**

This data is being collected to implement the Department of Energy's Energy Priorities and Allocations System regulations, promulgated pursuant to the Defense Production Act of 1950, as amended (DPA). The data you supply will be used to allow you to request special priorities assistance from DOE to fill a rated order issued pursuant to the DPA and DOE's implementing regulations. DOE will also use the information to conduct audits and for enforcement purposes.

Public reporting burden for this collection of information is estimated to average 32 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Office of the Chief Information Officer, Records Management Division, IM-23, Paperwork Reduction Project (1910-5159), U.S. Department of Energy, 1000 Independence Ave SW, Washington, DC, 20585-1290; and to the Office of Management and Budget (OMB), OIRA, Paperwork Reduction Project (1910-5159), Washington, DC 20503.

## 1. APPLICANT INFORMATION

a. Name and complete address of Applicant (Applicant can be any person needing assistance – Government agency, contractor, or supplier. See definition of Applicant in Footnotes section on last page of this form).

Applicant Name_____

Address_____

City_____ State_____ Zip_____

Contact Name_____

Title_____

Telephone_____ Fax_____

Email address_____

b. If Applicant is not end-user Government agency, give name and complete address of Applicant's customer.

Customer name_____

Address_____

City_____ State_____ Zip_____

Contact Name_____

Title_____

Telephone_____ Fax_____

Contract/purchase order no._____

Dated_____ Priority Rating_____

**2. APPLICANT ITEM(S). If Applicant is not end-user Government agency, describe item(s) to be delivered by Applicant under its customer's contract or purchase order though the use of the item(s) listed in Block 3. If known, identify Government program and end-item for which these items are required. If Applicant is end-user Government agency and Block 3 item(s) are not end-items, identify the end-item for which the Block 3 item(s) are required. See definition of "item" in Footnotes section on last page of this form.**

**3. ITEM(s) (including service) FOR WHICH APPLICANT REQUESTS ASSISTANCE**

| **Quantity**<br>*Pieces, units* | **Description**<br>*Include identifying information such as model or part number* | **Dollar Value**<br>*Each quantity listed* |
|---|---|---|
| | | |

[FR Doc. 2011–14282 Filed 6–8–11; 8:45 am]
BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

## 10 CFR Part 431

**[Docket No. EERE–2008–BT–TP–0014]**

**RIN 1904–AB85**

## Energy Conservation Program: Test Procedures for Walk-In Coolers and Walk-In Freezers

*Correction*

In rule document 2011–8690 appearing on pages 21579–21612 in the issue of Friday, April 15, 2011, the regulatory text is being republished below in its entirety due to errors in the equations.

## PART 431—[CORRECTED]

On page 21604, in the third column, in the third paragraph from the top, the regulatory text should read as set forth below:

## PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 431 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6317.

■ 2. Section 431.302 is amended by adding, in alphabetical order, new definitions for "Display door," "Display panel," "Door", "Envelope," "K-factor," "Panel," "Refrigerated," "Refrigeration system," and "U-factor" to read as follows:

### § 431.302 Definitions concerning walk-in coolers and walk-in freezers.

* * * * *

*Display door* means a door designed for product movement, display, or both, rather than the passage of persons.

*Display panel* means a panel that is entirely or partially comprised of glass, a transparent material, or both and is used for display purposes.

*Door* means an assembly installed in an opening on an interior or exterior wall that is used to allow access or close off the opening and that is movable in a sliding, pivoting, hinged, or revolving manner of movement. For walk-in coolers and walk-in freezers, a door includes the door panel, glass, framing materials, door plug, mullion, and any other elements that form the door or part of its connection to the wall.

*Envelope* means—

(1) The portion of a walk-in cooler or walk-in freezer that isolates the interior, refrigerated environment from the ambient, external environment; and

(2) All energy-consuming components of the walk-in cooler or walk-in freezer that are not part of its refrigeration system.

*K-factor* means the thermal conductivity of a material.

* * * * *

*Panel* means a construction component that is not a door and is used to construct the envelope of the walk-in, i.e., elements that separate the interior refrigerated environment of the walk-in from the exterior.

*Refrigerated* means held at a temperature at or below 55 degrees Fahrenheit using a refrigeration system.

*Refrigeration system* means the mechanism (including all controls and other components integral to the system's operation) used to create the refrigerated environment in the interior of a walk-in cooler or freezer, consisting of:

(1) A packaged dedicated system where the unit cooler and condensing unit are integrated into a single piece of equipment; or

(2) A split dedicated system with separate unit cooler and condensing unit sections; or

(3) A unit cooler that is connected to a multiplex condensing system.

*U-factor* means the heat transmission in a unit time through a unit area of a specimen or product and its boundary air films, induced by a unit temperature difference between the environments on each side.

* * * * *

■ 3. Section 431.303 is amended by:

■ a. Redesignating paragraph (b) as paragraph (c);

■ b. Adding at the end of the sentence in redesignated paragraph (c)(1), "and Appendix A to Subpart R of Part 431".

■ c. Adding new paragraphs (b), (c)(2), (d), and (e) to read as follows.

### § 431.303 Materials incorporated by reference.

* * * * *

(b) *AHRI.* Air-Conditioning, Heating, and Refrigeration Institute, 2111 Wilson Boulevard, Suite 500, Arlington, VA 22201, (703) 600–0366, or *http://www.ahrinet.org.*

(1) AHRI 1250 (I–P)–2009, ("AHRI 1250"), 2009 Standard for Performance Rating of Walk-In Coolers and Freezers, approved 2009, IBR approved for § 431.304.

(2) [Reserved]

(c) * * *

(2) ASTM C1363–05, ("ASTM C1363"), Standard Test Method for Thermal Performance of Building Materials and Envelope Assemblies by Means of a Hot Box Apparatus, approved May 1, 2005, IBR approved for Appendix A to Subpart R of part 431.

(d) CEN. European Committee for Standardization (French: Norme or German: Norm), Avenue Marnix 17, B–1000 Brussels, Belgium, Tel: + 32 2 550 08 11, Fax: + 32 2 550 08 19 or *http://www.cen.eu/.*

(1) DIN EN 13164:2009–02, ("DIN EN 13164"), Thermal insulation products for buildings—Factory made products of extruded polystyrene foam (XPS)—Specification, approved February 2009, IBR approved for Appendix A to Subpart R of part 431.

(2) DIN EN 13165:2009–02, ("DIN EN 13165"), Thermal insulation products for buildings—Factory made rigid polyurethane foam (PUR) products—Specification, approved February 2009, IBR approved for Appendix A to Subpart R of part 431.

(e) *NFRC.* National Fenestration Rating Council, 6305 Ivy Lane, Ste. 140, Greenbelt, MD 20770, (301) 589–1776, or *http://www.nfrc.org/.*

(1) NFRC 100–2010[E0A1], ("NFRC 100"), Procedure for Determining Fenestration Product U-factors, approved June 2010, IBR approved for Appendix A to Subpart R of part 431.

(2) [Reserved]

■ 4. Section 431.304 is amended by redesignating paragraphs (b)(2), (b)(3), (b)(4), and (b)(5) as (b)(1), (b)(2), (b)(3), and (b)(4), respectively, and by adding new paragraphs (b)(5), (b)(6), (b)(7), and (b)(8) to read as follows.

### § 431.304 Uniform test method for the measurement of energy consumption of walk-in coolers and walk-in freezers.

* * * * *

(b) * * *

(5) Determine the U-factor, conduction load, and energy use of walk-in cooler and walk-in freezer display panels, floor panels, and non-floor panels by conducting the test procedure set forth in Appendix A to this subpart, sections 4.1, 4.2, and 4.3, respectively.

(6) Determine the energy use of walk-in cooler and walk-in freezer display doors and non-display doors by conducting the test procedure set forth in Appendix A to this subpart, sections 4.4 and 4.5, respectively.

(7) Determine the Annual Walk-in Energy Factor of walk-in cooler and walk-in freezer refrigeration systems by conducting the test procedure set forth in AHRI 1250 (incorporated by reference; see § 431.303).

(8) Determine the annual energy consumption of walk-in cooler and walk-in freezer refrigeration systems:

(i) For systems consisting of a packaged dedicated system or a split dedicated system, where the condensing unit is located outdoors, by conducting the test procedure set forth in AHRI 1250 and recording the annual energy consumption term in the equation for annual walk-in energy factor in section 7 of AHRI 1250:

$$\text{Annual Energy Consumption} = \sum_{j=1}^{n} E(t_j)$$

where $t_j$ and n represent the outdoor temperature at each bin j and the number of hours in each bin *j,* respectively, for the temperature bins listed in Table D1 of AHRI 1250.

(ii) For systems consisting of a packaged dedicated system or a split dedicated system where the condensing unit is located in a conditioned space, by performing the following calculation:

$$\text{Annual Energy Consumption} = \left(\frac{0.33 \times B\dot{L}H + 0.67 \times B\dot{L}L}{\text{Annual Walk-in Energy Factor}}\right) \times 8760$$

where B$\dot{L}$H and B$\dot{L}$L for refrigerator and freezer systems are defined in sections 6.2.1 and 6.2.2, respectively, of AHRI 1250 and the annual walk-in energy factor is calculated from the results of the test procedures set forth in AHRI 1250.

(iii) For systems consisting of a single unit cooler or a set of multiple unit coolers serving a single piece of equipment and connected to a multiplex condensing system, by performing the following calculation:

$$\text{Annual Energy Consumption} = \left(\frac{0.33 \times B\dot{L}H + 0.67 \times B\dot{L}L}{\text{Annual Walk-in Energy Factor}}\right) \times 8760$$

where B$\dot{L}$H and B$\dot{L}$L for refrigerator and freezer systems are defined in section 7.9.2.2 and 7.9.2.3, respectively, of AHRI 1250 and the annual walk-in energy factor is calculated from the results of the test procedures set forth in AHRI 1250.

■ 5. Appendix A to subpart R of part 431 is added to read as follows:

## Appendix A to Subpart R of Part 431—Uniform Test Method for the Measurement of Energy Consumption of the Components of Envelopes of Walk-In Coolers and Walk-In Freezers

1.0 Scope

This appendix covers the test requirements used to measure the energy consumption of the components that make up the envelope of a walk-in cooler or walk-in freezer.

2.0 Definitions

The definitions contained in § 431.302 are applicable to this appendix.

3.0 Additional Definitions

*3.1 Automatic door opener/closer* means a device or control system that "automatically" opens and closes doors without direct user contact, such as a motion sensor that senses when a forklift is approaching the entrance to a door and opens it, and then closes the door after the forklift has passed.

*3.2 Core region* means the part of the panel that is not the edge region.

*3.3 Edge region* means a region of the panel that is wide enough to encompass any framing members and edge effects. If the panel contains framing members (e.g. a wood frame) then the width of the edge region must be as wide as any framing member plus 2 in. ± 0.25 in. If the panel does not contain framing members then the width of the edge region must be 4 in ± 0.25 in. For walk-in panels that utilize vacuum insulated panels (VIP) for insulation, the width of the edge region must be the lesser of 4.5 in. ± 1 in. or the maximum width that does not cause the VIP to be pierced by the cutting device when the edge region is cut.

*3.4 Surface area* means the area of the surface of the walk-in component that would be external to the walk-in. For example, for panel, the surface area would be the area of the side of the panel that faces the outside of the walk-in. It would not include edges of the panel that are not exposed to the outside of the walk-in.

*3.5 Rating conditions* means, unless explicitly stated otherwise, all conditions shown in Table A.1. For installations where two or more walk-in envelope components share any surface(s), the "external conditions" of the shared surface(s) must reflect the internal conditions of the adjacent walk-in. For example, if a walk-in component divides a walk-in freezer from a walk-in cooler, then the internal conditions are the freezer rating conditions and the external conditions are the cooler rating conditions.

*3.6 Percent time off (PTO)* means the percent of time that an electrical device is assumed to be off.

TABLE A.1—TEMPERATURE CONDITIONS

| | |
|---|---|
| **Internal Temperatures (cooled space within the envelope)** | |
| Cooler Dry Bulb Temperature | 35 °F. |
| Freezer Dry Bulb Temperature | −10 °F. |
| **External Temperatures (space external to the envelope)** | |
| Freezer and Cooler Dry Bulb Temperatures | 75 °F. |

TABLE A.1—TEMPERATURE CONDITIONS—Continued

| Subfloor Temperatures | |
|---|---|
| Freezer and Cooler Dry Bulb Temperatures | 55 °F. |

4.0 Calculation Instructions

*4.1* Display Panels

(a) Calculate the U-factor of the display panel in accordance with section 5.3 of this appendix, Btu/h-ft²-°F.

(b) Calculate the display panel surface area, as defined in section 3.4 of this appendix, $A_{dp}$, ft², with standard geometric formulas or engineering software.

(c) Calculate the temperature differential, $\Delta T_{dp}$, °F, for the display panel, as follows:

$$\Delta T_{dp} = |T_{DB,ext,dp} - T_{DB,int,dp}| \quad (4\text{-}1)$$

Where:

$T_{DB,ext,dp}$ = dry-bulb air external temperature, °F, as prescribed in Table A.1; and

$T_{DB,int,dp}$ = dry-bulb air temperature internal to the cooler or freezer, °F, as prescribed in Table A.1.

(d) Calculate the conduction load through the display panel, $Q_{cond\text{-}dp}$, Btu/h, as follows:

$$Q_{cond,dp} = A_{dp} \times \Delta T_{dp} \times U_{dp} \quad (4\text{-}2)$$

Where:

$A_{dp}$ = surface area of the walk-in display panel, ft²;

$\Delta T_{dp}$= temperature differential between refrigerated and adjacent zones, °F; and

$U_{dp}$ = thermal transmittance, U-factor, of the display panel in accordance with section 5.3 of this appendix, Btu/h-ft²-°F.

(e) Select Energy Efficiency Ratio (EER), as follows:

(1) For coolers, use EER = 12.4 Btu/W-h

(2) For freezers, use EER = 6.3 Btu/W-h

(f) Calculate the total daily energy consumption, $E_{dp}$, kWh/day, as follows:

$$E_{dp} = \frac{Q_{cond,dp}}{EER} \times \frac{24\ h \times 1\ kW}{1\ day \times 1000\ W} \quad (4\text{-}3)$$

Where:

$Q_{cond,\ dp}$ = the conduction load through the display panel, Btu/h; and EER = EER of walk-in (cooler or freezer), Btu/W-h.

*4.2* Floor Panels

(a) Calculate the surface area, as defined in section 3.4 of this appendix, of the floor panel edge, as defined in section 3.3, $A_{fp\ edge}$, ft², with standard geometric formulas or engineering software as directed in section 5.1 of this appendix.

(b) Calculate the surface area, as defined in section 3.4 of this appendix, of the floor panel core, as defined in section 3.2, $A_{fp\ core}$, ft², with standard geometric formulas or engineering software as directed in section 5.1 of this appendix.

(c) Calculate the total area of the floor panel, $A_{fp}$, ft², as follows:

$$A_{fp} = A_{fp\ core} + A_{fp\ edge} \quad (4\text{-}4)$$

Where:

$A_{fp\ core}$ = floor panel core area, ft²; and

$A_{fp\ edge}$ = floor panel edge area, ft².

(d) Calculate the temperature differential of the floor panel, $\Delta T_{fp}$, °F, as follows:

$$\Delta T_{fp} = |T_{ext,fp} - T_{DB,int,fp}| \quad (4\text{-}5)$$

Where:

$T_{ext,\ fp}$ = subfloor temperature, °F, as prescribed in Table A.1; and

$T_{DB,int,\ fp}$ = dry-bulb air internal temperature, °F, as prescribed in Table A.1. If the panel spans both cooler and freezer temperatures, the freezer temperature must be used.

(e) Calculate the floor foam degradation factor, $DF_{fp}$, unitless, as follows:

$$DF_{fp} = \frac{R_{LTTR,fp}}{R_{O,fp}} \quad (4\text{-}6)$$

Where:

$R_{LTTR,fp}$ = the long term thermal resistance R-value of the floor panel foam in accordance with section 5.2 of this appendix, h-ft²-°F/Btu; and

$R_{o,fp}$ = the R-value of foam determined in accordance with ASTM C518 (incorporated by reference; see section § 431.303) for purposes of compliance with the appropriate energy conservation standard, h-ft²-°F/Btu.

(f) Calculate the U-factor for panel core region modified by the long term thermal transmittance of foam, $U_{LT,fp\ core}$, Btu/h-ft²-°F, as follows:

$$U_{LT,fp\ core} = \frac{U_{fp\ core}}{DF_{fp}} \quad (4\text{-}7)$$

Where:

$U_{fp\ core}$ = the U-factor in accordance with section 5.1 of this appendix, Btu/h-ft²-°F; and

$DF_{fp}$ = floor foam degradation factor, unitless.

(g) Calculate the overall U-factor of the floor panel, $U_{fp}$, Btu/h-ft²-°F, as follows:

$$U_{fp} = \frac{A_{fp\,edge} \times U_{fp\,edge} + A_{fp\,core} \times U_{LT,fp\,core}}{A_{fp}} \quad (4\text{-}8)$$

Where:
$A_{fp\ edge}$ = area of floor panel edge, ft²;
$U_{fp\ edge}$ = U-factor for panel edge area in accordance with section 5.1 of this appendix, Btu/h-ft²-°F;
$A_{fp\ core}$ = area of floor panel core, ft²;
$U_{LT,fp\ core}$ = U-factor for panel core region modified by the long term thermal transmittance of foam, Btu/h-ft²-°F; and
$A_{fp}$ = total area of the floor panel, ft².

(h) Calculate the conduction load through floor panels, $Q_{cond\text{-}fp}$, Btu/h,

$$Q_{cond-fp} = \Delta T_{fp} \times A_{fp} \times U_{fp} \quad (4\text{-}9)$$

Where:
$\Delta T_{fp}$ = temperature differential across the floor panels, °F;
$A_{fp}$ = total area of the floor panel, ft²; and
$U_{fp}$ = overall U-factor of the floor panel, Btu/h-ft²-°F.

(i) Select Energy Efficiency Ratio (EER), as follows:

(1) For coolers, use EER = 12.4 Btu/W-h

(2) For freezers, use EER = 6.3 Btu/W-h

(j) Calculate the total daily energy consumption, $E_{fp}$, kWh/day, as follows:

$$E_{fp} = \frac{Q_{cond-fp}}{EER} \times \frac{24\ h \times 1\ kW}{1\ day \times 1000\ W} \quad (4\text{-}10)$$

Where:
$Q_{cond\text{-}fp}$ = the conduction load through the floor panel, Btu/h; and EER = EER of walk-in (cooler or freezer), Btu/W-h.

*4.3* Non-Floor Panels

(a) Calculate the surface area, as defined in section 3.4, of the non-floor panel edge, as defined in section 3.3, $A_{nf\ edge}$, ft², with standard geometric formulas or engineering software as directed in section 5.1 of this appendix.

(b) Calculate the surface area, as defined in section 3.4, of the non-floor panel core, as defined in section 3.2, $A_{nf\ core}$, ft², with standard geometric formulas or engineering software as directed in section 5.1 of this appendix.

(c) Calculate total non-floor panel area, $A_{nf}$, ft²:

$$A_{nf} = A_{nf\,edge} + A_{nf\,core} \quad (4\text{-}11)$$

Where:
$A_{nf\ edge}$ = non-floor panel edge area, ft²; and
$A_{nf\ core}$ = non-floor panel core area, ft².

(d) Calculate temperature differential, $\Delta T_{nf}$, °F:

$$\Delta T_{nf,} = |T_{DB,ext,nf} - T_{DB,int,nf}| \quad (4\text{-}12)$$

Where:
$T_{DB,ext,\ nf}$ = dry-bulb air external temperature, °F, as prescribed in Table A.1; and
$T_{DB,int,\ nf}$ = dry-bulb air internal temperature, °F, as prescribed in Table A.1. If the non-floor panel spans both cooler and freezer temperatures, then the freezer temperature must be used.

(e) Calculate the non-floor foam degradation factor, $DF_{nf}$, unitless, as follows:

$$DF_{nf} = \frac{R_{LTTR,nf,}}{R_{o,nf}} \quad (4\text{-}13)$$

Where:
$R_{LTTR,nf}$ = the R-value of the non-floor panel foam in accordance with section 5.2 of this appendix, h- ft²-°F/Btu; and
$R_{o,nf}$ = the R-value of foam determined in accordance with ASTM C518 (incorporated by reference; see section § 431.303) for purposes of compliance with the appropriate energy conservation standard, h-ft²-°F/Btu.

(f) Calculate the U-factor, $U_{LT,nf\ core}$, Btu/h-ft²-°F, as follows:

$$U_{LT,nf\,core} = \frac{U_{nf\,core}}{DF_{nf}} \quad (4\text{-}14)$$

Where:
$U_{nf\ core}$ = the U-factor, in accordance with section 5.1 of this appendix, of non-floor panel, Btu/h- ft²-°F; and
$DF_{nf}$ = the non-floor foam degradation factor, unitless.

(g) Calculate the overall U-factor of the non-floor panel, $U_{nf}$, Btu/h-ft²-°F, as follows:

$$U_{nf} = \frac{A_{nf\,edge} \times U_{nf\,edge} + A_{nf\,core} \times U_{LT,nf\,core}}{A_{nf}} \quad (4\text{-}15)$$

Where:
$A_{nf\ edge}$ = area of non-floor panel edge, ft²;
$U_{nf\ edge}$ = U-factor for non-floor panel edge area in accordance with section 5.1 of this appendix, Btu/h-ft²-°F;
$A_{nf\ core}$ = area of non-floor panel core, ft²;
$U_{LT,nf\ core}$ = U-factor for non-floor panel core region modified by the long term thermal transmittance of foam, Btu/h-ft²-°F; and
$A_{nf}$ = total area of the non- floor panel, ft².

(h) Calculate the conduction load through non-floor panels, $Q_{cond\text{-}nf}$, Btu/h,

$$Q_{cond-nf} = \Delta T_{nf} \times A_{nf} \times U_{nf} \quad (4\text{-}16)$$

Where:

$\Delta T_{nf}$ = temperature differential across the non-floor panels, °F;
$A_{nf}$ = total area of the non-floor panel, ft²; and
$U_{nf}$ = overall U-factor of the non-floor panel, Btu/h-ft²-°F.

(i) Select Energy Efficiency Ratio (EER), as follows:

(1) For coolers, use EER = 12.4 Btu/W-h

(2) For freezers, use EER = 6.3 Btu/W-h

(j) Calculate the total daily energy consumption, $E_{nf}$, kWh/day, as follows:

$$E_{nf} = \frac{Q_{cond-nf}}{EER} \times \frac{24\ h \times 1\ kW}{1\ day \times 1000\ W} \quad (4\text{-}17)$$

Where:

$Q_{cond-nf}$ = the conduction load through the non-floor panel, Btu/h; and
EER = EER of walk-in (cooler or freezer), Btu/W-h.

*4.4* Display Doors

*4.4.1* Conduction Through Display Doors

(a) Calculate the U-factor of the door in accordance with section 5.3 of this appendix, Btu/h-ft²-°F

(b) Calculate the surface area, as defined in section 3.4 of this appendix, of the display door, $A_{dd}$, ft², with standard geometric formulas or engineering software.

(c) Calculate the temperature differential, $\Delta T_{dd}$, °F, for the display door as follows:

$$\Delta T_{dd} = \left| T_{DB,ext,dd} - T_{DB,int,dd} \right| \quad (4\text{-}18)$$

Where:

$T_{DB,ext,\ dd}$ = dry-bulb air temperature external to the display door, °F, as prescribed in Table A.1; and

$T_{DB,int,\ dd}$ = dry-bulb air temperature internal to the display door, °F, as prescribed in Table A.1.

(d) Calculate the conduction load through the display doors, $Q_{cond-dd}$, Btu/h, as follows:

$$Q_{cond,dd} = A_{dd} \times \Delta T_{dd} \times U_{dd} \quad (4\text{-}19)$$

Where:

$\Delta T_{dd}$ = temperature differential between refrigerated and adjacent zones, °F;
$A_{dd}$ = surface area walk-in display doors, ft²; and
$U_{dd}$ = thermal transmittance, U-factor of the door, in accordance with section 5.3 of this appendix, Btu/h-ft²-°F.

*4.4.2* Direct Energy Consumption of Electrical Component(s) of Display Doors

Electrical components associated with display doors could include, but are not limited to: heater wire (for anti-sweat or anti-freeze application); lights (including display door lighting systems); control system units; and sensors.

(a) Select the required value for percent time off (PTO) for each type of electricity consuming device, $PTO_t$ (%)

(1) For lights without timers, control system or other demand-based control, PTO = 25 percent. For lighting with timers, control system or other demand-based control, PTO = 50 percent.

(2) For anti-sweat heaters on coolers (if included): Without timers, control system or other demand-based control, PTO = 0 percent. With timers, control system or other demand-based control, PTO = 75 percent. For anti-sweat heaters on freezers (if included): Without timers, control system or other auto-shut-off systems, PTO = 0 percent. With timers, control system or other demand-based control, PTO = 50 percent.

(3) For all other electricity consuming devices: Without timers, control system, or other auto-shut-off systems, PTO = 0 percent. If it can be demonstrated that the device is controlled by a preinstalled timer, control system or other auto-shut-off system, PTO = 25 percent.

(b) Calculate the power usage for each type of electricity consuming device, $P_{dd-comp,u,t}$, kWh/day, as follows:

$$P_{dd-comp,u,t} = P_{rated,u,t} \times \left(1 - PTO_{u,t}\right) \times n_{u,t} \times \frac{24h}{day} \quad (4\text{-}20)$$

Where:

u = the index for each of type of electricity-consuming device located on either (1) the interior facing side of the display door or within the inside portion of the display door, (2) the exterior facing side of the display door, or (3) any combination of (1) and (2). For purposes of this calculation, the interior index is represented by u = int and the exterior index is represented by u = ext. If the electrical component is both on the interior and exterior side of the display door then u = int. For anti-sweat heaters sited anywhere in the display door, 75 percent of the total power is be attributed to u = int and 25 percent of the total power is attributed to u = ext;
t = index for each type of electricity consuming device with identical rated power;
$P_{rated,u,t}$ = rated power of each component, of type t, kW;
$PTO_{u,t}$ = percent time off, for device of type t, %; and
$n_{u,t}$ = number of devices at the rated power of type t, unitless.

(c) Calculate the total electrical energy consumption for interior and exterior power, $P_{dd-tot,\ int}$ (kWh/day) and $P_{dd-tot,\ ext}$ (kWh/day), respectively, as follows:

$$P_{dd-tot,int} = \sum_1^t P_{dd-comp,int,t} \quad (4\text{-}21)$$

$$P_{dd-tot,ext} = \sum_1^t P_{dd-comp,ext,t} \quad (4\text{-}22)$$

Where:

t = index for each type of electricity consuming device with identical rated power;

$P_{dd\text{-}comp,int,\ t}$ = the energy usage for an electricity consuming device sited on the interior facing side of or in the display door, of type t, kWh/day; and

$P_{dd\text{-}comp,ext,\ t}$ = the energy usage for an electricity consuming device sited on the external facing side of the display door, of type t, kWh/day.

(d) Calculate the total electrical energy consumption, $P_{dd\text{-}tot}$, (kWh/day), as follows:

$$P_{dd-tot} = P_{dd-tot,int} + P_{dd-tot,ext} \quad (4\text{-}23)$$

Where:

$P_{dd\text{-}tot,int}$ = the total interior electrical energy usage for the display door, kWh/day; and

$P_{dd\text{-}tot,ext}$ = the total exterior electrical energy usage for the display door, kWh/day.

*4.4.3* Total Indirect Electricity Consumption Due to Electrical Devices

(a) Select Energy Efficiency Ratio (EER), as follows:

(1) For coolers, use EER = 12.4 Btu/Wh

(2) For freezers, use EER = 6.3 Btu/Wh

(b) Calculate the additional refrigeration energy consumption due to thermal output from electrical components sited inside the display door, $C_{dd\text{-}load}$, kWh/day, as follows:

$$C_{dd-load} = P_{dd-tot,int} \times \frac{3.412\ \frac{Btu}{W-h}}{EER} \quad (4\text{-}24)$$

Where:

EER = EER of walk-in cooler or walk-in freezer, Btu/W-h; and

$P_{dd\text{-}tot,int}$ = The total internal electrical energy consumption due for the display door, kWh/day.

*4.4.4* Total Display Door Energy Consumption

(a) Select Energy Efficiency Ratio (EER), as follows:

(1) For coolers, use EER = 12.4 Btu/W-h

(2) For freezers, use EER = 6.3 Btu/W-h

(b) Calculate the total daily energy consumption due to conduction thermal load, $E_{dd,\ thermal}$, kWh/day, as follows:

$$E_{dd,thermal} = \frac{Q_{cond,dd}}{EER} \times \frac{24\ h \times 1\ kW}{1\ day \times 1000\ W} \quad (4\text{-}25)$$

Where:

$Q_{cond,\ dd}$ = the conduction load through the display door, Btu/h; and

EER = EER of walk-in (cooler or freezer), Btu/W-h.

(c) Calculate the total energy, $E_{dd,tot}$, kWh/day,

$$E_{dd,tot} = E_{dd,thermal} + P_{dd-tot} + C_{dd-load} \quad (4\text{-}26)$$

Where:

$E_{dd,\ thermal}$ = the total daily energy consumption due to thermal load for the display door, kWh/day;

$P_{dd\text{-}tot}$ = the total electrical load, kWh/day; and

$C_{dd\text{-}load}$ = additional refrigeration load due to thermal output from electrical components contained within the display door, kWh/day.

*4.5* Non-Display Doors

*4.5.1* Conduction Through Non-Display Doors

(a) Calculate the surface area, as defined in section 3.4 of this appendix, of the non-display door, $A_{nd}$, $ft^2$, with standard geometric formulas or with engineering software.

(b) Calculate the temperature differential of the non-display door, $\Delta T_{nd}$,°F, as follows:

$$\Delta T_{nd} = |T_{DB,ext,nd} - T_{DB,int,nd}| \quad (4\text{-}27)$$

Where:

$T_{DB,ext,\ nd}$ = dry-bulb air external temperature, °F, as prescribed by Table A.1; and

$T_{DB,int,\ nd}$ = dry-bulb air internal temperature, °F, as prescribed by Table A.1. If the component spans both cooler and freezer spaces, the freezer temperature must be used.

(c) Calculate the conduction load through the non-display door: $Q_{cond\text{-}nd}$, Btu/h,

$$Q_{cond-nd} = \Delta T_{nd} \times A_{nd} \times U_{nd} \quad (4\text{-}28)$$

Where:

$\Delta T_{nd}$ = temperature differential across the non-display door, °F;

$U_{nd}$ = thermal transmittance, U-factor of the door, in accordance with section 5.3 of this appendix, Btu/h-ft²-°F; and

$A_{nd}$ = area of non-display door, ft².

*4.5.2* Direct Energy Consumption of Electrical Components of Non-Display Doors

Electrical components associated with a walk-in non-display door comprise any components that are on the non-display door and that directly consume electrical energy. This includes, but is not limited to, heater wire (for anti-sweat or anti-freeze application), control system units, and sensors.

(a) Select the required value for percent time off for each type of electricity consuming device, $PTO_t$ (%)

(1) For lighting without timers, control system or other demand-based control, PTO = 25 percent. For lighting with timers, control system or other demand-based control, PTO = 50 percent.

(2) For anti-sweat heaters on coolers (if included): Without timers, control system or other demand-based control, PTO = 0 percent. With timers, control system or other demand-based control, PTO = 75 percent. For anti-sweat heaters on freezers (if included): Without timers, control system or other auto-shut-off systems, PTO = 0 percent. With timers, control system or other demand-based control, PTO = 50 percent.

(3) For all other electricity consuming devices: Without timers, control system, or other auto-shut-off systems, PTO = 0 percent. If it can be demonstrated that the device is controlled by a preinstalled timer, control system or other auto-shut-off system, PTO = 25 percent.

(b) Calculate the power usage for each type of electricity consuming device, $P_{nd\text{-}comp,u,t}$, kWh/day, as follows:

$$P_{nd-comp,u,t} = P_{rated,u,t} \times \left(1 - PTO_{u,t}\right) \times n_{u,t} \times \frac{24h}{day} \quad (4\text{-}29)$$

Where:

u = the index for each of type of electricity-consuming device located on either (1) the interior facing side of the display door or within the inside portion of the display door, (2) the exterior facing side of the display door, or (3) any combination of (1) and (2). For purposes of this calculation, the interior index is represented by u = int and the exterior index is represented by u = ext. If the electrical component is both on the interior and exterior side of the display door then u = int. For anti-sweat heaters sited anywhere in the display door, 75 percent of the total power is be attributed to u=int and 25 percent of the total power is attributed to u=ext;

t = index for each type of electricity consuming device with identical rated power;

$P_{rated,u,t}$ = rated power of each component, of type t, kW;

$PTO_{u,t}$ = percent time off, for device of type t, %; and

$n_{u,t}$ = number of devices at the rated power of type t, unitless.

(c) Calculate the total electrical energy consumption for interior and exterior power, $P_{nd\text{-}tot,\ int}$ (kWh/day) and $P_{nd\text{-}tot,\ ext}$ (kWh/day), respectively, as follows:

$$P_{nd-tot,int} = \sum_1^t P_{nd-comp,int,t} \quad (4\text{-}30)$$

$$P_{nd-tot,ext} = \sum_1^t P_{nd-comp,ext,t} \quad (4\text{-}31)$$

Where:

t = index for each type of electricity consuming device with identical rated power;

$P_{nd\text{-}comp,int,\ t}$ = the energy usage for an electricity consuming device sited on the internal facing side or internal to the non-display door, of type t, kWh/day; and

$P_{nd\text{-}comp,ext,\ t}$ = the energy usage for an electricity consuming device sited on the external facing side of the non-display door, of type t, kWh/day. For anti-sweat heaters,

(d) Calculate the total electrical energy consumption, $P_{nd\text{-}tot}$, kWh/day, as follows:

$$P_{nd-tot} = P_{nd-tot,int} + P_{nd-tot,ext} \quad (4\text{-}32)$$

Where:

$P_{nd\text{-}tot,int}$ = the total interior electrical energy usage for the non-display door, of type t, kWh/day; and

$P_{nd\text{-}tot,ext}$ = the total exterior electrical energy usage for the non-display door, of type t, kWh/day.

*4.5.3* Total Indirect Electricity Consumption Due to Electrical Devices

(a) Select Energy Efficiency Ratio (EER), as follows:

(1) For coolers, use EER = 12.4 Btu/Wh

(2) For freezers, use EER = 6.3 Btu/Wh

(b) Calculate the additional refrigeration energy consumption due to thermal output from electrical components associated with the non-display door, $C_{nd\text{-}load}$, kWh/day, as follows:

$$C_{nd-load} = P_{nd-tot,int} \times \frac{3.412}{EER} \frac{Btu}{W-h} \quad (4\text{-}33)$$

Where:

EER = EER of walk-in cooler or freezer, Btu/W-h; and

$P_{nd\text{-}tot,int}$ = the total interior electrical energy consumption for the non-display door, kWh/day.

*4.5.4* Total Non-Display Door Energy Consumption

(a) Select Energy Efficiency Ratio (EER), as follows:

(1) For coolers, use EER = 12.4 Btu/W-h

(2) For freezers, use EER = 6.3 Btu/W-h

(b) Calculate the total daily energy consumption due to thermal load, $E_{nd,\ thermal}$, kWh/day, as follows:

$$E_{nd,thermal} = \frac{Q_{cond-nd}}{EER} \times \frac{24\ h \times 1\ kW}{1\ day \times 1000\ W} \qquad (4\text{-}34)$$

Where:

$Q_{cond-nd}$ = the conduction load through the non-display door, Btu/hr; and

EER = EER of walk-in (cooler or freezer), Btu/W-h.

(c) Calculate the total energy, $E_{nd,tot}$, kWh/day, as follows:

$$E_{nd,tot} = E_{nd,thermal} + P_{nd-tot} + C_{load} \qquad (4\text{-}35)$$

Where:

$E_{nd,\ thermal}$ = the total daily energy consumption due to thermal load for the non-display door, kWh/day;

$P_{nd-tot}$ = the total electrical energy consumption, kWh/day; and

$C_{nd-load}$ = additional refrigeration load due to thermal output from electrical components contained on the inside face of the non-display door, kWh/day.

5.0 Test Methods and Measurements

*5.1* Measuring Floor and Non-floor Panel U-factors

Follow the test procedure in ASTM C1363, (incorporated by reference; see § 431.303), exactly, with these exceptions:

(1) Test Sample Geometry Requirements

(i) Two (2) panels, 8 ft. ± 1 ft. long and 4 ft. ± 1 ft. wide must be used.

(ii) The panel edges must be joined using the manufacturer's panel interface joining system (e.g., camlocks, standard gasketing, etc.).

(iii) The Panel Edge Test Region, see figure 1, must be cut using the following dimensions:

1. If the panel contains framing members (e.g. a wood frame), then the width of edge (W) must be as wide as any framing member plus 2 in. ± 0.25 in. For example, if the face of the panel contains 1.5 in. thick framing members around the edge of the panel, then width of edge (W) = 3.5 in. ± 0.25 in and the Panel Edge Test Region would be 7 in. ± 0.5 in. wide.

2. If the panel does not contain framing members, then the width of edge (W) must be 4 in ± 0. 25 in.

3. Walk-in panels that utilize vacuum insulated panels (VIP) for insulation, width of edge (W) = the lesser of 4.5 in. ± 1 in. or the maximum width that does not cause the VIP to be pierced by the cutting device when the edge region is cut.

(iv) Panel Core Test Region of length Y and height Z, see Figure 1, must also be cut from one of the two panels such that panel length = Y + X, panel height = Z +X where X=2W.

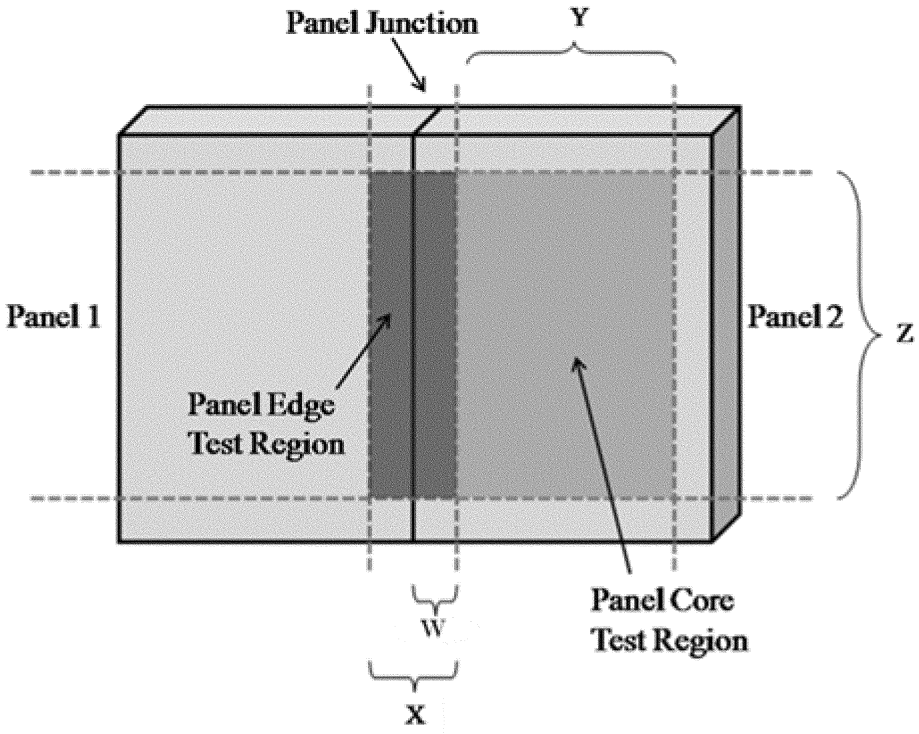



**Figure 1 ASTM C1363 Test Regions (Note: diagram not drawn to scale)**

(2) Testing Conditions

(i) The air temperature on the "hot side", as denoted in ASTM C1363, of the non-floor panel should be maintained at 75 °F ± 1 °F.

1. Exception: When testing floor panels, the air temperature should be maintained at 55 °F ± 1 °F.

(ii) The temperature on the "cold side", as denoted in ASTM C1363, of the panel should be maintained at 35 °F ± 1 °F for the panels used for walk-in coolers and − 10 °F ± 1 °F for panels used for walk-in freezers.

(iii) The air velocity must be maintained as natural convection conditions as described in ASTM C1363. The test must be completed using the masked method and with surround panel in place as described in ASTM C1363.

(3) Required Test Measurements

(i) Non-floor Panels

1. Panel Edge Region U-factor: $U_{nf,\ edge}$

2. Panel Core Region U-factor: $U_{nf,\ core}$

(ii) Floor Panels

1. Floor Panel Edge Region U-factor: $U_{fp,\ edge}$

2. Floor Panel Core Region U-factor: $U_{fp,\ core}$

*5.2* Measuring Long Term Thermal Resistance (LTTR) of Insulating Foam

Follow the test procedure in Annex C of DIN EN 13164 or Annex C of DIN EN 13165 (as applicable), (incorporated by reference; see § 431.303), exactly, with these exceptions:

(1) Temperatures During Thermal Resistance Measurement

(i) For freezers: 20 °F ± 1 °F must be used.

(ii) For coolers: 55 °F ± 1 °F must be used.

(2) Sample Panel Preparation

(i) A 800mm × 800mm square (× thickness of the panel) section cut from the geometric center of the panel that is being tested must be used as the sample for completing DIN EN 13165.

(ii) A 500mm × 500mm square (× thickness of the panel) section cut from the geometric center of the panel that is being tested must be used as the sample for completing DIN EN 13164.

(3) Required Test Measurements

(i) Non-floor Panels

1. Long Term Thermal Resistance: $R_{LTTR,nf}$

(ii) Floor Panels

1. Long Term Thermal Resistance: $R_{LTTR,fp}$

*5.3* U-factor of Doors and Display Panels

(a) Follow the procedure in NFRC 100, (incorporated by reference; see § 431.303), exactly, with these exceptions:

(1) The average convective heat transfer coefficient on both interior and exterior surfaces of the door should be based on the coefficients described in section 4.3 of NFRC 100.

(2) Internal conditions:

(i) Air temperature of 35 °F (1.7 °C) for cooler doors and − 10 °F (− 23.3 °C) for freezer doors

(ii) Mean inside radiant temperature must be the same as shown in section 5.3(a)(2)(i), above.

(3) External conditions

(i) Air temperature of 75 °F (23.9 °C)

(ii) Mean outside radiant temperature must be the same as section 5.3(a)(3)(i), above.

(4) Direct solar irradiance = 0 W/m² (Btu/h-ft²).

(b) Required Test Measurements

(i) Display Doors and Display Panels

1. Thermal Transmittance: $U_{dd}$

(ii) Non-Display Door

1. Thermal Transmittance: $U_{nd}$

[FR Doc. C1–2011–8690 Filed 6–8–11; 8:45 am]

BILLING CODE 1505–01–D

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket No. USCG–2011–0222]**

**RIN 1625–AA00**

## Safety Zone; *New York Water Taxi 10th Anniversary Fireworks*, Upper New York Bay, Red Hook, NY

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary Final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone in the Captain of the Port (COTP) Zone New York on the navigable waters of the Upper New York Bay in the vicinity of Red Hook, New York for a fireworks display. This temporary safety zone is necessary to ensure the safety of vessels and spectators from hazards associated with fireworks displays. Persons and vessels are prohibited from entering into, transiting through, mooring, or anchoring within the temporary safety zone unless authorized by the COTP New York or the designated on-scene representative.

**DATES:** This rule is effective from 8:30 p.m. until 10 p.m. on June 21, 2011.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0222 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0222 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary rule, call or e-mail LTJG Eunice James, Coast Guard Sector New York Waterways Management Division; 718–354–4163, e-mail *Eunice.A.James@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

### Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the Coast Guard did not receive information regarding the dates and scope of the event in time to publish a NPRM followed by a final rule before the effective date. The sponsor was not aware of the requirements for submitting an application for a marine event 135 days in advance, resulting in a late notification. The sponsor is now aware of this requirement for all future events. Nevertheless, the sponsor is unable to reschedule this event due to other activities being held in conjunction with the fireworks display. The safety zone is necessary to provide for the safety of event participants, spectator craft, and other vessels operating near the event area. For the safety concerns noted, it is in the public interest to have these regulations in effect during the event.

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 rule must become effective on the date specified above in order to provide for the safety of the public including spectators and vessels operating in the area near the fireworks display.

**Background and Purpose**

The fireworks event was planned by a private party to celebrate the 10th Anniversary of New York Water Taxi. The fireworks will commence at 9 p.m. on June 21, 2011 and will last approximately 10 minutes. This event poses significant risk to participants, spectators and the maritime public because of hazardous conditions associated with a fireworks display. This temporary safety zone is necessary to ensure the safety of these participants, spectators and vessels.

**Discussion of Rule**

This rule establishes a temporary safety zone on the waters of the Upper New York Bay. The temporary safety zone will encompass all waters of the Upper New York Bay in the vicinity of Red Hook, Brooklyn, NY, within a 180 yards radius around position 40°40′52″ N, 074°01′39″ W (NAD 83) approximately 400 yards south of Governors Island. All persons and vessels shall comply with the instructions of the COTP New York or the designated representative. Entry into, transiting, or anchoring within the temporary safety zone is prohibited unless authorized by the COTP New York or the designated on-scene representative. The COTP New York or the designated representative may be reached on VFH Channel 16.

**Regulatory Analyses**

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

**Executive Order 12866 and Executive Order 13563**

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, as supplemented by Executive Order 13563, 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.

The Coast Guard's implementation of this temporary safety zone will be of short duration and designed to minimize the impact to vessel traffic on navigable waters. This safety zone will only be enforced for 90 minutes. Furthermore, vessels may be authorized to transit the zone with permission of the COTP New York or the designated on-scene representative.

**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 rule will affect the following entities, some of which may be small entities: the owners and operators of vessels intending to transit or anchor in a portion of the Upper New York Bay in the vicinity of Governors Island and Red Hook, NY. The fireworks will commence at 9 p.m. on June 21, 2011 and will last approximately 10 minutes.

This rule will not have a significant economic impact on a substantial number of small entities for the following reasons: Vessel traffic can safely transit around the zone. Before the effective period, we will issue maritime advisories widely available to users of the waterway. This rule will be in effect for only 90 minutes.

**Assistance for Small Entities**

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

**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 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.

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

**Environment**

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves the establishment of a temporary safety zone on a portion of the Upper New York Bay during the launching of fireworks. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

**List of Subjects in 33 CFR Part 165**

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

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

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T01–0222 to read as follows:

**§ 165.T01–0222 Safety Zone; New York Water Taxi 10th Anniversary Fireworks, Upper New York Bay, Red Hook, NY.**

(a) *Location.* The following area is a temporary safety zone: A 180 yard radius around position 40°40′52″ N, 074°01′39″ W in the vicinity of Governors Island and Red Hook, NY on the Upper NY Bay.

(b) *Enforcement period.* This section will be enforced from 8:30 p.m. until 10 p.m. on June 21, 2011.

(c) *Definitions.* "Designated on-scene representative" means any commissioned, warrant, and petty officer of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, and local, state, and Federal law enforcement vessels who have been authorized to act on behalf of the COTP New York.

(d) *Regulations.*

(1) Entry into, transit through, mooring or anchoring within this safety zone is prohibited unless authorized by the COTP New York or the designated on-scene representative.

(2) Persons desiring to operate within the safety zone established in this section may contact the COTP New York at telephone number 718–354–4398 or via on-scene patrol personnel on VHF channel 16 to seek permission to do so. If permission is granted, all persons and vessels must still comply with the instructions of the COTP New York or the designated on-scene representative.

Dated: May 23, 2011.

**L.L. Fagan,**

*Captain, U.S. Coast Guard, Captain of the Port New York.*

[FR Doc. 2011–14327 Filed 6–8–11; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket No. USCG–2011–0159]**

**RIN 1625–AA00**

## Safety Zone; The Pacific Grove Feast of Lanterns, Fireworks Display, Pacific Grove, CA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone in the navigable waters of Monterey Bay, off of Lovers Point, in Pacific Grove, California in support of the Pacific Grove Feast of Lanterns Fireworks Display. This safety zone is established to ensure the safety of participants and spectators from the dangers associated with the pyrotechnics. Unauthorized persons or vessels are prohibited from entering into, transiting through, or remaining in the safety zone without permission of the Captain of the Port or a designated representative.

**DATES:** This rule is effective from 9 p.m. through 9:45 p.m. on July 30, 2011.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0159 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0159 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary rule, call Lieutenant Junior Grade Allison Natcher at (415) 399–7442, or e-mail *D11-PF-MarineEvents@uscg.mil*. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

**Regulatory Information**

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to

comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the event would occur before the rulemaking process would be completed. Because of the dangers posed by the pyrotechnics used in these fireworks displays, the safety zones are necessary to provide for the safety of event participants, spectators, spectator craft, and other vessels transiting the event area. For the safety concerns noted, it is impracticable to publish an NPRM with respect to this rule as these regulations must be in effect during the event.

**Basis and Purpose**

Pacific Grove Feast of Lanterns will sponsor the Pacific Grove Feast of Lanterns Fireworks Display on July 30, 2011, on the navigable waters of Monterey Bay, off of Lovers Point, in Pacific Grove, California. The fireworks display is meant for entertainment purposes. This safety zone establishes a temporary restricted area on the waters surrounding the fireworks launch site during the fireworks displays. This restricted area around the launch site is necessary to protect spectators, vessels, and other property from the hazards associated with the pyrotechnics over the water. The Coast Guard has granted the event sponsor a marine event permit for the fireworks displays.

**Discussion of Rule**

From 9 p.m. until 9:45 p.m. the area to which the temporary safety zone applies will encompass the navigable waters around the fireworks launch site off of Lovers Point within a radius of 1,000 feet. At 9:45 p.m., the safety zone shall terminate. The fireworks launch site will be located in positions: 36°37′26.42″ N, 121° 54′54.03″ W (NAD 83).

The effect of the temporary safety zones will be to restrict navigation in the vicinity of the fireworks sites while the fireworks are set up, and until the conclusion of the scheduled displays. Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the restricted area. These regulations are needed to keep spectators and vessels a safe distance away from the launch site to ensure the safety of participants, spectators, and transiting vessels.

**Regulatory Analyses**

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

**Regulatory Planning and Review**

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.

Although this rule restricts access to the waters encompassed by the safety zone, the effect of this rule will not be significant. The entities most likely to be affected are pleasure craft engaged in recreational activities. In addition, the rule will only restrict access for a limited time. Finally, the Public Broadcast Notice to Mariners will notify the users of local waterway to ensure that the safety zone will result in minimum 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 will not have a significant economic impact on a substantial number of small entities.

Although this rule may affect owners and operators of pleasure craft engaged in recreational activities and sightseeing, it will not have a significant economic impact on a substantial number of small entities for several reasons: (i) This rule will encompass only a small portion of the waterway for a limited period of time; (ii) vessel traffic can pass safely around the area; (iii) vessels engaged in recreational activities and sightseeing have ample space outside of the affected areas of Monterey Bay, CA to engage in these activities; and (iv) the maritime public will be advised in advance of this safety zone via Broadcast Notice to Mariners.

**Assistance for Small Entities**

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

**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 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 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 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.

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

**Environment**

We have analyzed this rule under Department of Homeland Security Management Directive 0023.1 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves establishing a temporary safety zone.

An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

**List of Subjects in 33 CFR Part 165**

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and 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, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165–T11–413 to read as follows:

**§ 165–T11–413 Safety Zone; Pacific Grove Feast of Lanterns, Pacific Grove Feast of Lanterns Fireworks Display, Pacific Grove, CA**

(a) *Location.* This temporary safety zone is established for the navigable waters of Monterey Bay, off of Lovers Point, in Pacific Grove, CA. The fireworks launch sites will be located in positions: 36°37′26.42″ N, 121°54′54.03″ W (NAD 83).

From 9 p.m. until 9:45 p.m. the area to which the temporary safety zone applies will encompass the navigable waters around the fireworks launch site off of Lovers Point within a radius of 1,000 feet. At 9:45 p.m., the safety zone shall terminate.

(b) *Definitions.* As used in this section, "designated representative" means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port San Francisco (COTP) in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general regulations in § 165.23, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the COTP or the COTP's designated representative.

(2) The safety zone is closed to all vessel traffic, except as may be permitted by the COTP or a designated representative.

(3) Vessel operators desiring to enter or operate within the safety zone must contact the COTP or a designated representative to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the COTP or the designated representative. Persons and vessels may request permission to enter the safety zones on VHF–16 or through the 24-hour Command Center at telephone (415) 399–3547.

(d) Effective period. This section is effective from 9 p.m. through 9:45 p.m. on July 30, 2011.

Dated: May 17, 2011.

**Cynthia. L. Stowe,**

*Captain, U.S. Coast Guard, Captain of the Port San Francisco.*

[FR Doc. 2011–14329 Filed 6–8–11; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket No. USCG–2011–0416]**

**RIN 1625–AA00**

## Safety Zone; Nicole Cerrito Birthday Fireworks, Detroit River, Detroit, MI

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone on the Detroit River, Detroit, MI. This zone is intended to restrict vessels from a portion of the Detroit River during the Nicole Cerrito Birthday Fireworks. This temporary safety zone is necessary to provide for the safety of the crews, spectators, participants of the event, participating vessels and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless

authorized by the Captain of the Port or his designated representative.

**DATES:** This rule is effective from 10 p.m. through 11:15 p.m. on June 11, 2011.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0416 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0416 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary rule, call or e-mail LT Katie Stanko, Prevention Department, Sector Detroit, Coast Guard; telephone (313) 568–9508, e-mail *Katie.R.Stanko@uscg.mil*. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

**SUPPLEMENTARY INFORMATION:**

**Regulatory Information**

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because waiting for a notice and comment period to run would be impracticable and contrary to the public interest because it would inhibit the Coast Guard's ability to protect the public from the hazards associated with maritime fireworks displays.

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**. Delaying the effective date of this rule or providing a 30 day notice period would be impracticable and contrary to the public interest for the reasons discussed in the preceding paragraph.

**Background and Purpose**

On June 11, 2011, a private party is holding a land-based birthday celebration that will include fireworks launched from a point on the Detroit River. The fireworks display will occur between 10 p.m. and 11:15 p.m., June 11, 2011. The Captain of the Port has determined that waterborne fireworks displays present significant hazards to vessels and spectators in the vicinity of the launch site.

**Discussion of Rule**

Because of the aforesaid hazards, the Captain of the Port has determined that the temporary safety zone is necessary to ensure the safety of spectators and vessels during the setup, loading, and launching of the Nicole Cerrito Birthday Fireworks Display. Accordingly, the safety zone will encompass all waters on the Detroit River within a 300 foot radius of the fireworks barge launch site located off the shore of Detroit, MI at position 42°21′04″ N, 082°58′32″ W from 10 p.m. until 11:15 p.m. on June 11, 2011. All geographic coordinates are North American Datum of 1983 (NAD 83).

All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated patrol personnel. Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Detroit or his designated representative. The Captain of the Port or his designated representative may be contacted via VHF Channel 16.

**Regulatory Analyses**

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

**Regulatory Planning and Review**

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 conclude that this rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues. The safety zone around the launch platform will be relatively small and exist for only a minimal time. Thus, restrictions on vessel movement within any particular area of the Detroit River are expected to be minimal. Under certain conditions, moreover, vessels may still transit through the safety zone when permitted by the Captain of the Port.

**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 rule will affect the following entities, some of which may be small entities: The owners and operators of vessels intending to transit or anchor in this portion of the Detroit River between 10 p.m. through 11:15 p.m. on June 11, 2011.

This safety zone will not have a significant economic impact on a substantial number of small entities because vessels can easily transit around the zone. The Coast Guard will give notice to the public via a Broadcast Notice to Mariners that the regulation is in effect.

**Assistance for Small Entities**

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain

about this rule or any policy or action of the Coast Guard.

**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 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

**Taking of Private Property**

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

**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 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.

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

**Environment**

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g) of the Instruction because it involves the establishment of a temporary safety zone. An environmental analysis checklist and a categorical exclusion determination will be available in the docket where indicated under **ADDRESSES**.

**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. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T09–0416 to read as follows:

**§ 165. T09–0416 Safety zone; Nicole Cerrito Birthday Fireworks, Detroit River, Detroit, MI.**

(a) *Location.* The safety zone will encompass all U.S. navigable waters on the Detroit River within a 300 foot radius of the fireworks barge launch site located off the shore of Detroit, MI at position 42°21′04″ N, 082°58′32″ W. All geographic coordinates are North American Datum of 1983 (NAD 83).

(b) *Effective and Enforcement Period.* This rule is effective and will be enforced from 10 p.m. through 11:15 p.m. on June 11, 2011.

(c) *Regulations.* (1) In accordance with the general regulations in Section 165.23 of this part, entry into, transiting or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Detroit, or his designated representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Detroit or his designated representative.

(3) The "designated representative" of the Captain of the Port is any Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port to act on his behalf. The designated representative of the Captain of the Port will be aboard either a Coast Guard or Coast Guard Auxiliary vessel. The Captain of the Port or his designated representative may be contacted via VHF Channel 16.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Detroit or his designated representative to obtain permission to do so.

(5) Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port or his designated representative.

Dated: May 31, 2011.

**E. J. Marohn,**

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

[FR Doc. 2011–14328 Filed 6–8–11; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket No. USCG–2010–0063]**

## Safety Zones; Annual Firework Displays Within the Captain of the Port, Puget Sound Area of Responsibility

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of enforcement of regulation.

**SUMMARY:** The Coast Guard will enforce the safety zones for annual firework displays in the Captain of the Port, Puget Sound area of responsibility during the dates and times noted below. This action is necessary to prevent injury and to protect life and property of the maritime public from the hazards associated with the firework displays. During the enforcement periods, entry into, transit through, mooring, or anchoring within these zones is prohibited unless authorized by the Captain of the Port, Puget Sound or Designated Representative.

**DATES:** The regulations in 33 CFR 165.1332 will be enforced during the dates and times noted below.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this notice, call or e-mail ENS Anthony P. LaBoy, Sector Puget Sound Waterways Management, Coast Guard; telephone 206–217–6323, *SectorPugetSoundWWM@uscg.mil.*

**SUPPLEMENTARY INFORMATION:** The Coast Guard is providing notice of enforcement of the safety zones established for Annual Fireworks Displays within the Captain of the Port, Puget Sound Area of Responsibility in 33 CFR 165.1332 during the dates and times noted below.

The following safety zone will be enforced from 5 p.m. on July 1, 2011 through 1 a.m. on July 2, 2011:

| Event name | Location | Latitude | Longitude | Radius |
|---|---|---|---|---|
| Alderbrook Resort & Spa Fireworks | Hood Canal | 47–21.033′ N | 122–13.233′ W | 350 |

The following safety zone will be enforced from 5 p.m. on July 2, 2011 through 1 a.m. on July 3, 2011:

| Event name | Location | Latitude | Longitude | Radius |
|---|---|---|---|---|
| Langlie's Old Fashioned Independence Celebration | Indianola | 47°44.817′ N | 122°31.533′ W | 250 |

The following safety zones will be enforced from 5 p.m. on July 3, 2011 through 1 a.m. on July 4, 2011:

| Event name | Location | Latitude | Longitude | Radius |
|---|---|---|---|---|
| Liberty Bay Fireworks | Liberty Bay | 47°43.917′ N | 122°39.133′ W | 300 |
| Deer Harbor Annual Fireworks Display | Deer Harbor | 48°37.0′ N | 123°00.25′ W. | 200 |

The following safety zones will be enforced from 5 p.m. on July 4, 2011 through 1 a.m. on July 5, 2011.

| Event name | Location | Latitude | Longitude | Radius |
|---|---|---|---|---|
| Port Angeles Chamber of Commerce | Port Angeles Harbor | 48°07.033′ N | 123°24.967′ W | 300 |
| Sheridan Beach Community | Lake Forest Park | 47°44.783′ N | 122°16.917′ W | 200 |
| Brewster Fire Department Fireworks | Brewster | 48°06.367′ N | 119°47.15′ W | 250 |
| City of Mount Vernon Fireworks | Edgewater Park | 48°25.178′ N | 122°20.424′ W | 150 |
| Tacoma Freedom Fair | Commencement Bay | 47°16.817′ N | 122°27.933′ W | 300 |
| City of Renton Fireworks | Renton, Lake Washington | 47°29.986′ N | 122°11.85′ W | 150 |
| Des Moines Fireworks | Des Moines | 47°24.117′ N | 122°20.033′ W | 150 |
| Vashon Island Fireworks | Quartermaster Harbor | 47°45.25′ N | 122°15.75′ W | 450 |
| City of Kenmore Fireworks | Lake Forest Park | 47°39.0′ N | 122°13.55′ W | 300 |
| Yarrow Point Community | Yarrow Point | 47°38.727′ N | 122°13.466′ W | 150 |
| Kirkland Fireworks | Kirkland , Lake Washington | 47°40.583′ N | 122°12.84′ W | 250 |
| Three Tree Point Community Fireworks | Three Tree Point | 47°27.033′ N | 122°23.15′ W | 200 |
| Kingston Fireworks | Appletree Cove | 47°47.65′ N | 122°29.917′ W | 150 |

| Event name | Location | Latitude | Longitude | Radius |
|---|---|---|---|---|
| Bainbridge Island Fireworks | Eagle Harbor | 47°37.267′ N | 122°31.583′ W | 300 |
| City of Anacortes Fireworks | Fidalgo Bay | 47°17.1′ N | 122°28.4′ W | 350 |
| Roche Harbor Fireworks | Roche Harbor | 48°36.7′ N | 123°09.5′ W | 150 |
| Blast Over Bellingham | Bellingham Bay | 48°44.933′ N | 122°29.667′ W | 450 |
| Port Orchard Fireworks | Port Orchard | 47°32.883′ N | 122°37.917′ W | 350 |
| Steilacoom Annual Fireworks | Steilacoom | 47°10.4′ N | 122°36.2′ W | 450 |
| Fireworks Display | Henderson Bay | 47°21.8′ N | 122°38.367′ W | 250 |
| Chase Family Fourth at Lake Union | Lake Union | 47°38.418′ N | 122°20.111′ W | 300 |
| Friday Harbor Independence | Friday Harbor | 48°32.6′ N | 122°00.467′ W | 250 |
| Port Townsend Sunrise Rotary | Port Townsend | 48°08.067′ N | 122°46.467′ W | 200 |
| Orcas Island | Orcas Island | 48°41.317′ N | 122°54.467′ W | 250 |

The following safety zone will be enforced from 5 p.m. on July 09, 2011 through 1 a.m. on July 10, 2011:

| Event name | Location | Latitude | Longitude | Radius |
|---|---|---|---|---|
| Mercer Island Celebration | Mercer Island | 47°35.517′ N | 122°13.233′ W | 450 |

The following safety zone will be enforced from 5 p.m. on July 29, 2011 through 1 a.m. on July 30, 2011:

| Event name | Location | Latitude | Longitude | Radius |
|---|---|---|---|---|
| Whaling Days | Dyes Inlet | 47°38.65′ N | 122°41.35′ W | 450 |

The following safety zone will be enforced from 5 p.m. on August 13, 2011 through 1 a.m. on August 14, 2011:

| Event name | Location | Latitude | Longitude | Radius |
|---|---|---|---|---|
| Medina Days | Medina Park | 47°36.867′ N | 122°14.5′ W | 300 |

The special requirements listed in 33 CFR 165.1332, which can be found in the **Federal Register** (75 FR 33698) published on June 15, 2010, apply to the activation and enforcement of these safety zones.

All vessel operators who desire to enter the safety zone must obtain permission from the Captain of the Port or Designated Representative by contacting either the on-scene patrol craft on VHF Ch 13 or Ch 16 or the Coast Guard Sector Puget Sound Joint Harbor Operations Center (JHOC) via telephone at (206) 217–6002.

The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

This notice is issued under authority of 33 CFR 165.1332 and 33 CFR 165 and 5 U.S.C. 552(a). In addition to this notice, the Coast Guard will provide the maritime community with extensive advanced notification of the safety zones via the Local Notice to Mariners and marine information broadcasts on the day of the events.

Dated: May 20, 2011.

**S.J. Ferguson,**

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

[FR Doc. 2011–14330 Filed 6–8–11; 8:45 am]

**BILLING CODE 9110–04–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R07–OAR–2010–0416; FRL–9317–4]**

### Approval and Promulgation of Determination of Attainment for the 1997 8-Hour Ozone Standard: States of Missouri and Illinois

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking final action to determine that the St. Louis (MO–IL) metropolitan nonattainment area has attained the 1997 8-hour National Ambient Air Quality Standard (NAAQS) for ozone. The St. Louis metropolitan ozone nonattainment area includes the counties of Franklin, Jefferson, St. Charles, and St. Louis as well as St. Louis City in Missouri; and the counties of Madison, Monroe, St. Clair, and Jersey in Illinois. This final determination is based on three years of complete, quality assured ambient air quality monitoring data for Missouri and Illinois for the 2008 through 2010 ozone seasons showing attainment of the NAAQS at all ozone monitoring sites in the nonattainment area. Based on this final determination, the obligation to submit certain ozone attainment demonstration requirements, along with other requirements related to the attainment of the 1997 8-hour ozone standard are suspended.

**DATES:** This rule is effective on July 11, 2011.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–R07–OAR–2010–0416. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101. The Regional Office's official hours of business are Monday through Friday, 8 to 4:30 excluding Federal holidays. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance.

**FOR FURTHER INFORMATION CONTACT:** In Region 7 contact Lachala Kemp, Air Planning and Development Branch, 901 N. 5th Street, Kansas City, Kansas 66101 at 913–551–7214, or by e-mail at *kemp.lachala@epa.gov.* In Region 5 contact Edward Doty, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6057 or by e-mail at *doty.edward@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document "we," "us," or "our" refer to EPA. This section provides additional information by addressing the following questions:

**Table of Contents**

I. What action is EPA taking?
II. What is the effect of this action?
III. EPA's Determination of Attainment
IV. Statutory and Executive Order Reviews

## I. What action is EPA taking?

EPA is making a final determination that the St. Louis (MO-IL) metropolitan 1997 8-hour ozone nonattainment area has attained the 1997 8-hour ozone NAAQS. EPA published in the **Federal Register** its proposed determination for the St. Louis (MO-IL) metropolitan nonattainment area on February 28, 2011 (76 FR 10815). A detailed discussion of the rationale for the determination, and the effect of the determination, was included in the proposal. EPA received no comments on the proposed rule. EPA's determination is based upon the most recent three years of complete, quality assured ambient air monitoring data for Missouri and Illinois showing that the area has attained the NAAQS during the 2008–2010 monitoring period.

On March 27, 2008 (73 FR 16436), EPA promulgated a revised 8-hour ozone standard of 0.075 ppm. On January 6, 2010, EPA again addressed this 2008 revised standard and proposed to set the primary 8-hour ozone standard within the range of 0.060 to 0.070 ppm, rather than at 0.075 ppm. EPA is working to complete reconsideration of the standard and thereafter will proceed with designations. Today's rulemaking relates only to a final determination of attainment for the 1997 8-hour ozone standard and is not affected by the ongoing process of reconsidering the revised 2008 standard.

The monitors and design values are displayed in Table 1. The table summarizes the annual fourth-high daily maximum 8-hour ozone concentrations and their 3-year (2008–2010) averages for all monitors in the St. Louis (MO-IL) metropolitan nonattainment area. These data reflect peak ozone concentrations quality assured and reported by the States of Illinois and Missouri.

TABLE 1—ANNUAL FOURTH-HIGH DAILY MAXIMUM 8-HOUR OZONE CONCENTRATIONS AND 3 YEAR AVERAGES IN ppm FOR THE ST. LOUIS (MO-IL) AREA

| State | County | Monitor | 2008 4th high (ppm) | 2009 4th high (ppm) | 2010 4th high (ppm) | 2008–2010 average (ppm) |
|---|---|---|---|---|---|---|
| Illinois | Jersey | Jerseyville 17–083–1001 | 0.069 | 0.068 | 0.072 | 0.069 |
| | Madison | Alton 17–119–0008 | 0.068 | 0.067 | 0.080 | 0.071 |
| | | Maryville 17–119–1009 | 0.070 | 0.074 | 0.074 | 0.072 |
| | | Wood River 17–119–3007 | 0.067 | 0.066 | 0.070 | 0.067 |
| | St. Clair | East St. Louis 17–163–0010 | 0.064 | 0.069 | 0.072 | 0.068 |
| Missouri | Jefferson | Arnold West 29–099–00019 | 0.70 | 0.070 | 0.077 | 0.072 |
| | St. Charles | Orchard Farm 29–183–1004 | 0.072 | 0.073 | 0.077 | 0.074 |
| | | West Alton 29–183–1002 | 0.076 | 0.071 | 0.084 | 0.077 |
| | St. Louis | Maryland Heights 29–189–0014 | 0.069 | 0.070 | 0.076 | 0.071 |
| | | Pacific 29–189–0005 | 0.064 | 0.064 | 0.069 | 0.065 |
| | St. Louis City | Blair Street 29–510–0085 | 0.073 | 0.065 | 0.071 | 0.069 |

Review of the 2008–2010 ozone monitoring data in the nonattainment area shows that all sites were attaining the 1997 8-hour ozone NAAQS during this period. Therefore, based on the most recent three years of complete, quality assured ozone monitoring data, EPA is determining that the 1997 8-hour ozone standard has been attained in the St. Louis (MO-IL) metropolitan ozone nonattainment area.

**II. What is the effect of this action?**

EPA is taking final action to determine that the St. Louis metropolitan 8-hour ozone nonattainment area consisting of both the Missouri and Illinois portions of the area has attained the 1997 8-hour ozone standard. As provided in 40 CFR 51.918, based on this determination, certain attainment demonstration requirements and associated reasonably available control measures, reasonable further progress plans, contingency measures, and other planning SIP requirements related to attainment of the 8-hour ozone NAAQS shall be suspended as to the St. Louis nonattainment area. Under 40 CFR 51.918, a final determination that the area has met the 1997 8-hour ozone standard suspends the state's obligation to submit requirements related to attainment, for so long as the area continues to attain the standard. This action does not constitute a redesignation to attainment under CAA section 107(d)(3), because Missouri and Illinois do not have approved maintenance plans as required under section 175A of the CAA, nor has EPA made a determination that the area has met the other requirements for redesignation. The ozone classification and designation status of the area remains moderate nonattainment for the 1997 8-hour ozone NAAQS until such time as a redesignation request and maintenance plan are submitted to EPA and EPA determines that it meets the CAA requirements for redesignation to attainment.

If EPA subsequently determines, after notice-and-comment rulemaking in the **Federal Register**, that the area has violated the 1997 8-hour ozone standard, the basis for the suspension of these requirements would no longer exist, and the area would thereafter have to address the pertinent requirements.

**III. EPA's Determination of Attainment**

EPA is taking final action to determine that the St. Louis (MO-IL) metropolitan 1997 8-hour ozone nonattainment area has attained the 1997 8-hour ozone standard based on three years of complete, quality assured ambient air quality monitoring data for Missouri and Illinois for the 2008–2010 ozone seasons. As provided in 40 CFR 51.918, based on this determination, the requirements for Missouri and Illinois to submit an attainment demonstration and associated reasonably available control measures, a reasonable further progress plan, and contingency measures under section 172(c)(9), and any other planning SIP related to attainment of the 1997 8-hour ozone NAAQS for the St. Louis Metropolitan area would be suspended. This suspension of requirements would be effective as long as the area continues to attain the 1997 8-hour ozone standard. This action addresses only the 1997 8-hour ozone standard of 0.08 ppm, and does not address any subsequent revisions to the standard.

**IV. Statutory and Executive Order Reviews**

This final determination of attainment is based on air quality data and would result in the suspension of certain Federal Requirements. Accordingly, this action does not impose additional requirements beyond those imposed by state law. Therefore this final action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this 8-hour ozone clean NAAQS data final determination for the St. Louis (MO-IL) metropolitan area does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

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 August 8, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

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

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: May 24, 2011.

**Karl Brooks,**

*Regional Administrator, Region 7.*

Dated: June 1, 2011.

**Susan Hedman,**

*Regional Administrator, Region 5.*

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 O—Illinois**

* * * * *

■ 2. Section 52.726 is amended by adding paragraph (jj) to read as follows:

**§ 52.726 Control strategy: Ozone.**

* * * * *

(jj) Determination of Attainment. EPA has determined, as of June 9, 2011, that the St. Louis (MO-IL) metropolitan 1997 8-hour ozone nonattainment area has attained the 1997 8-hour ozone NAAQS. This determination, in accordance with 40 CFR 51.918, suspends the requirements for this area to submit an attainment demonstration, associated reasonably available control measures, reasonable further progress, contingency measures, and other plan elements related to attainment of the standards for as long as the area continues to meet the 1997 Ozone NAAQS.

## Subpart AA—Missouri

2. Section 52.1342 is added to subpart AA to read as follows:

**§ 52.1342 Control strategy: Ozone.**

Determination of Attainment. EPA has determined, as of June 9, 2011, that the St. Louis (MO-IL) metropolitan 1997 8-hour ozone nonattainment area has attained the 1997 8-hour ozone NAAQS. This determination, in accordance with 40 CFR 51.918, suspends the requirements for this area to submit an attainment demonstration, associated reasonably available control measures, reasonable further progress, contingency measures, and other plan elements related to attainment of the standards for as long as the area continues to meet the 1997 Ozone NAAQS.

[FR Doc. 2011–14296 Filed 6–8–11; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R10–OAR–2011–0003; FRL–9316–9]**

## Approval and Promulgation of Implementation Plans; Oregon; Interstate Transport of Pollution; Significant Contribution to Nonattainment and Interference With Maintenance Requirements

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is approving a portion of the State Implementation Plan (SIP) revision submitted by the State of Oregon for the purpose of addressing certain provisions of the interstate transport provisions of Clean Air Act (CAA) section 110(a)(2)(D)(i)(I) for the 1997 8-hour ozone National Ambient Air Quality Standards (NAAQS or standards) and the 1997 fine particulate matter ($PM_{2.5}$) NAAQS. Section 110(a)(2)(D)(i) of the CAA requires that each State have adequate provisions to prohibit air emissions from adversely affecting air quality in other States through interstate transport. EPA is taking final action to approve Oregon's SIP revision for the 1997 8-hour ozone NAAQS and 1997 $PM_{2.5}$ NAAQS as meeting the requirements of CAA section 110(a)(2)(D)(i)(I) to prohibit emissions that will contribute significantly to nonattainment of the these standards in any other State and to prohibit emissions that will interfere with maintenance of these standards by any other State.

**DATES:** *Effective Date:* This action is effective on July 11, 2011.

**ADDRESSES:** Copies of the State's SIP revision and other information supporting this action are available for inspection at EPA Region 10, Office of Air, Waste, and Toxics (AWT–107), 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101.

**FOR FURTHER INFORMATION CONTACT:** Donna Deneen, EPA Region 10, Office of Air, Waste, and Toxics (AWT–107), 1200 Sixth Avenue, Seattle, Washington 98101, or at (206) 553–6706.

**SUPPLEMENTARY INFORMATION:** Throughout this notice, the words "we", "us", or "our" means the Environmental Protection Agency (EPA).

### Table of Contents

I. What action is EPA taking?
II. What is the background for this action?
III. Public Comments on the Proposed Action
IV. Final Action
V. Statutory and Executive Order Reviews

### I. What action is EPA taking?

EPA is approving a portion of Oregon's Interstate Transport State Implementation Plan (SIP) revision for the 1997 8-hour ozone NAAQS and 1997 $PM_{2.5}$ NAAQS submitted by the Oregon Department of Environmental Quality (ODEQ) on June 23, 2010 and December 23, 2010. Specifically, we are approving the portion of the interstate transport SIP revision that addresses the following elements of CAA section 110(a)(2)(D)(i): (1) Significant contribution to nonattainment of these NAAQS in any other state; and (2) interference with maintenance of these NAAQS by any other state. EPA will address element (3), interference with any other state's required measures to prevent significant deterioration (PSD) of its air quality; and element (4), interference with any other state's required measures to protect visibility in separate actions.[1] This action does not address the requirements of the 2006 $PM_{2.5}$ NAAQS or the 2008 8-hour ozone NAAQS; those standards will be addressed in future actions.

### II. What is the background for this action?

On July 18, 1997, EPA promulgated new standards for 8-hour ozone and fine particulate matter ($PM_{2.5}$). Section 110(a)(1) of the CAA requires states to submit SIPs to address a new or revised NAAQS within three years after promulgation of such standards, or within such shorter period as EPA may prescribe. Section 110(a)(2) lists the elements that such new SIPs must address, as applicable, including section 110(a)(2)(D)(i) which pertains to interstate transport of certain emissions.

On June 23, 2010, the State of Oregon submitted a SIP revision addressing the requirements of section 110(a)(2)(D)(i) for both the 1997 8-hour ozone NAAQS and 1997 $PM_{2.5}$ NAAQS. In this rulemaking EPA is addressing the first two elements of section 110(a)(2)(D)(i): (1) Significant contribution to nonattainment of these NAAQS in any other state, and (2) interference with maintenance of these NAAQS by any other state. On April 7, 2011, EPA published a proposal to approve the portion of Oregon's SIP submission that addresses these two elements. 76 FR 19292.

### III. Public Comments on the Proposed Action

EPA provided a 30-day review and comment period and solicited comments on our proposal published on April 7, 2011. 76 FR 19292. EPA received no comments on this proposed action.

### IV. Final Action

EPA is approving the revisions to the Oregon SIP as discussed in our proposed action and concludes that for the 1997 8-hour ozone NAAQS and 1997 $PM_{2.5}$ NAAQS, air pollutant emissions from sources within Oregon do not either (1) significantly contribute to nonattainment of the NAAQS in any other state; or (2) interfere with maintenance of the NAAQS by any other state.

As noted previously, EPA will address element (3) interference with any other state's required measures to prevent significant deterioration of its

[1] On March 8, 2011, EPA proposed to approve the Oregon interstate transport SIP provisions addressing interference with any other state's required measures to protect visibility. *See* 76 FR 12651 (March 8, 2011).

air quality and element (4), interference with any other state's required measures to protect visibility, in a separate action. EPA will also take action on the portion of Oregon's SIP that addresses the 2006 $PM_{2.5}$ NAAQS and the 2008 8-hour ozone NAAQS in a separate action.

**V. Statutory and Executive Order Reviews**

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

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

Under section 307(b)(1) of the 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 August 8, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: May 27, 2011.

**Michelle L. Pirzadeh,**

*Acting Regional Administrator Region 10.*

Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

## PART 52—[AMENDED]

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

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

### Subpart MM—Oregon

■ 2. Section 52.1989 is added to read as follows:

**§ 52.1989 Interstate Transport for the 1997 8-hour ozone NAAQS and 1997 $PM_{2.5}$ NAAQS.**

(a) On June 23, 2010 and December 23, 2010, the Oregon Department of Environmental Quality submitted a SIP revision, adopted by the Oregon Environmental Quality Commission on April 30, 2010, to meet the requirements of Clean Air Act section 110(a)(2)(D)(i). EPA approves the portion of this submittal relating to significant contribution to nonattainment of the NAAQS in any other state and interference with maintenance of the NAAQS by any other state.

(b) [Reserved.]

[FR Doc. 2011–14199 Filed 6–8–11; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R10–OAR–2007–0406, FRL–9316–7]**

### Approval and Promulgation of Implementation Plans; ID

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is approving revisions to the Idaho State Implementation Plan (SIP) that were submitted to EPA by the State of Idaho on April 16, 2007. This SIP submittal includes new and revised rules which provide the Idaho Department of Environmental Quality (IDEQ) the regulatory authority to address regional haze and to implement Best Available Retrofit Technology (BART) requirements.

**DATES:** This action is effective on July 11, 2011.

**ADDRESSES:** EPA has established a docket for this action under Docket Identification No. EPA–R10–OAR–2007–0406. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information may not be publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://*

*www.regulations.gov* or in hard copy at EPA Region 10, Office of Air, Waste, and Toxics, AWT–107, 1200 Sixth Avenue, Seattle, Washington 98101. EPA requests that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Steve Body at telephone number: (206) 553–0782, e-mail address: *body.steve@epa.gov,* or the above EPA, Region 10 address.

**SUPPLEMENTARY INFORMATION:** Throughout this document, wherever "we," "us," or "our" is used, we mean the EPA.

Information is organized as follows:

**Table of Contents**

I. Background
II. Public Comments on the Proposed Action
III. Final Action
IV. Limitations in Indian Country
V. Statutory and Executive Order Reviews

## I. Background

On January 5, 2011, EPA published in the **Federal Register**, a proposal to approve new and revised Idaho administrative rules: IDAPA58.01.01.006.04.a,b,c; 006.14.a through z; 006.16; 006.28; 006.42; 006.63.d; 006.65; 006.67; 006.81; 006.91; 006.92.b; 006.99; 006.101.b; 006.124; 006.125; 007.02a.iv; 007.02.d; 651; 665; 666; 667; and 668. These rules provide the Idaho Department of Environmental Quality (IDEQ) the regulatory authority to address regional haze and to implement Best Available Retrofit Technology (BART) requirements. See 76 FR 508. Included in Idaho's SIP revision submittal were several other visibility-related rule revisions which are not specifically related to regional haze or BART requirements. One revision related to open burning is not being addressed in this action because it was superseded by a subsequent SIP revision on May 28, 2008, which was approved in a separate rulemaking on August 1, 2008. Other revisions related to permitting are not being addressed in this action because they were superseded by subsequent SIP revisions on May 12, 2008, and June 8, 2009, which were approved in a separate rulemaking on November 26, 2010.

The rule revisions were submitted in accordance with the requirements of section 110 and part D of the Clean Air Act.

## II. Public Comments on the Proposed Action

EPA provided a 30-day review and comment period and solicited comments on our proposal published in the January 5, 2011, **Federal Register** (76 FR 508). EPA received no comments on this proposed action.

## III. Final Action

Pursuant to section 110 of the CAA, EPA is approving as a SIP revision Idaho rules: IDAPA58.01.01.006.04.a,b,c; 006.14.a through z; 006.16; 006.28; 006.42; 006.63.d; 006.65; 006.67; 006.81; 006.91; 006.92.b; 006.99; 006.101.b; 006.124; 006.125; 007.02a.iv; 007.02.d; 651; 665; 666; 667; and 668, that provide the State of Idaho authority to impose the BART provisions of 40 CFR 51.308(e). These revisions are described in detail in EPA's proposed action, published in the **Federal Register** on January 5, 2011, (76 FR 508).

## IV. Limitations in Indian Country

Idaho has not demonstrated authority to implement and enforce IDAPA chapter 58 within "Indian Country" as defined in 18 U.S.C. 1151.[1] Therefore, this SIP approval does not extend to "Indian Country" in Idaho. *See* CAA sections 110(a)(2)(A) (SIP shall include enforceable emission limits), 110(a)(2)(E)(i) (State must have adequate authority under State law to carry out SIP), and 172(c)(6) (nonattainment SIPs shall include enforceable emission limits). This is consistent with EPA's previous approval of Idaho's SIP revisions, in which EPA specifically disapproved the program for sources within Indian Reservations in Idaho because the State had not shown it had authority to regulate such sources. *See* 40 CFR 52.683(b). It is also consistent with EPA's approval of Idaho's title V air operating permits program. *See* 61 FR 64622, 64623 (December 6, 1996) (interim approval does not extend to Indian Country); 66 FR 50574, 50575 (October 4, 2001) (full approval does not extend to Indian Country).

[1] "Indian country" is defined under 18 U.S.C. 1151 as: (1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (2) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (3) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way through the same. Under this definition, EPA treats as reservations trust lands validly set aside for the use of a Tribe even if the trust lands have not been formally designated as a reservation. In Idaho, Indian country includes, but is not limited to, the Coeur d'Alene Reservation, the Reservation of the Kootenai Tribe, the Fort hall Indian Reservation, and the Nez Perce Reservation as described in the 1863 Nez Perce Treaty.

## V. Statutory and Executive Order Reviews

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and the EPA notes

that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 8, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, and Reporting and recordkeeping requirements.

Dated: May, 25, 2011.

**Dennis J. McLerran,**

*Regional Administrator, Region 10.*

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 N—Idaho

■ 2. In § 52.670(c), the table in paragraph (c) is amended:

■ a. By revising entries 006 and 007.

■ b. By revising entry 651.

■ c. By adding entries 665 through 668.

**§ 52.670 Identification of plan.**

* * * * *

(c) * * *

EPA-APPROVED IDAHO REGULATIONS

| State citation | Title/subject | State effective date | EPA approval date | Explanations |
|---|---|---|---|---|
| **Idaho Administrative Procedures Act (IDAPA) 58.01.01—Rules for the Control of Air Pollution in Idaho** | | | | |
| * | * | * * | * | * * |
| 006 | General Definitions | 3/30/07 4/11/06, 7/1/02, 4/5/00, 3/20/97, 5/1/94. | 6/9/11 [Insert page number where the document begins]. | Except Section 006.55(b) (re: state air toxics in definition of "modification"). |
| 007 | Definitions for the Purposes of Sections 200 through 225 and 400 through 461. | 3/30/07, 4/11/06, 4/5/00, 6/30/95, 5/1/95, 5/1/94. | 6/9/11 [Insert page number where the document begins]. | |
| * | * | * * | * | * * |
| 651 | General Rules | 3/30/07, 5/1/94 | 6/9/11 [Insert page number where the document begins]. | |
| 665 | Regional Haze Rules. | 3/30/07 | 6/9/11 [Insert page number where the document begins]. | |
| 666 | Reasonable Progress Goals. | 3/30/07 | 6/9/11 [Insert page number where the document begins]. | |
| 667 | Long-Term Strategy for Regional Haze. | 3/30/07 | 6/9/11 [Insert page number where the document begins]. | |
| 668 | BART Requirement for Regional Haze. | 3/30/07 | 6/9/11 [Insert page number where the document begins]. | |
| * | * | * * | * | * * |

[FR Doc. 2011–14204 Filed 6–8–11; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

## 47 CFR Parts 2, 80 and 90

**[WT Docket No. 04–344; FCC 11–80]**

## Maritime Communications

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Federal Communications Commission (Commission or FCC) denies a petition for reconsideration of the period in which inland VPCSA incumbents must vacate Channel 87B, and declines to extend this period generally to non-AIS operations because such an extension would undermine the primary goal of this proceeding. Further, the Commission determines that rechannelizing the VPC frequency band

in order to facilitate more efficient spectrum usage is beyond the scope of this rulemaking proceeding.

**DATES:** Effective July 11, 2011.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey Tobias, *Jeff.Tobias@FCC.gov,* Wireless Telecommunications Bureau, (202) 418–1617, or TTY (202) 418–7233.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Federal Communications Commission's *Memorandum Opinion and Order* (*MO&O*) in WT Docket No. 04–344, FCC 11–80, adopted on May 24, 2011, and released on May 26, 2011. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://www.fcc.gov.* Alternative formats are available to persons with disabilities by sending an e-mail to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

1. AIS, which is used to monitor and track maritime traffic for purposes of both navigational safety and homeland security, is a global maritime navigation safety communications system through which marine vessels automatically transmit navigational data to appropriately equipped shore stations, other ships, and aircraft. The International Telecommunication Union has designated VHF maritime Channel 87B for AIS use in international waters. In the *Report and Order,* published at 71 FR 60067, October 12, 2006, in this proceeding, the Commission designated Channel 87B for exclusive AIS use only in the nine maritime VPCSAs. Because the majority of the commenters favored designating Channel 87B for exclusive AIS use nationwide, the Commission invited comment in the *Further Notice of Proposed Rule Making* (*Further NPRM*), published at 71 FR 60102, October 12, 2006, on whether to extend the AIS designation to the thirty-three inland VPCSAs. In the *Second Report and Order,* published at 74 FR 5117, September 29, 2009, the Commission concluded that it would serve the public interest to designate Channel 87B for exclusive AIS use on a nationwide basis. The Commission required inland VPCSA licensees to vacate Channel 87B within two years after the effective date of the redesignation of Channel 87B.

2. Two duplex VPC channels had been set aside for public safety interoperability in each inland VPCSA. Specifically, Channel 25 (157.250/161.850 MHz) was set aside in each inland VPCSA, and either Channel 84 (157.225/161.825 MHz) or Channel 85 (157.275/161.875 MHz) was also set aside in each inland VPCSA. The Commission determined in the *Second Report and Order* that it was appropriate to redesignate Channels 84 and 85 for use by inland VPC licensees. PacifiCorp, among other commenters, specifically requested this additional VPC spectrum. The Commission grandfathered the public safety incumbents on Channels 84 and 85 for fifteen years following the effective date of the redesignation of Channel 87B. The Commission recognized that, with the inland VPCSA licensees having to vacate Channel 87B within two years while the public safety incumbents could remain on Channels 84 and 85 for fifteen years, there would be a period during which some inland VPCSA incumbents would have to protect incumbent public safety operations on Channel 84 or 85.

3. PacifiCorp argues that allowing public safety incumbents to remain on Channels 84 and 85 for up to fifteen years while mandating that inland VPCSA licensees migrate to those channels within two years significantly undermines the ability of certain geographic area licensees on VPC Channel 87, such as PacifiCorp, to make a seamless transition to replacement Channels 84 and 85. It requests that the Commission extend the grandfathering period for inland VPCSA licensees to remain on Channel 87B to six months after the public safety incumbent(s) in that VPCSA vacate Channel 84 or 85. In the alternative, PacifiCorp requests that affected inland VPCSA licensees be given the right to apply for an unlicensed exclusive-use channel in the VHF band, such as a part 22 VHF channel, to use until six months after Channel 84 or 85 is vacated.

4. The Commission declines to extend the grandfathering period for inland VPCSA licensees to remain on Channel 87B. The paramount goal of this proceeding is to ensure that AIS is deployed widely, quickly, reliably, and cost-effectively, and in a manner that will maximize its capabilities. In the *Second Report and Order,* moreover, the Commission concluded that there are compelling safety and national security reasons to designate Channel 87B for AIS on a nationwide basis. Permitting the continued use of Channel 87B for non-AIS communications, the Commission stated, would compromise the integrity of the domestic, and by extension the global, AIS network. The Commission continues to believe that permitting inland VPCSA incumbents to remain on Channel 87B for an extended period would impede the rapid, interference-free implementation of the domestic AIS network, and thus undermine the primary goal of this proceeding. In addition, the Commission does not believe that the record substantiates the claim that inland VPCSA licensees in general are unduly burdened by the requirement to migrate to Channel 84 or 85 within two years while protecting any co-channel public safety incumbents for up to fifteen years. In most of the part of the country that is divided into inland VPCSAs, there are no public safety incumbents on Channel 84 or 85. No other inland VPCSA incumbent has sought reconsideration of the grandfathering provisions adopted in the *Second Report and Order,* and even PacifiCorp confines its discussion to the situation in Wyoming. The Commission's rules permit PacifiCorp to request a waiver, and argue why its circumstances satisfy the applicable waiver standard. The Commission therefore finds that PacifiCorp has not demonstrated a need to revisit the grandfathering provisions adopted in the *Second Report and Order.*

5. PacifiCorp also asserts that, even where Channels 84 and 85 are not encumbered by public safety incumbents, the designation of those channels as VPC spectrum does not fully offset inland VPCSA licensees' loss of Channel 87B. VPC channels are 25 kilohertz wide, but, under § 80.371(c)(1)(iii) of the Commission's rules, VPC licensees may also operate on 12.5 kHz offset frequencies in areas where the licensee is authorized on both frequencies adjacent to the offset frequency, and in areas where the licensee on the other side of the offset frequency consents to the licensee's use of the adjacent offset frequency. Thus, an inland VPCSA incumbent licensed on Channels 27 (157.350/161.950 MHz), 87 (157.375/161.975 MHz), and 28 (157.400/162.000 MHz) can operate on the interstitial channel between Channels 27 and 87 and the interstitial channel between Channels 87 and 28. After the licensee replaces Channel 87B with Channel 84 or 85, however, it loses those two interstitial channels and gains only one interstitial channel (*i.e.,* either the interstitial channel between Channels 24 and 84 or the interstitial channel between Channels 85 and 26), because Channels 84 and 85 both are adjacent to Channel 25, which remains

designated for public safety interoperability. Consequently, PacifiCorp argues, requiring an inland VPCSA incumbent to relocate from Channel 87B to Channel 84 or 85 will result in a net loss to the incumbent of at least one 12.5 kHz interstitial channel.

6. To address both this particular issue and what PacifiCorp views more broadly as the current inefficient use of the VPC spectrum, PacifiCorp recommends that the Commission revise the channel plan for the inland VPCSAs. Specifically, PacifiCorp proposes that the Commission split the 25 kHz VPC channels into adjacent 12.5 kHz channels, and permit inland VPC licensees to use two 12.5 kHz channels with channel centers offset 6.25 kHz from the center frequency of each existing 25 kHz channel. In the alternative, PacifiCorp suggests that the Commission retain the existing VPC band plan, but shift the twenty-five kilohertz of spectrum that is designated for public safety interoperability in order to make an additional interstitial channel available for VPC use. Such action, PacifiCorp says, will allow for more intensive use of VPC spectrum by avoiding the stranding of spectrum where a licensee chooses to deploy more spectrally-efficient 12.5 kHz equipment but does not control both of the adjacent 25 kHz channels.

7. The Commission concludes that PacifiCorp's proposals to modify the VPC channel plan are beyond the scope of this rulemaking proceeding. The *Further NPRM* did not seek comment on them, and they are not a logical outgrowth of any proposals that the *Further NPRM* did make. In the *Further NPRM,* the Commission did not invite comment on modifying either the VPC channel plan or the public safety interoperability set-aside (except for redesignating one channel for VPC use), and did not suggest that it might change the rules with respect to any channels other than Channels 84, 85, and 87. Nor did any commenter raise the possibility. The Commission sees no reason to depart here from its well-established policy of not considering matters that are first raised on reconsideration, absent extenuating circumstances. This policy serves the same goals of procedural regularity, administrative efficiency, and fundamental fairness that underlie Section 405 of the Communications Act of 1934, as amended, and the notice-and-comment rulemaking requirements of the Administrative Procedure Act (APA).

8. PacifiCorp argues that its proposed alternative channel plans are a natural and logical outgrowth of actions already contemplated and taken by the Commission, and would merely complete the prior efforts by the Commission to 'restore the operating capacity' of inland VPCSA licensees. The Commission disagrees. In determining whether an agency's adopted rule can be deemed a logical outgrowth of a proposed rule, the focus of the inquiry is on whether the purposes underlying the APA notice-and-comment requirements have been served. In furtherance of this inquiry, the agency should consider whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule, and whether the final rule could have been anticipated by persons with knowledge of the proposed rule. The Commission concludes that interested parties who potentially may have objected to, or wished to comment on, the rule changes now proposed by PacifiCorp did not have meaningful notice that such rule changes might be adopted, and could not have anticipated that, in this proceeding focused on domestic implementation of AIS, the Commission might broadly revise the VPC channel plan. The primary objective of the rulemaking proceeding is to ensure that the United States can take full advantage of the navigational safety and homeland security benefits of AIS, but PacifCorp's proposals address matters regarding the VPC frequency band that are at best ancillary to this objective. Nothing in the *Further NPRM* suggested that the Commission might consider such action. The Commission therefore holds that it would not be reasonable to construe the *Further NPRM* as providing notice that the Commission might adopt special measures, which had not yet been identified, if necessary to ensure that inland VPCSA licensees could fully duplicate their prior operations, and that PacifCorp's proposed alternative channel plans are too remote from anything discussed or suggested in either the *Further NPRM* or the comments to be deemed a "logical outgrowth." The Commission therefore denies PacifCorp's petition insofar as it asks the Commission to adopt one of PacifiCorp's alternative VPC channel plans.

9. Having determined to affirm its decisions regarding the grandfathering provisions adopted in the *Second Report and Order,* the Commission amends § 80.371(c)(1)(i) of its rules to more precisely conform it to those decisions. As noted above, the Commission grandfathered two site-based licensees operating on Channel 87B in inland VPCSAs for fifteen years. Site-based Channel 87B licensees in the *maritime* VPCSAs are grandfathered only until their current license terms expire. But note three to § 80.371(c)(1)(i) of the Commission's rules was not amended to reflect the Commission's decision in the *Second Report and Order* to provide a different grandfathering period for the site-based licensees operating on Channel 87B in the *inland* VPCSAs, and thus incorrectly provides, without qualification, that no site-based authorization to use Channel 87B will be renewed. As the Commission has explained, while accurate prior to the adoption of the *Second Report and Order,* that statement is now accurate only with regard to the Channel 87B site-based incumbents in the maritime VPCSAs. The Commission therefore amends note three to reflect that Channel 87B site-based incumbents in inland VPCSAs have been grandfathered for fifteen years, irrespective of their remaining license term.

10. Finally, the Commission also corrects a typographical error in § 2.106 of its rules, note US228, and § 90.20(g)(2)(ii) of its rules, which state that incumbent site-based Channel 87B licensees in the inland VPCSAs are grandfathered until March 4, 2024, rather than March 2, 2024 (fifteen years after the effective date of the rule amendments adopted in the *Second Report and Order.* (Note US228 was codified as note US399 in the *Second Report and Order,* but was later renumbered.)

## I. Procedural Matters

### *A. Paperwork Reduction Act Analysis*

11. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

12. The Commission will send a copy of this *Memorandum Opinion and Order* to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

13. Accordingly, pursuant to section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. 405(a), and § 1.429 of the Commission's rules, 47 CFR 1.429, that the petition for

reconsideration filed by PacifiCorp on March 2, 2009, *is denied.*

14. Pursuant to the authority of sections 4(i), 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), 403, that parts 2 and 80 of the Commission's rules *are amended* as set forth below, effective July 11, 2011.

15. The proceeding WT Docket No. 04–344 *is hereby terminated.*

**List of Subjects in 47 CFR Parts 2, 80 and 90**

Communications equipment, Radio.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

**Final Rules**

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 2, 80 and 90 as follows:

## PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

■ 1. The authority citation for part 2 continues to read as follows:

**Authority:** 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

■ 2. Section 2.106 is amended by revising footnote US228 to the Table of Frequency Allocations to read as follows:

**§ 2.106 Table of Frequency Allocations.**

**UNITED STATES (US) NOTES**

* * * * *

US228 The use of the bands 161.9625–161.9875 MHz (AIS 1 with center frequency 161.975 MHz) and 162.0125–162.0375 MHz (AIS 2 with center frequency 162.025 MHz) by the maritime mobile service is restricted to Automatic Identification Systems (AIS), except that non-Federal stations in the band 161.9625–161.9875 MHz may continue to operate on a primary basis according to the following schedule:

(a) In VHF Public Coast Service Areas (VPCSAs) 1–9, site-based stations licensed prior to November 13, 2006 may continue to operate until expiration of the license term for licenses in active status as of November 13, 2006;

(b) In VPCSAs 10–42, site-based stations licensed prior to March 2, 2009 may continue to operate until March 2, 2024; and

(c) In VPCSAs 10–42, geographical stations licensed prior to March 2, 2009 may continue to operate until March 2, 2011. *See* 47 CFR 80.371(c)(1)(ii) for the definitions of VPCSAs and geographic license.

* * * * *

## PART 80—STATIONS IN THE MARITIME SERVICES

■ 3. The authority citation for part 80 continues to read as follows:

**Authority:** Secs. 4, 303, 307(e), 309, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, 307(e), 309, and 332, unless otherwise noted. Interpret or apply 48 Stat. 1064–1068, 1081–1105, as amended; 47 U.S.C. 151–155, 301–609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

■ 4. Section 80.371 is amended by revising footnote 3 to the table in paragraph (c)(1)(i) to read as follows:

**§ 80.371 Public correspondence frequencies.**

* * * * *

(c)(1)(i) * * *

[3] The frequency 161.975 MHz is available only for Automatic Identification System communications. No license authorizing a site-based VHF Public Coast Station or a Private Land Mobile Radio Station to operate on the frequency 161.975 MHz in VHF Public Coast Service Areas (VPCSAs) 1–9 will be renewed unless the license is or has been modified to remove frequency 161.975 MHz as an authorized frequency. In VPCSAs 10–42, site-based stations licensed to operate on frequency 161.975 MHz prior to March 2, 2009 may continue to operate on a co-primary basis on that frequency until March 2, 2024. Licenses authorizing geographic stations to operate on frequency 161.975 MHz will be modified on March 2, 2011 to replace the frequency with either frequency pair 157.225/161.825 MHz (VPCSAs 10–15, 23–30, 33–34, 36–39, and 41–42) or frequency pair 157.275/161.875 MHz (VPCSAs 16–22, 31–32, 35, and 40), unless an application to so modify the license is granted before that date.

* * * * *

## PART 90—PRIVATE LAND MOBILE RADIO SERVICES

■ 5. The authority citation for part 90 continues to read as follows:

**Authority:** Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

■ 6. Section 90.20 is amended by revising paragraph (g)(2)(ii) to read as follows:

**§ Public Safety Pool.**

* * * * *

(g) * * *

(2) * * *

(ii) The channel pairs 157.225 MHz/161.825 MHz and 157.275 MHz/161.875 MHz were formerly allocated and assigned under this section as public safety interoperability channels but were reallocated for assignment as VHF public coast station channels under § 80.371(c) of this chapter. Public safety operations licensed on these channels as of March 2, 2009 or licensed pursuant to an application filed prior to September 19, 2008, may remain authorized to operate on the channels on a primary basis until March 2, 2024.

* * * * *

[FR Doc. 2011–14314 Filed 6–8–11; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[MB Docket No. 11–29; RM–11622, DA 11–949]**

### Television Broadcasting Services; Nashville, TN

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission grants a petition for rulemaking filed by NewsChannel 5 Network, LLC ("NewsChannel 5"), the licensee of WTVF(TV), requesting the substitution of channel 25 for channel 5 at Nashville. According to NewsChannel 5, after WTVF(TV) transitioned from its pre-transition digital channel 56 to its post-transition digital channel 5, thousands of calls were received from viewers that could no longer view the station's digital signal.

**DATES:** This rule is effective July 11, 2011.

**FOR FURTHER INFORMATION CONTACT:** Joyce L. Bernstein, *joyce.bernstein@fcc.gov,* Media Bureau, (202) 418–1600.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's *Report and Order,* MB Docket No. 11–29, adopted May 23, 2011, and released May 25, 2011. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (*http://fjallfoss.fcc.gov/ecfs/*). This document may be purchased from the Commission's duplicating contractor,

Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via the company's Web site, *http://www.bcipweb.com.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional review Act, *see* 5 U.S.C. 801(a)(1)(A).

**List of Subjects in 47 CFR Part 73**

Television.

Federal Communications Commission.

**Barbara A. Kreisman,**

*Chief, Video Division, Media Bureau.*

**Final Rule**

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

## PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334, 336, and 339.

**§ 73.622 [Amended]**

■ 2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Tennessee, is amended by removing channel 5 and adding channel 25 at Nashville.

[FR Doc. 2011–14313 Filed 6–8–11; 8:45 am]

BILLING CODE 6712–01–P

# Proposed Rules

Federal Register
Vol. 76, No. 111
Thursday, June 9, 2011

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2011–0564; Directorate Identifier 2011–NM–021–AD]**

**RIN 2120–AA64**

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

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

**ACTION:** Notice of proposed rulemaking (NPRM).

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

There have been several in-service reports of airspeed mismatch between the pilot and co-pilot's airspeed indicators. It was discovered that during or after heavy rain, the pitot-static tubing may become partially or completely blocked by water, which fails to enter the drain bottles. Investigation revealed that drain bottles used in the primary pitot-static system include check valves, which impede the entry of water into the drain bottle. This condition, if not corrected, may result in erroneous airspeed and altitude indications.

* * * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

**DATES:** We must receive comments on this proposed AD by July 25, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; phone: 514–855–5000; fax: 514–855–7401; e-mail: *thd.crj@aero.bombardier.com;* Internet: *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

### Examining the AD Docket

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

**FOR FURTHER INFORMATION CONTACT:** Christopher Alfano, Aerospace Engineer, Airframe & Mechanical Systems Branch, ANE–171, New York Aircraft Certification Office (ACO), FAA, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone: 516–228–7340; fax: 516–794–5531.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2011–0564; Directorate Identifier 2011–NM–021–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

### Discussion

Transport Canada Civil Aviation (TCCA), which is the airworthiness authority for Canada, has issued Canadian Airworthiness Directive CF–2010–37, dated October 28, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

There have been several in-service reports of airspeed mismatch between the pilot and co-pilot's airspeed indicators. It was discovered that during or after heavy rain, the pitot-static tubing may become partially or completely blocked by water, which fails to enter the drain bottles. Investigation revealed that drain bottles used in the primary pitot-static system include check valves, which impede the entry of water into the drain bottle. This condition, if not corrected, may result in erroneous airspeed and altitude indications.

This directive mandates replacement of the [certain] Water Accumulator Assemblies [with new water accumulator assemblies] to improve drainage of the pitot-static tubing.

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

### Relevant Service Information

Bombardier Inc., has issued Service Bulletin 601R–34–147, Revision B, dated March 8, 2011; and Service Bulletin 670BA–34–030, Revision B, dated March 23, 2010. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

### FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified

of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

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

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the proposed AD.

**Costs of Compliance**

Based on the service information, we estimate that this proposed AD would affect about 1,041 products of U.S. registry. We also estimate that it would take about 2 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $1,200 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $1,426,170, or $1,370 per product.

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

For the reasons discussed above, I certify this proposed regulation:

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

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

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

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

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

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

**Bombardier, Inc.:** Docket No. FAA–2011–0564; Directorate Identifier 2011–NM–021–AD.

**Comments Due Date**

(a) We must receive comments by July 25, 2011.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to all Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, serial numbers 7003 thru 7067, 7069 thru 7990, 8000 thru 8107, and subsequent; Model CL–600–2C10 (Regional Jet Series 700, 701, & 702) airplanes; Model CL–600–2D15 (Regional Jet Series 705) airplanes; and Model CL–600–2D24 (Regional Jet Series 900) airplanes; certificated in any category.

**Subject**

(d) Air Transport Association (ATA) of America Code 34: Navigation.

**Reason**

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

There have been several in-service reports of airspeed mismatch between the pilot and co-pilot's airspeed indicators. It was discovered that during or after heavy rain, the pitot-static tubing may become partially or completely blocked by water, which fails to enter the drain bottles. Investigation revealed that drain bottles used in the primary pitot-static system include check valves, which impede the entry of water into the drain bottle. This condition, if not corrected, may result in erroneous airspeed and altitude indications.

* * * * *

**Compliance**

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

**Actions**

(g) Within 9 months after the effective date of this AD, do the actions specified in paragraphs (g)(1) and (g)(2) of this AD, as applicable.

(1) For Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes identified in Bombardier Service Bulletin 601R–34–147, Revision B, dated March 8, 2011: Replace water accumulator assemblies having part numbers (P/N) 50029–001, 9435015, 50030–001, and 9435014 installed on the pitot and static lines of the air data computer (ADC) with new or serviceable water accumulator assemblies having P/N 50036–001, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 601R–34–147, Revision B, dated March 8, 2011.

(2) For Model CL–600–2C10 (Regional Jet Series 700, 701, & 702), CL–600–2D15 (Regional Jet Series 705), and CL–600–2D24 (Regional Jet Series 900) airplanes: Replace water accumulator assemblies having P/N 50033–001 installed on the pitot and static lines of the ADC with new or serviceable water accumulator assemblies having P/N 50036–001, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 670BA–34–030, Revision B, dated March 23, 2010.

**Parts Installation**

(h) As of the effective date of this AD, no person may install a water accumulator assembly P/N 50029–001, 9435015, 50030–001, or 9435014 for Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, or P/N 50033–001 for Model CL–600–2C10 (Regional Jet Series 700, 701, & 702), Model CL–600–2D15 (Regional Jet Series 705), and

Model CL–600–2D24 (Regional Jet Series 900) airplanes on the pitot and static lines of the ADC, on any airplane.

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

(i) Replacing water accumulator assemblies in accordance with Bombardier Service Bulletin 670BA–34–147, dated April 1, 2009; or Revision A, dated November 3, 2009; before the effective date of this AD is acceptable for compliance with the corresponding replacement required by paragraph (g)(1) of this AD.

(j) Replacing water accumulator assemblies in accordance with Bombardier Service Bulletin 670BA–34–030, dated April 1, 2009; or Revision A, dated November 3, 2009; (for Model CL–600–2C10, CL–600–2D15, and CL–600–2D24 airplanes), before the effective date of this AD, is acceptable for compliance with the corresponding replacement required by paragraph (g)(2) of this AD.

**FAA AD Differences**

**Note 1:** This AD differs from the MCAI and/or service information as follows: No differences.

**Other FAA AD Provisions**

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone: 516–228–7300; fax: 516–794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

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

**Related Information**

(l) Refer to MCAI Transport Canada Civil Aviation Airworthiness Directive CF–2010–37, dated October 28, 2010; Bombardier Service Bulletin 601R–34–147, Revision B, dated March 8, 2011; and Bombardier Service Bulletin 670BA–34–030, Revision B, dated March 23, 2010; for related information.

Issued in Renton, Washington, on May 31, 2011.

**Jeffrey E. Duven,**

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

[FR Doc. 2011–14348 Filed 6–8–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2010–1055; Directorate Identifier 2010–NE–35–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Austro Engine GmbH Model E4 Diesel Piston Engines

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to supersede an existing airworthiness directive (AD) that applies to the products listed above. The existing AD currently requires frequent inspections of the fuel pressure supply for excessive oscillations to determine if high-pressure fuel pumps have been exposed to damaging pressure oscillations. Pumps that have been exposed require replacement before further flight. Since we issued that AD, Austro Engine, the manufacturer of the pump, introduced a new part number (P/N) fuel pump as mandatory terminating action to the repetitive inspections. This proposed AD would require the initial and repetitive inspections of AD 2010–23–09, but would also require installing HP fuel pump P/N E4A–30–200–000, as mandatory terminating action to the repetitive inspections. We are proposing this AD to prevent engine power loss or in-flight shutdown, which could result in loss of control of the airplane.

**DATES:** We must receive comments on this proposed AD by July 25, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Austro Engine GmbH, Rudolf-Diesel-Strasse 11, A–2700 Weiner Neustadt, Austria, phone: +43 2622 23000; fax: +43 2622 23000–2711, or go to: *http://www.austroengine.at.* You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

**Examining the AD Docket**

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

**FOR FURTHER INFORMATION CONTACT:** James Lawrence, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7176; fax: 781–238–7199; e-mail: *james.lawrence@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–1055; Directorate Identifier 2010–NE–35–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

**Discussion**

On October 27, 2010, we issued AD 2010–23–09, Amendment 39–16498 (75 FR 68179, November 5, 2010), for Austro Engine GmbH model E4 diesel

piston engines. That AD requires frequent inspections of the fuel pressure supply for excessive oscillations to determine if high-pressure fuel pumps have been exposed to damaging pressure oscillations. Pumps that have been exposed require replacement before further flight. That AD resulted from the European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, issuing emergency AD 2010–0206–E, dated October 8, 2010 to correct that same unsafe condition. We issued our AD to prevent engine power loss or in-flight shutdown, which could result in loss of control of the airplane.

**Actions Since Existing AD Was Issued**

Since we issued AD 2010–23–09, EASA issued AD 2011–0039, dated March 8, 2011, adding a terminating action on Austro Engine GmbH model E4 diesel piston engines.

**Relevant Service Information**

We reviewed Austro Engine GmbH Work Instruction No. WI–MSB–E4–009, dated October 7, 2010, and Austro Engine GmbH Mandatory Service Bulletin No. MSB–E4–009/2, dated March 4, 2011. The actions described in this service information are intended to prevent engine power loss or in-flight shutdown, which could result in loss of control of the airplane.

**FAA's Determination**

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

**Proposed AD Requirements**

This proposed AD would retain all the requirements of AD 2010–23–09, and require installing HP fuel pump P/N E4A–30–200–000, as mandatory terminating action to the repetitive inspections.

**Costs of Compliance**

Based on the service information, we estimate that this proposed AD will affect about 32 model E4 diesel piston engines, installed on airplanes of U.S. registry. We also estimate that it will take about 1 work-hour per engine to perform one inspection, and about 2 work-hours per engine to replace the HP fuel pump. The average labor rate is $85 per work-hour. Required parts will cost about $2,325 per product. Based on these figures, we estimate the cost of the AD on U.S. operators to be $82,560.

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

For the reasons discussed above, I certify that the proposed regulation:

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

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

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

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2010–23–09, Amendment 39–16498 (75 FR 68179, November 5, 2010), and adding the following new AD:

**Austro Engine GmbH:** Docket No. FAA–2010–1055; Directorate Identifier 2010–NE–35–AD.

**Comments Due Date**

(a) The FAA must receive comments on this AD action by July 25, 2011.

**Affected ADs**

(b) This AD supersedes AD 2010–23–09, Amendment 39–16498.

**Applicability**

(c) This AD applies to Austro Engine GmbH model E4 diesel piston engines, with high-pressure (HP) fuel pump, part number (P/N) E4A–30–100–000, installed.

**Unsafe Condition**

(d) This AD was prompted by Austro Engine GmbH introducing a new P/N fuel pump as mandatory terminating action to the repetitive inspections required by AD 2010–23–09, Amendment 39–16498. We are issuing this AD to prevent engine power loss or in-flight shutdown, which could result in loss of control of the airplane.

**Compliance**

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

(1) Inspect the fuel pressure supply for excessive oscillations using the inspection schedule in Table 1 of this AD.

TABLE 1—INSPECTION SCHEDULE

| Accumulated Time-Since-New (TSN) or Time Since Last Inspection (TSLI): | Compliance time: |
|---|---|
| 45 flight hours or more. | Within 10 flight hours after the effective date of this AD. |
| Fewer than 45 flight hours. | Before 55 flight hours TSN or TSLI. |
| Repetitive inspections | Before 55 flight hours TSLI. |

(2) Use Austro Engine GmbH Work Instruction No. WI–MSB–E4–009, dated October 7, 2010, to do the inspections.

(3) Replace the HP fuel pump before further flight with a new HP fuel pump, P/N E4A–30–200–000, if the oscillations exceed 300mV (750hPa).

**Mandatory Terminating Action**

(4) As mandatory terminating action to the repetitive inspections, within 120 flight hours after the effective date of this AD, replace the HP fuel pump, P/N E4A–30–100–000, with an HP fuel pump, P/N E4A–30–200–000. Austro Engine GmbH Mandatory Service Bulletin (MSB) No. MSB–E4–009/2 contains guidance on replacing the HP fuel pump.

**Installation Prohibitions**

(f) After the effective date of this AD, do not install any HP fuel pump P/N E4A–30–100–000, onto any engine.

(g) After the effective date of this AD, do not install any engine equipped with HP fuel pump P/N E4A–30–100–000, onto any airplane.

**Alternative Methods of Compliance (AMOCs)**

(h) The Manager, Engine Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

**Related Information**

(i) Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2011–0039, dated March 8, 2011, Austro Engine GmbH Work Instruction No. WI–MSB–E4–009, dated October 7, 2010, and Austro Engine GmbH MSB No. MSB–E4–009/2, dated March 4, 2011, for related information. For a copy of this service information, contact Austro Engine GmbH, Rudolf-Diesel-Strasse 11, A–2700 Weiner Neustadt, Austria, phone: +43 2622 23000; fax: +43 2622 23000–2711, or go to: *http://www.austroengine.at.* For information on the availability of this material at the FAA, call 781–238–7125.

(j) For more information about this AD, contact James Lawrence, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: (781) 238–7176; fax: (781) 238–7199; e-mail: *james.lawrence@faa.gov.*

Issued in Burlington, Massachusetts, on June 2, 2011.

**Peter A. White,**

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

[FR Doc. 2011–14235 Filed 6–8–11; 8:45 am]

**BILLING CODE 4910–13–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R04–OAR–2009–0786–201033; FRL–9317–6]**

## Approval and Promulgation of Air Quality Implementation Plans; State of Tennessee; Regional Haze State Implementation Plan

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing a limited approval and a limited disapproval of a revision to the Tennessee State Implementation Plan (SIP) submitted by the State of Tennessee through the Tennessee Department of Environment and Conservation (TDEC) on April 4, 2008, that addresses regional haze for the first implementation period. This revision addresses the requirements of the Clean Air Act (CAA) and EPA's rules that require states to prevent any future and remedy any existing anthropogenic impairment of visibility in mandatory Class I areas caused by emissions of air pollutants from numerous sources located over a wide geographic area (also referred to as the "regional haze program"). States are required to assure reasonable progress toward the national goal of achieving natural visibility conditions in Class I areas. EPA is proposing a limited approval of this SIP revision to implement the regional haze requirements for Tennessee on the basis that the revision, as a whole, strengthens the Tennessee SIP. Also in this action, EPA is proposing a limited disapproval of this same SIP revision because of the deficiencies in the State's April 2008 regional haze SIP submittal arising from the remand by the U.S. Court of Appeals for the District of Columbia (DC Circuit) to EPA of the Clean Air Interstate Rule (CAIR).

**DATES:** Comments must be received on or before July 11, 2011.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R04–OAR–2009–0786, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

2. *E-mail: spann.jane@epa.gov.*

3. *Fax:* 404–562–9029.

4. *Mail:* EPA–R04–OAR–2009–0786, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.

5. *Hand Delivery or Courier:* Jane Spann, Acting Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office'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.

*Instructions:* Direct your comments to Docket ID No. "EPA–R04–OAR–2009–0786." EPA's policy is that all comments received will be included in the public docket without change and may be made available online at: *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *http://www.regulations.gov* or e-mail, information that you consider to be CBI or otherwise protected. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

*Docket:* All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Sara Waterson or Michele Notarianni, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency,

Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303–8960. Sara Waterson can be reached at telephone number (404) 562–9061 and by electronic mail at *waterson.sara@epa.gov.* Michele Notarianni can be reached at telephone number (404) 562–9031 and by electronic mail at *notarianni.michele@epa.gov.*

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## I. What action is EPA proposing to take?

EPA is proposing a limited approval of Tennessee's April 4, 2008, SIP revision addressing regional haze under CAA sections 301(a) and 110(k)(3) because the revision as a whole strengthens the Tennessee SIP. However, the Tennessee SIP relies on CAIR, an EPA rule, to satisfy key elements of the regional haze requirements. Due to the remand of CAIR, *see North Carolina* v. *EPA,* 531 F.3d 836 (DC Cir. 2008), the revision does not meet all of the applicable requirements of the CAA and EPA's regulations as set forth in sections 169A and 169B of the CAA and in 40 CFR 51.300–308. As a result, EPA is concurrently proposing a limited disapproval of Tennessee's SIP revision. The revision nevertheless represents an improvement over the current SIP, and makes considerable progress in fulfilling the applicable CAA regional haze program requirements. This proposed rulemaking and the accompanying Technical Support Document [1] (TSD) explain the basis for EPA's proposed limited approval and limited disapproval actions.

Under CAA sections 301(a) and 110(k)(6) and EPA's long-standing guidance, a limited approval results in approval of the entire SIP submittal, even of those parts that are deficient and prevent EPA from granting a full approval of the SIP revision. *Processing of State Implementation Plan (SIP) Revisions,* EPA Memorandum from John Calcagni, Director, Air Quality Management Division, OAQPS, to Air Division Directors, EPA Regional Offices I–X, September 7, 1992, (1992 Calcagni Memorandum) located at *http://www.epa.gov/ttn/caaa/t1/memoranda/siproc.pdf.* The deficiencies that EPA has identified as preventing a full approval of this SIP revision relate to the status and impact of CAIR on certain interrelated and required elements of the regional haze program. At the time the Tennessee regional haze SIP was being developed, the State's reliance on CAIR was fully consistent with EPA's regulations, *see* 70 FR 39104, 39142–4143 (July 6, 2005). CAIR, as originally promulgated, requires significant reductions in emissions of sulfur dioxide ($SO_2$) and nitrogen oxides ($NO_X$) to limit the interstate transport of these pollutants, and the reliance on CAIR by affected states as an alternative to requiring BART for electrical generating units (EGUs) had specifically been upheld in *Utility Air Regulatory Group* v. *EPA,* 471 F.3d 1333 (DC Cir. 2006). In 2008, however, the DC Circuit remanded CAIR back to EPA. *See North Carolina* v. *EPA,* 550 F.3d 1176. The Court found CAIR to be inconsistent with the requirements of the CAA, *see North Carolina* v. *EPA,* 531 F.3d 896 (DC Cir. 2008), but ultimately remanded the rule to EPA without vacatur because it found that "allowing CAIR to remain in effect until it is replaced by a rule consistent with [the court's] opinion would at least temporarily preserve the environmental values covered by CAIR." *North Carolina* v. *EPA,* 550 F.3d at 1178. In response to the court's decision, EPA has proposed a new rule to address interstate transport of $NO_X$ and $SO_2$ in the eastern United States. *See* 75 FR 45210 (Aug. 2, 2010) ("the Transport Rule"). EPA explained in that proposal that the Transport Rule, when finalized, will replace CAIR and the CAIR Federal implementation plans (FIPs). In other words, the CAIR and CAIR FIP requirements, which were found to be illegal by the DC Circuit, will not remain in force after the Transport Rule requirements are in place. Given the status of CAIR, EPA is proposing to find that Tennessee may not rely on CAIR in its present form to provide reductions to satisfy the reasonable progress and BART requirements of the regional haze program.

While CAIR will not remain in effect indefinitely, it is currently in force. *See North Carolina* v. *EPA,* 550 F.3d 1176. By granting limited approval of Tennessee's regional haze SIP, EPA will allow the State to rely on the emissions reductions associated with CAIR for so long as CAIR is in place. EPA believes that this course of action is consistent with the court's intention to keep CAIR in place in order to "temporarily preserve the environmental values covered by CAIR." *Id,* at 1178.

## II. What is the background for EPA's proposed action?

### *A. The regional haze problem*

Regional haze is visibility impairment that is produced by a multitude of sources and activities which are located across a broad geographic area and emit

[1] EPA's TSD to this action, entitled, "*Technical Support Document for Tennessee Regional Haze Submittal,*" is included in the public docket for this action.

fine particles ($PM_{2.5}$) (*e.g.,* sulfates, nitrates, organic carbon, elemental carbon, and soil dust), and their precursors (*e.g.,* $SO_2$, $NO_X$, and in some cases, ammonia ($NH_3$) and volatile organic compounds (VOC)). Fine particle precursors react in the atmosphere to form fine particulate matter which impairs visibility by scattering and absorbing light. Visibility impairment reduces the clarity, color, and visible distance that one can see. $PM_{2.5}$ can also cause serious health effects and mortality in humans and contributes to environmental effects such as acid deposition and eutrophication.

Data from the existing visibility monitoring network, the "Interagency Monitoring of Protected Visual Environments" (IMPROVE) monitoring network, show that visibility impairment caused by air pollution occurs virtually all the time at most national park and wilderness areas. The average visual range [2] in many Class I areas (*i.e.,* national parks and memorial parks, wilderness areas, and international parks meeting certain size criteria) in the western United States is 100–150 kilometers, or about one-half to two-thirds of the visual range that would exist without anthropogenic air pollution. In most of the eastern Class I areas of the United States, the average visual range is less than 30 kilometers, or about one-fifth of the visual range that would exist under estimated natural conditions. *See* 64 FR 35715 (July 1, 1999).

### *B. Requirements of the CAA and EPA's Regional Haze Rule (RHR)*

In section 169A of the 1977 Amendments to the CAA, Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section of the CAA establishes as a national goal the "prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I Federal areas [3] which impairment results from manmade air pollution." On December 2, 1980, EPA promulgated regulations to address visibility impairment in Class I areas that is "reasonably attributable" to a single source or small group of sources, *i.e.,* "reasonably attributable visibility impairment". *See* 45 FR 80084. These regulations represented the first phase in addressing visibility impairment. EPA deferred action on regional haze that emanates from a variety of sources until monitoring, modeling and scientific knowledge about the relationships between pollutants and visibility impairment were improved.

Congress added section 169B to the CAA in 1990 to address regional haze issues. EPA promulgated a rule to address regional haze on July 1, 1999 (64 FR 35713), the RHR. The RHR revised the existing visibility regulations to integrate into the regulation provisions addressing regional haze impairment and established a comprehensive visibility protection program for Class I areas. The requirements for regional haze, found at 40 CFR 51.308 and 51.309, are included in EPA's visibility protection regulations at 40 CFR 51.300–309. Some of the main elements of the regional haze requirements are summarized in section III of this preamble. The requirement to submit a regional haze SIP applies to all 50 states, the District of Columbia and the Virgin Islands.[4] 40 CFR 51.308(b) requires states to submit the first implementation plan addressing regional haze visibility impairment no later than December 17, 2007.

### *C. Roles of Agencies in Addressing Regional Haze*

Successful implementation of the regional haze program will require long-term regional coordination among states, tribal governments and various Federal agencies. As noted above, pollution affecting the air quality in Class I areas can be transported over long distances, even hundreds of kilometers. Therefore, to effectively address the problem of visibility impairment in Class I areas, states need to develop strategies in coordination with one another, taking into account the effect of emissions from one jurisdiction on the air quality in another.

Because the pollutants that lead to regional haze can originate from sources located across broad geographic areas, EPA has encouraged the states and Tribes across the United States to address visibility impairment from a regional perspective. Five regional planning organizations (RPOs) were developed to address regional haze and related issues. The RPOs first evaluated technical information to better understand how their states and Tribes impact Class I areas across the country, and then pursued the development of regional strategies to reduce emissions of particulate matter (PM) and other pollutants leading to regional haze.

The Visibility Improvement State and Tribal Association of the Southeast (VISTAS) RPO is a collaborative effort of state governments, tribal governments, and various Federal agencies established to initiate and coordinate activities associated with the management of regional haze, visibility and other air quality issues in the Southeastern United States. Member state and tribal governments include: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, West Virginia, and the Eastern Band of the Cherokee Indians.

## III. What are the requirements for regional haze SIPs?

### *A. The CAA and the RHR*

Regional haze SIPs must assure reasonable progress towards the national goal of achieving natural visibility conditions in Class I areas. Section 169A of the CAA and EPA's implementing regulations require states to establish long-term strategies for making reasonable progress toward meeting this goal. Implementation plans must also give specific attention to certain stationary sources that were in existence on August 7, 1977, but were not in operation before August 7, 1962, and require these sources, where appropriate, to install BART controls for the purpose of eliminating or reducing visibility impairment. The specific regional haze SIP requirements are discussed in further detail below.

### *B. Determination of Baseline, Natural, and Current Visibility Conditions*

The RHR establishes the deciview as the principal metric or unit for expressing visibility. This visibility metric expresses uniform changes in haziness in terms of common

[2] Visual range is the greatest distance, in kilometers or miles, at which a dark object can be viewed against the sky.

[3] Areas designated as mandatory Class I Federal areas consist of national parks exceeding 6,000 acres, wilderness areas and national memorial parks exceeding 5,000 acres, and all international parks that were in existence on August 7, 1977. *See* 42 U.S.C. 7472(a). In accordance with section 169A of the CAA, EPA, in consultation with the Department of Interior, promulgated a list of 156 areas where visibility is identified as an important value. *See* 44 FR 69122 (November 30, 1979). The extent of a mandatory Class I area includes subsequent changes in boundaries, such as park expansions. *See* 42 U.S.C. 7472(a). Although states and Tribes may designate as Class I additional areas which they consider to have visibility as an important value, the requirements of the visibility program set forth in section 169A of the CAA apply only to "mandatory Class I Federal areas." Each mandatory Class I Federal area is the responsibility of a "Federal Land Manager." *See* 42 U.S.C. 7602(i). When we use the term "Class I area" in this action, we mean a "mandatory Class I Federal area."

[4] Albuquerque/Bernalillo County in New Mexico must also submit a regional haze SIP to completely satisfy the requirements of section 110(a)(2)(D) of the CAA for the entire State of New Mexico under the New Mexico Air Quality Control Act (section 74–2–4).

increments across the entire range of visibility conditions, from pristine to extremely hazy conditions. Visibility expressed in deciviews is determined by using air quality measurements to estimate light extinction and then transforming the value of light extinction using a logarithm function. The deciview is a more useful measure for tracking progress in improving visibility than light extinction itself because each deciview change is an equal incremental change in visibility perceived by the human eye. Most people can detect a change in visibility at one deciview.[5]

The deciview is used in expressing RPGs (which are interim visibility goals towards meeting the national visibility goal), defining baseline, current, and natural conditions, and tracking changes in visibility. The regional haze SIPs must contain measures that ensure "reasonable progress" toward the national goal of preventing and remedying visibility impairment in Class I areas caused by anthropogenic air pollution by reducing anthropogenic emissions that cause regional haze. The national goal is a return to natural conditions, *i.e.,* anthropogenic sources of air pollution would no longer impair visibility in Class I areas.

To track changes in visibility over time at each of the 156 Class I areas covered by the visibility program (40 CFR 81.401–437), and as part of the process for determining reasonable progress, states must calculate the degree of existing visibility impairment at each Class I area at the time of each regional haze SIP submittal and periodically review progress every five years midway through each 10-year implementation period. To do this, the RHR requires states to determine the degree of impairment (in deciviews) for the average of the 20 percent least impaired ("best") and 20 percent most impaired ("worst") visibility days over a specified time period at each of their Class I areas. In addition, states must also develop an estimate of natural visibility conditions for the purpose of comparing progress toward the national goal. Natural visibility is determined by estimating the natural concentrations of pollutants that cause visibility impairment and then calculating total light extinction based on those estimates. EPA has provided guidance to states regarding how to calculate baseline, natural and current visibility conditions in documents titled, EPA's *Guidance for Estimating Natural Visibility Conditions Under the Regional Haze Rule,* September 2003, (EPA–454/B–03–005 located at *http://www.epa.gov/ttncaaa1/t1/memoranda/rh_envcurhr_gd.pdf*), (hereinafter referred to as "EPA's 2003 Natural Visibility Guidance"), and *Guidance for Tracking Progress Under the Regional Haze Rule,* September 2003, (EPA–454/B–03–004 located at *http://www.epa.gov/ttncaaa1/t1/memoranda/rh_tpurhr_gd.pdf*)), (hereinafter referred to as "EPA's 2003 Tracking Progress Guidance").

For the first regional haze SIPs that were due by December 17, 2007, "baseline visibility conditions" were the starting points for assessing "current" visibility impairment. Baseline visibility conditions represent the degree of visibility impairment for the 20 percent least impaired days and 20 percent most impaired days for each calendar year from 2000 to 2004. Using monitoring data for 2000 through 2004, states are required to calculate the average degree of visibility impairment for each Class I area, based on the average of annual values over the five-year period. The comparison of initial baseline visibility conditions to natural visibility conditions indicates the amount of improvement necessary to attain natural visibility, while the future comparison of baseline conditions to the then current conditions will indicate the amount of progress made. In general, the 2000–2004 baseline period is considered the time from which improvement in visibility is measured.

### *C. Determination of Reasonable Progress Goals (RPGs)*

The vehicle for ensuring continuing progress towards achieving the natural visibility goal is the submission of a series of regional haze SIPs from the states that establish two RPGs (*i.e.,* two distinct goals, one for the "best" and one for the "worst" days) for every Class I area for each (approximately) 10-year implementation period. The RHR does not mandate specific milestones or rates of progress, but instead calls for states to establish goals that provide for "reasonable progress" toward achieving natural (*i.e.,* "background") visibility conditions. In setting RPGs, states must provide for an improvement in visibility for the most impaired days over the (approximately) 10-year period of the SIP, and ensure no degradation in visibility for the least impaired days over the same period.

States have significant discretion in establishing RPGs, but are required to consider the following factors established in section 169A of the CAA and in EPA's RHR at 40 CFR 51.308(d)(1)(i)(A): (1) The costs of compliance; (2) the time necessary for compliance; (3) the energy and non-air quality environmental impacts of compliance; and (4) the remaining useful life of any potentially affected sources. States must demonstrate in their SIPs how these factors are considered when selecting the RPGs for the best and worst days for each applicable Class I area. States have considerable flexibility in how they take these factors into consideration, as noted in EPA's *Guidance for Setting Reasonable Progress Goals under the Regional Haze Program,* ("EPA's Reasonable Progress Guidance"), July 1, 2007, memorandum from William L. Wehrum, Acting Assistant Administrator for Air and Radiation, to EPA Regional Administrators, EPA Regions 1–10 (pp.4–2, 5–1). In setting the RPGs, states must also consider the rate of progress needed to reach natural visibility conditions by 2064 (referred to as the "uniform rate of progress" or the "glidepath") and the emission reduction measures needed to achieve that rate of progress over the 10-year period of the SIP. Uniform progress towards achievement of natural conditions by the year 2064 represents a rate of progress which states are to use for analytical comparison to the amount of progress they expect to achieve. In setting RPGs, each state with one or more Class I areas ("Class I state") must also consult with potentially "contributing states," *i.e.,* other nearby states with emission sources that may be affecting visibility impairment at the Class I state's areas. *See* 40 CFR 51.308(d)(1)(iv).

### *D. Best Available Retrofit Technology (BART)*

Section 169A of the CAA directs states to evaluate the use of retrofit controls at certain larger, often uncontrolled, older stationary sources in order to address visibility impacts from these sources. Specifically, section 169A(b)(2)(A) of the CAA requires states to revise their SIPs to contain such measures as may be necessary to make reasonable progress towards the natural visibility goal, including a requirement that certain categories of existing major stationary sources[6] built between 1962 and 1977 procure, install, and operate the "Best Available Retrofit Technology" as determined by the state. Under the RHR, states are directed to conduct BART determinations for such "BART-eligible" sources that may be anticipated to cause or contribute to any visibility

[5] The preamble to the RHR provides additional details about the deciview. *See* 64 FR 35714, 35725 (July 1, 1999).

[6] The set of "major stationary sources" potentially subject to BART is listed in CAA section 169A(g)(7).

impairment in a Class I area. Rather than requiring source-specific BART controls, states also have the flexibility to adopt an emissions trading program or other alternative program as long as the alternative provides greater reasonable progress towards improving visibility than BART.

On July 6, 2005, EPA published the *Guidelines for BART Determinations Under the Regional Haze Rule* at Appendix Y to 40 CFR Part 51 (hereinafter referred to as the "BART Guidelines") to assist states in determining which of their sources should be subject to the BART requirements and in determining appropriate emission limits for each applicable source. In making a BART determination for a fossil fuel-fired electric generating plant with a total generating capacity in excess of 750 megawatts, a state must use the approach set forth in the BART Guidelines. A state is encouraged, but not required, to follow the BART Guidelines in making BART determinations for other types of sources.

States must address all visibility-impairing pollutants emitted by a source in the BART determination process. The most significant visibility impairing pollutants are $SO_2$, $NO_X$, and PM. EPA has stated that states should use their best judgment in determining whether VOC or $NH_3$ compounds impair visibility in Class I areas.

Under the BART Guidelines, states may select an exemption threshold value for their BART modeling, below which a BART-eligible source would not be expected to cause or contribute to visibility impairment in any Class I area. The state must document this exemption threshold value in the SIP and must state the basis for its selection of that value. Any source with emissions that model above the threshold value would be subject to a BART determination review. The BART Guidelines acknowledge varying circumstances affecting different Class I areas. States should consider the number of emission sources affecting the Class I areas at issue and the magnitude of the individual sources' impacts. Any exemption threshold set by the state should not be higher than 0.5 deciview.

In their SIPs, states must identify potential BART sources, described as "BART-eligible sources" in the RHR, and document their BART control determination analyses. In making BART determinations, section 169A(g)(2) of the CAA requires that states consider the following factors: (1) The costs of compliance, (2) the energy and non-air quality environmental impacts of compliance, (3) any existing pollution control technology in use at the source, (4) the remaining useful life of the source, and (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. States are free to determine the weight and significance to be assigned to each factor.

A regional haze SIP must include source-specific BART emission limits and compliance schedules for each source subject to BART. Once a state has made its BART determination, the BART controls must be installed and in operation as expeditiously as practicable, but no later than five years after the date of EPA approval of the regional haze SIP. *See* CAA section 169(g)(4)); *see* 40 CFR 51.308(e)(1)(iv). In addition to what is required by the RHR, general SIP requirements mandate that the SIP must also include all regulatory requirements related to monitoring, recordkeeping, and reporting for the BART controls on the source.

As noted above, the RHR allows states to implement an alternative program in lieu of BART so long as the alternative program can be demonstrated to achieve greater reasonable progress toward the national visibility goal than would BART. Under regulations issued in 2005 revising the regional haze program, EPA made just such a demonstration for CAIR. *See* 70 FR 39104 (July 6, 2005). EPA's regulations provide that states participating in the CAIR cap-and trade program under 40 CFR part 96 pursuant to an EPA-approved CAIR SIP or which remain subject to the CAIR FIP in 40 CFR part 97 need not require affected BART-eligible EGUs to install, operate, and maintain BART for emissions of $SO_2$ and $NO_X$. *See* 40 CFR 51.308(e)(4). Since CAIR is not applicable to emissions of PM, states were still required to conduct a BART analysis for PM emissions from EGUs subject to BART for that pollutant.

### *E. Long-Term Strategy (LTS)*

Consistent with the requirement in section 169A(b) of the CAA that states include in their regional haze SIP a 10 to 15 year strategy for making reasonable progress, section 51.308(d)(3) of the RHR requires that states include a LTS in their regional haze SIPs. The LTS is the compilation of all control measures a state will use during the implementation period of the specific SIP submittal to meet applicable RPGs. The LTS must include "enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals" for all Class I areas within, or affected by emissions from, the state. *See* 40 CFR 51.308(d)(3).

When a state's emissions are reasonably anticipated to cause or contribute to visibility impairment in a Class I area located in another state, the RHR requires the impacted state to coordinate with the contributing states in order to develop coordinated emissions management strategies. *See* 40 CFR 51.308(d)(3)(i). In such cases, the contributing state must demonstrate that it has included, in its SIP, all measures necessary to obtain its share of the emission reductions needed to meet the RPGs for the Class I area. The RPOs have provided forums for significant interstate consultation, but additional consultations between states may be required to sufficiently address interstate visibility issues. This is especially true where two states belong to different RPOs.

States should consider all types of anthropogenic sources of visibility impairment in developing their LTS, including stationary, minor, mobile, and area sources. At a minimum, states must describe how each of the following seven factors listed below are taken into account in developing their LTS: (1) Emission reductions due to ongoing air pollution control programs, including measures to address RAVI; (2) measures to mitigate the impacts of construction activities; (3) emissions limitations and schedules for compliance to achieve the RPG; (4) source retirement and replacement schedules; (5) smoke management techniques for agricultural and forestry management purposes including plans as currently exist within the state for these purposes; (6) enforceability of emissions limitations and control measures; and (7) the anticipated net effect on visibility due to projected changes in point, area, and mobile source emissions over the period addressed by the LTS. *See* 40 CFR 51.308(d)(3)(v).

### *F. Coordinating Regional Haze and Reasonably Attributable Visibility Impairment (RAVI) LTS*

As part of the RHR, EPA revised 40 CFR 51.306(c) regarding the LTS for RAVI to require that the RAVI plan must provide for a periodic review and SIP revision not less frequently than every three years until the date of submission of the state's first plan addressing regional haze visibility impairment, which was due December 17, 2007, in accordance with 40 CFR 51.308(b) and (c). On or before this date, the state must revise its plan to provide for review and revision of a coordinated LTS for

addressing RAVI and regional haze, and the state must submit the first such coordinated LTS with its first regional haze SIP. Future coordinated LTS's, and periodic progress reports evaluating progress towards RPGs, must be submitted consistent with the schedule for SIP submission and periodic progress reports set forth in 40 CFR 51.308(f) and 51.308(g), respectively. The periodic review of a state's LTS must report on both regional haze and RAVI impairment and must be submitted to EPA as a SIP revision.

*G. Monitoring Strategy and Other Implementation Plan Requirements*

Section 51.308(d)(4) of the RHR includes the requirement for a monitoring strategy for measuring, characterizing, and reporting of regional haze visibility impairment that is representative of all mandatory Class I Federal areas within the state. The strategy must be coordinated with the monitoring strategy required in section 51.305 for RAVI. Compliance with this requirement may be met through "participation" in the IMPROVE network, *i.e.,* review and use of monitoring data from the network. The monitoring strategy is due with the first regional haze SIP, and it must be reviewed every five years. The monitoring strategy must also provide for additional monitoring sites if the IMPROVE network is not sufficient to determine whether RPGs will be met.

The SIP must also provide for the following:

- Procedures for using monitoring data and other information in a state with mandatory Class I areas to determine the contribution of emissions from within the state to regional haze visibility impairment at Class I areas both within and outside the state;
- Procedures for using monitoring data and other information in a state with no mandatory Class I areas to determine the contribution of emissions from within the state to regional haze visibility impairment at Class I areas in other states;
- Reporting of all visibility monitoring data to the Administrator at least annually for each Class I area in the state, and where possible, in electronic format;
- Developing a statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment in any Class I area. The inventory must include emissions for a baseline year, emissions for the most recent year for which data are available, and estimates of future projected emissions. A state must also make a commitment to update the inventory periodically; and
- Other elements, including reporting, recordkeeping, and other measures necessary to assess and report on visibility.

The RHR requires control strategies to cover an initial implementation period extending to the year 2018, with a comprehensive reassessment and revision of those strategies, as appropriate, every 10 years thereafter. Periodic SIP revisions must meet the core requirements of section 51.308(d) with the exception of BART. The requirement to evaluate sources for BART applies only to the first regional haze SIP. Facilities subject to BART must continue to comply with the BART provisions of section 51.308(e), as noted above. Periodic SIP revisions will assure that the statutory requirement of reasonable progress will continue to be met.

*H. Consultation With States and Federal Land Managers (FLMs)*

The RHR requires that states consult with FLMs before adopting and submitting their SIPs. *See* 40 CFR 51.308(i). States must provide FLMs an opportunity for consultation, in person and at least 60 days prior to holding any public hearing on the SIP. This consultation must include the opportunity for the FLMs to discuss their assessment of impairment of visibility in any Class I area and to offer recommendations on the development of the RPGs and on the development and implementation of strategies to address visibility impairment. Further, a state must include in its SIP a description of how it addressed any comments provided by the FLMs. Finally, a SIP must provide procedures for continuing consultation between the state and FLMs regarding the state's visibility protection program, including development and review of SIP revisions, five-year progress reports, and the implementation of other programs having the potential to contribute to impairment of visibility in Class I areas.

## IV. What is the relationship of the CAIR to the regional haze requirements?

*A. Overview of EPA's CAIR*

CAIR, as originally promulgated, requires 28 states and the District of Columbia to reduce emissions of $SO_2$ and $NO_X$ that significantly contribute to, or interfere with maintenance of, the national ambient air quality standards (NAAQS) for fine particulates and/or ozone in any downwind state. *See* 70 FR 25162 (May 12, 2005). CAIR establishes emission budgets or caps for $SO_2$ and $NO_X$ for states that contribute significantly to nonattainment in downwind states and requires the significantly contributing states to submit SIP revisions that implement these budgets. States have the flexibility to choose which control measures to adopt to achieve the budgets, including participation in EPA-administered cap-and-trade programs addressing $SO_2$, $NO_X$ -annual, and $NO_X$ -ozone season emissions.

*B. Remand of the CAIR*

On July 11, 2008, the DC Circuit issued its decision to vacate and remand both CAIR and the associated CAIR FIPs in their entirety. *See North Carolina* v. *EPA,* 531 F.3d 836 (DC Cir. 2008). However, in response to EPA's petition for rehearing, the Court issued an order remanding CAIR to EPA without vacating either CAIR or the CAIR FIPs. The Court thereby left the EPA CAIR rule and CAIR SIPs and FIPs in place in order to "temporarily preserve the environmental values covered by CAIR" until EPA replaces it with a rule consistent with the court's opinion. *See North Carolina* v. *EPA,* 550 F.3d at 1178. The Court directed EPA to "remedy CAIR's flaws" consistent with its July 11, 2008, opinion but declined to impose a schedule on EPA for completing that action. Because CAIR accordingly has been remanded to the Agency without vacatur, CAIR and the CAIR FIPs are currently in effect in subject states.

*C. Regional Haze SIP Elements Potentially Affected by the CAIR Remand*

The following is a summary of the elements of the regional haze SIPs that are potentially affected by the remand of CAIR. Many states relied on CAIR as an alternative to BART for $SO_2$ and $NO_X$ for subject EGUs, as allowed under the BART provisions at 40 CFR 51.308(e)(4). Additionally, several states established RPGs that reflect the improvement in visibility expected to result from controls planned for or already installed on sources within the state to meet the CAIR provisions for this implementation period for specified pollutants. Many states relied upon their own CAIR SIPs or the CAIR FIPs for their states to provide the legal requirements which leads to these planned controls, and did not include enforceable measures in the LTS in the regional haze SIP submission to ensure these reductions. States also submitted demonstrations showing that no additional controls on EGUs beyond CAIR would be reasonable for this implementation period. Due to EPA's

need to address the concerns of the Court as outlined in its decision remanding CAIR, EPA believes it would be inappropriate to fully approve states' LTSs that rely upon the emissions reductions predicted to result from CAIR to meet the BART requirement for EGUs or to meet the RPGs in the states' regional haze SIPs. For this reason, EPA cannot fully approve regional haze SIP revisions that rely on CAIR for emission reduction measures. EPA therefore proposes to grant limited approval and limited disapproval of the Tennessee SIP. The next section discusses how the Agency proposes to address these deficiencies.

*D. Rationale and Scope of Proposed Limited Approval*

EPA is intending to propose to issue limited approvals of those regional haze SIP revisions that rely on CAIR to address the impact of emissions from a state's own EGUs. Limited approval results in approval of the entire regional haze submission and all its elements. EPA is taking this approach because an affected state's SIP will be stronger and more protective of the environment with the implementation of those measures by the state and having Federal approval and enforceability than it would without those measures being included in the state's SIP.

EPA also intends to propose to issue limited disapprovals for regional haze SIP revisions that rely on CAIR concurrently with the proposals for limited approval. As explained in the 1992 Calcagni Memorandum, "[t]hrough a limited approval, EPA [will] concurrently, or within a reasonable period of time thereafter, disapprove the rule * * * for not meeting all of the applicable requirements of the Act. * * * [T]he limited disapproval is a rulemaking action, and it is subject to notice and comment." Final limited disapproval of a SIP submittal does not affect the Federal enforceability of the measures in the subject SIP revision nor prevent state implementation of these measures. The legal effects of the final limited disapproval are to provide EPA the authority to issue a FIP at any time, and to obligate the Agency to take such action no more than two years after the effective date of the final limited disapproval action.

## V. What is EPA's analysis of Tennessee's regional haze submittal?

On April 4, 2008, TDEC's Division of Air Pollution Control submitted revisions to the Tennessee SIP to address regional haze in the State's Class I areas as required by EPA's RHR.

*A. Affected Class I Areas*

Tennessee has two Class I areas within its borders: Great Smoky Mountains National Park and Joyce-Kilmer Slickrock Wilderness Area. These Class I areas also fall within the geographic boundaries of North Carolina. Therefore, both Tennessee and North Carolina are responsible for developing their own regional haze SIPs that address these Class I areas. The two states worked together to determine appropriate RPGs, including consulting with other states that impact the two Class I areas, as discussed in V.F.1. In addition, both Tennessee and North Carolina are responsible for describing their own long-term emission strategies, their role in the consultation processes, and how their particular state SIP meets the other requirements in EPA's regional haze regulations.

The Tennessee regional haze SIP establishes RPGs for visibility improvement at each of these Class I areas and a LTS to achieve those RPGs within the first regional haze implementation period ending in 2018. In developing the LTS for each area, Tennessee considered both emission sources inside and outside of Tennessee that may cause or contribute to visibility impairment in Tennessee's Class I areas. The State also identified and considered emission sources within Tennessee that may cause or contribute to visibility impairment in Class I areas in neighboring states as required by 40 CFR 51.308(d)(3). The VISTAS RPO worked with the State in developing the technical analyses used to make these determinations, including state-by-state contributions to visibility impairment in specific Class I areas, which included the two areas in Tennessee and those areas affected by emissions from Tennessee.

*B. Determination of Baseline, Natural and Current Visibility Conditions*

As required by the RHR and in accordance with EPA's 2003 Natural Visibility Guidance, Tennessee calculated baseline/current and natural visibility conditions for each of its Class I areas, as summarized below (and as further described in sections III.B.1 and III.B.2. of EPA's TSD to this **Federal Register** action).

1. Estimating Natural Visibility Conditions

Natural background visibility, as defined in EPA's 2003 Natural Visibility Guidance, is estimated by calculating the expected light extinction using default estimates of natural concentrations of fine particle components adjusted by site-specific estimates of humidity. This calculation uses the IMPROVE equation, which is a formula for estimating light extinction from the estimated natural concentrations of fine particle components (or from components measured by the IMPROVE monitors). As documented in EPA's 2003 Natural Visibility Guidance, EPA allows states to use "refined" or alternative approaches to 2003 EPA guidance to estimate the values that characterize the natural visibility conditions of the Class I areas. One alternative approach is to develop and justify the use of alternative estimates of natural concentrations of fine particle components. Another alternative is to use the "new IMPROVE equation" that was adopted for use by the IMPROVE Steering Committee in December 2005.[7] The purpose of this refinement to the "old IMPROVE equation" is to provide more accurate estimates of the various factors that affect the calculation of light extinction. Tennessee opted to use the default estimates for the natural concentrations combined with the "new IMPROVE equation," for all of its areas. Using this approach, natural visibility conditions using the new IMPROVE equation were calculated separately for each Class I area by VISTAS.

The new IMPROVE equation takes into account the most recent review of the science[8] and it accounts for the

[7] The IMPROVE program is a cooperative measurement effort governed by a steering committee composed of representatives from Federal agencies (including representatives from EPA and the FLMs) and RPOs. The IMPROVE monitoring program was established in 1985 to aid the creation of Federal and State implementation plans for the protection of visibility in Class I areas. One of the objectives of IMPROVE is to identify chemical species and emission sources responsible for existing anthropogenic visibility impairment. The IMPROVE program has also been a key participant in visibility-related research, including the advancement of monitoring instrumentation, analysis techniques, visibility modeling, policy formulation and source attribution field studies.

[8] The science behind the revised IMPROVE equation is summarized in Appendix B.2 of the Tennessee Regional Haze submittal and in numerous published papers. See for example: Hand, J.L., and Malm, W.C., 2006, *Review of the IMPROVE Equation for Estimating Ambient Light Extinction Coefficients—Final Report.* March 2006. Prepared for Interagency Monitoring of Protected Visual Environments (IMPROVE), Colorado State University, Cooperative Institute for Research in the Atmosphere, Fort Collins, Colorado. *http://vista.cira.colostate.edu/improve/publications/GrayLit/016_IMPROVEeqReview/IMPROVEeqReview.htm;* and Pitchford, Marc., 2006, *Natural Haze Levels II: Application of the New IMPROVE Algorithm to Natural Species Concentrations Estimates.* Final Report of the Natural Haze Levels II Committee to the RPO Monitoring/Data Analysis Workgroup. September 2006 *http://vista.cira.colostate.edu/improve/Publications/GrayLit/029_NaturalCondII/naturalhazelevelsIIreport.ppt.*

effect of particle size distribution on light extinction efficiency of sulfate, nitrate, and organic carbon. It also adjusts the mass multiplier for organic carbon (particulate organic matter) by increasing it from 1.4 to 1.8. New terms are added to the equation to account for light extinction by sea salt and light absorption by gaseous nitrogen dioxide. Site-specific values are used for Rayleigh scattering (scattering of light due to atmospheric gases) to account for the site-specific effects of elevation and temperature. Separate relative humidity enhancement factors are used for small and large size distributions of ammonium sulfate and ammonium nitrate and for sea salt. The terms for the remaining contributors, elemental carbon (light-absorbing carbon), fine soil, and coarse mass terms, do not change between the original and new IMPROVE equations.

2. Estimating Baseline Conditions

The Joyce Kilmer-Slickrock Wilderness Area does not contain an IMPROVE monitor. In cases where onsite monitoring is not available, 40 CFR 51.308(d)(2)(i) requires states to use the most representative monitoring available for the 2000–2004 period to establish baseline visibility conditions, in consultation with EPA. Tennessee used and EPA concurs with the use of 2000–2004 data from the IMPROVE monitor at Great Smoky Mountains National Park for the Joyce Kilmer-Slickrock Wilderness Area. The Great Smoky Mountains National Park is nearest and contiguous to the Joyce Kilmer-Slickrock Wilderness Area, and the areas possess similar characteristics, such as meteorology and topography.

TDEC estimated baseline visibility conditions at both Tennessee Class I areas using available monitoring data from a single IMPROVE monitoring site in the Great Smoky Mountains National Park. As explained in section III.B, for the first regional haze SIP, baseline visibility conditions are the same as current conditions. A five-year average of the 2000 to 2004 monitoring data was calculated for each of the 20 percent worst and 20 percent best visibility days at each Tennessee Class I area. IMPROVE data records for Great Smoky Mountains National Park for the period 2000 to 2004 meet the EPA requirements for data completeness. See page 2–8 of EPA's 2003 Tracking Progress Guidance. Table 3.3–1 from Appendix G of the Tennessee regional haze SIP, also provided in section III.B.3 of EPA's TSD to this action, lists the 20 percent best and worst days for the baseline period of 2000–2004 for Great Smoky Mountains National Park. This data is also provided at the following Web site: *http://www.metro4-sesarm.org/vistas/SesarmBext_20BW.htm.*

3. Summary of Baseline and Natural Conditions

For the Tennessee Class I areas, baseline visibility conditions on the 20 percent worst days are approximately 30 deciviews. Natural visibility in these areas is predicted to be approximately 11 deciviews on the 20 percent worst days. The natural and baseline conditions for Tennessee's Class I areas for both the 20 percent worst and best days are presented in Table 1 below.

TABLE 1—NATURAL BACKGROUND AND BASELINE CONDITIONS FOR THE TENNESSEE CLASS I AREAS

| Class I area | Average for 20 percent worst days (dv[9]) | Average for 20 percent best days (dv) |
|---|---|---|
| Natural Background Conditions: | | |
| Great Smoky Mountains National Park | 11.05 | 4.54 |
| Joyce Kilmer-Slickrock Wilderness Area | 11.05 | 4.54 |
| Baseline Visibility Conditions (2000–2004): | | |
| Great Smoky Mountains National Park | 30.28 | 13.58 |
| Joyce Kilmer-Slickrock Wilderness Area | 30.28 | 13.58 |

4. Uniform Rate of Progress

In setting the RPGs, Tennessee considered the uniform rate of progress needed to reach natural visibility conditions by 2064 ("glidepath") and the emission reduction measures needed to achieve that rate of progress over the period of the SIP to meet the requirements of 40 CFR 51.308(d)(1)(i)(B). As explained in EPA's Reasonable Progress Guidance document, the uniform rate of progress is not a presumptive target, and RPGs may be greater, lesser, or equivalent to the glidepath.

The State's implementation plan presents two sets of graphs, one for the 20 percent best days, and one for the 20 percent worst days, for its two Class I areas. Tennessee constructed the graph for the worst days (*i.e.,* the glidepath) in accordance with EPA's 2003 Tracking Progress Guidance by plotting a straight graphical line from the baseline level of visibility impairment for 2000–2004 to the level of visibility conditions representing no anthropogenic impairment in 2064 for its two areas. For the best days, the graph includes a horizontal, straight line spanning from baseline conditions in 2004 out to 2018 to depict no degradation in visibility over the implementation period of the SIP. Tennessee's SIP shows that the State's RPGs for its areas provide for improvement in visibility for the 20 percent worst days over the period of the implementation plan and ensure no degradation in visibility for the 20 percent best days over the same period, in accordance with 40 CFR 51.308(d)(1).

For the Tennessee Class I areas, the overall visibility improvement necessary to reach natural conditions is the difference between baseline visibility of 30.28 deciviews for the 20 percent worst days and natural conditions of 11.05 deciviews, *i.e.,* 19.23 deciviews. Over the 60-year period from 2004 to 2064, this would require an average improvement of 0.321 deciviews per year to reach natural conditions. Hence, for the 14-year period from 2004 to 2018, in order to achieve visibility improvements at least equivalent to the uniform rate of progress for the 20 percent worst days at Great Smoky Mountain National Park and the Joyce Kilmer-Slickrock Wilderness Area, Tennessee would need to project at least 4.49 deciviews over the first implementation period (*i.e.,* 0.321 deciviews × 14 years = 4.49 deciviews) of visibility improvement from the 30.28 deciviews baseline in 2004, resulting in visibility levels at or below 25.79 deciviews in 2018. As discussed below in section V.C.7,

[9] The term, "dv," is the abbreviation for "deciview."

"Reasonable Progress Goals," Tennessee projects a 6.78 deciview improvement to visibility from the 30.28 deciview baseline to 23.50 deciviews in 2018 for the 20 percent most impaired days, and a 1.47 deciview improvement to 12.11 deciviews from the baseline visibility of 13.58 deciviews for the 20 percent least impaired days.

*C. Long-Term Strategy/Strategies*

As described in section III.E of this action, the LTS is a compilation of state-specific control measures relied on by the state for achieving its RPGs. Tennessee's LTS for the first implementation period addresses the emissions reductions from Federal, state, and local controls that take effect in the State from the end of the baseline period starting in 2004 until 2018. The Tennessee LTS was developed by the State, in coordination with the VISTAS RPO, through an evaluation of the following components: (1) Identification of the emission units within Tennessee and in surrounding states that likely have the largest impacts currently on visibility at the State's two Class I areas; (2) estimation of emissions reductions for 2018 based on all controls required or expected under Federal and state regulations for the 2004–2018 period (including BART); (3) comparison of projected visibility improvement with the uniform rate of progress for the State's Class I areas; and (4) application of the four statutory factors in the reasonable progress analysis for the identified emission units to determine if additional reasonable controls were required.

CAIR is also an element of Tennessee's LTS. CAIR rule revisions were approved into the Tennessee SIP in 2007 and 2009. *See* 72 FR 46388 (Aug. 20, 2007); 74 FR 61535 (Nov. 25, 2009). Tennessee opted to rely on CAIR emission reduction requirements to satisfy the BART requirements for $SO_2$ and $NO_X$ from EGUs. *See* 40 CFR 51.308(e)(4). Therefore, Tennessee only required its BART-eligible EGUs to evaluate PM emissions for determining whether they are subject to BART, and, if applicable, for performing a BART control assessment. See section III.D. of this notice for further details. Additionally, as discussed below in section V.C.5, Tennessee concluded that no additional controls beyond CAIR are reasonable for reasonable progress for its EGUs for this first implementation period. Prior to the remand of CAIR, EPA believed the State's reliance on CAIR for specific BART and reasonable progress provisions affecting its EGUs was adequate, as detailed later in this notice. As explained in section IV. of this notice, the Agency proposes today to issue a limited approval and a proposed limited disapproval of the State's regional haze SIP revision.

1. Emissions Inventory for 2018 With Federal and State Control Requirements

The emissions inventory used in the regional haze technical analyses was developed by VISTAS with assistance from Tennessee. The 2018 emissions inventory was developed by projecting 2002 emissions and applying reductions expected from Federal and state regulations affecting the emissions of VOC and the visibility-impairing pollutants $NO_X$, PM, and $SO_2$. The BART Guidelines direct states to exercise judgment in deciding whether VOC and $NH_3$ impair visibility in their Class I area(s). As discussed further in section V.C.3, VISTAS performed modeling sensitivity analyses, which demonstrated that anthropogenic emissions of VOC and $NH_3$ do not significantly impair visibility in the VISTAS region. Thus, while emissions inventories were also developed for $NH_3$ and VOC, and applicable Federal VOC reductions were incorporated into Tennessee's regional haze analyses, Tennessee did not further evaluate $NH_3$ and VOC emissions sources for potential controls under BART or reasonable progress.

VISTAS developed emissions for five inventory source classifications: Stationary point and area sources, off-road and on-road mobile sources, and biogenic sources. Stationary point sources are those sources that emit greater than a specified tonnage per year, depending on the pollutant, with data provided at the facility level. Stationary area sources are those sources whose individual emissions are relatively small, but due to the large number of these sources, the collective emissions from the source category could be significant. VISTAS estimated emissions on a countywide level for the inventory categories of: (a) stationary area sources; (b) off-road (or non-road) mobile sources (*i.e.,* equipment that can move but does not use the roadways); and (c) biogenic sources (which are natural sources of emissions, such as trees). On-road mobile source emissions are estimated by vehicle type and road type, and are summed to the countywide level.

There are many Federal and state control programs being implemented that VISTAS and Tennessee anticipate will reduce emissions between the end of the baseline period and 2018. Emission reductions from these control programs are projected to achieve substantial visibility improvement by 2018 in the Tennessee Class I areas. The control programs relied upon by Tennessee include CAIR; EPA's $NO_X$ SIP Call; North Carolina's Clean Smokestacks Act; Georgia multi-pollutant rule; consent decrees for Tampa Electric, Virginia Electric and Power Company, Gulf Power-Plant Crist, and American Electric Power; $NO_X$ and/or VOC reductions from the control rules in 1-hour ozone SIPs for Atlanta, Birmingham, and Northern Kentucky; North Carolina's $NO_X$ Reasonably Available Control Technology state rule for Philip Morris USA and Norandal USA in the Charlotte/Gastonia/Rock Hill 1997 8-hour ozone nonattainment area; Federal 2007 heavy duty diesel (2007) engine standards for on-road trucks and buses; Federal Tier 2 tailpipe controls for on-road vehicles; Federal large spark ignition and recreational vehicle controls; and EPA's non-road diesel rules. Controls from various Federal Maximum Achievable Control Technology (MACT) rules were also utilized in the development of the 2018 emission inventory projections. These MACT rules include the industrial boiler/process heater MACT (referred to as "Industrial Boiler MACT"), the combustion turbine and reciprocating internal combustion engines MACTs, and the VOC 2-, 4-, 7-, and 10-year MACT standards.

On July 30, 2007, the U.S. District Court of Appeals mandated the vacatur and remand of the Industrial Boiler MACT Rule.[10] This MACT was vacated since it was directly affected by the vacatur and remand of the Commercial and Industrial Solid Waste Incinerator (CISWI) Definition Rule. Notwithstanding the vacatur of this rule, the VISTAS states, including Tennessee, decided to leave these controls in the modeling for their regional haze SIPs since it is believed that by 2018, EPA will have re-promulgated an industrial boiler MACT rule or the states will have addressed the issue through state-level case-by-case MACT reviews in accordance with section 112(j) of the CAA. EPA finds this approach acceptable for the following reasons. EPA proposed a new Industrial Boiler MACT rule to address the vacatur on June 4, 2010, (75 FR 32006), and issued a final rule on March 21, 2011, (76 FR 15608), giving Tennessee time to assure the required controls are in place prior to the end of the first implementation period in 2018. In the absence of an established MACT rule for boilers and process heaters, the statutory language in section 112(j) of the CAA specifies a

[10] *See NRDC* v. *EPA,* 489F.3d 1250.

schedule for the incorporation of enforceable MACT-equivalent limits into the title V operating permits of affected sources. Should circumstances warrant the need to implement section 112(j) of the CAA for industrial boilers, EPA would expect, in this case, that compliance with case-by-case MACT limits for industrial boilers would occur no later than January 2015, which is well before the 2018 RPGs for regional haze. In addition, the RHR requires that any resulting differences between emissions projections and actual emissions reductions that may occur will be addressed during the five-year review prior to the next 2018 regional haze SIP. The expected reductions due to the original, vacated Industrial Boiler MACT rule were relatively small compared to the State's total $SO_2$, $PM_{2.5}$, and coarse particulate matter ($PM_{10}$) emissions in 2018 (*i.e.,* 0.5 to 1.5 percent, depending on the pollutant, of the projected 2018 $SO_2$, $PM_{2.5}$, and $PM_{10}$ inventory), and not likely to affect any of Tennessee's modeling conclusions. Thus, if there is a need to address discrepancies such that projected emissions reductions from the vacated Industrial Boiler MACT were greater than actual reductions achieved by the replacement MACT, EPA would not expect that this would affect the adequacy of the existing Tennessee regional haze SIP.

Below in Tables 2 and 3 are summaries of the 2002 baseline and 2018 estimated emission inventories for Tennessee.

TABLE 2—2002 EMISSIONS INVENTORY SUMMARY FOR TENNESSEE

[Tons per year]

| | VOC | $NO_X$ | $PM_{2.5}$ | $PM_{10}$ | $NH_3$ | $SO_2$ |
|---|---|---|---|---|---|---|
| Point | 85,254 | 221,651 | 39,973 | 49,814 | 1,817 | 413,755 |
| Area | 153,509 | 17,936 | 42,925 | 212,972 | 34,412 | 29,942 |
| On-Road Mobile | 179,807 | 238,577 | 3,949 | 5,371 | 6,625 | 9,226 |
| Off-Road Mobile | 66,450 | 96,827 | 6,458 | 6,819 | 43 | 10,441 |
| Total | 485,020 | 574,991 | 93,305 | 274,976 | 42,897 | 463,364 |

TABLE 3—2018 EMISSIONS INVENTORY SUMMARY FOR TENNESSEE

[Tons per year]

| | VOC | $NO_X$ | $PM_{2.5}$ | $PM_{10}$ | $NH_3$ | $SO_2$ |
|---|---|---|---|---|---|---|
| Point | 93,432 | 94,234 | 46,680 | 57,940 | 2,454 | 169,354 |
| Area | 183,110 | 20,002 | 48,265 | 248,086 | 36,376 | 32,073 |
| On-Road Mobile | 67,324 | 69,385 | 1,544 | 3,092 | 9,021 | 948 |
| Off-road Mobile | 45,084 | 70,226 | 4,403 | 4,672 | 55 | 5,207 |
| Total | 388,950 | 253,847 | 100,892 | 313,790 | 47,906 | 207,582 |

2. Modeling To Support the LTS and Determine Visibility Improvement for Uniform Rate of Progress

VISTAS performed modeling for the regional haze LTS for the 10 southeastern states, including Tennessee. The modeling analysis is a complex technical evaluation that began with selection of the modeling system. VISTAS used the following modeling system:

- *Meteorological Model:* The Pennsylvania State University/National Center for Atmospheric Research Mesoscale Meteorological Model is a nonhydrostatic, prognostic meteorological model routinely used for urban- and regional-scale photochemical, $PM_{2.5,}$ and regional haze regulatory modeling studies.
- *Emissions Model:* The Sparse Matrix Operator Kernel Emissions modeling system is an emissions modeling system that generates hourly gridded speciated emission inputs of mobile, non-road mobile, area, point, fire and biogenic emission sources for photochemical grid models.
- *Air Quality Model:* The EPA's Models–3/Community Multiscale Air Quality (CMAQ) modeling system is a photochemical grid model capable of addressing ozone, PM, visibility and acid deposition at a regional scale. The photochemical model selected for this study was CMAQ version 4.5. It was modified through VISTAS with a module for Secondary Organics Aerosols in an open and transparent manner that was also subjected to outside peer review.

CMAQ modeling of regional haze in the VISTAS region for 2002 and 2018 was carried out on a grid of 12x12 kilometer cells that covers the 10 VISTAS states (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, West Virginia) and states adjacent to them. This grid is nested within a larger national CMAQ modeling grid of 36x36 kilometer grid cells that covers the continental United States, portions of Canada and Mexico, and portions of the Atlantic and Pacific Oceans along the east and west coasts. Selection of a representative period of meteorology is crucial for evaluating baseline air quality conditions and projecting future changes in air quality due to changes in emissions of visibility-impairing pollutants. VISTAS conducted an in-depth analysis which resulted in the selection of the entire year of 2002 (January 1–December 31) as the best period of meteorology available for conducting the CMAQ modeling. The VISTAS states modeling was developed consistent with EPA's *Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, PM 2.5, and Regional Haze*, located at *http://www.epa.gov/scram001/guidance/guide/final-03-pm-rh-guidance.pdf,* (EPA–454/B–07–002), April 2007, and EPA document, *Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations,* located at *http://www.epa.gov/ttnchie1/eidocs/eiguid/index.html,* EPA–454/R–05–001, August 2005, updated November 2005 ("EPA's Modeling Guidance").

VISTAS examined the model performance of the regional modeling for the areas of interest before determining whether the CMAQ model results were suitable for use in the regional haze assessment of the LTS and for use in the modeling assessment. The modeling assessment predicts future levels of emissions and visibility impairment used to support the LTS and to compare predicted, modeled visibility levels with those on the uniform rate of progress. In keeping with the objective of the CMAQ modeling platform, the air quality model performance was evaluated using graphical and statistical assessments based on measured ozone, fine particles, and acid deposition from various monitoring networks and databases for the 2002 base year. VISTAS used a diverse set of statistical parameters from the EPA's Modeling Guidance to stress and examine the model and modeling inputs. Once VISTAS determined the model performance to be acceptable, VISTAS used the model to assess the 2018 RPGs using the current and future year air quality modeling predictions, and compared the RPGs to the uniform rate of progress.

In accordance with 40 CFR 51.308(d)(3), the State of Tennessee provided the appropriate supporting documentation for all required analyses used to determine the State's LTS. The technical analyses and modeling used to develop the glidepath and to support the LTS are consistent with EPA's RHR, and interim and final EPA Modeling Guidance. EPA accepts the VISTAS technical modeling to support the LTS and determine visibility improvement for the uniform rate of progress because the modeling system was chosen and simulated according to EPA Modeling Guidance. EPA agrees with the VISTAS model performance procedures and results, and that the CMAQ is an appropriate tool for the regional haze assessments for the Tennessee LTS and regional haze SIP.

3. Relative Contributions to Visibility Impairment: Pollutants, Source Categories, and Geographic Areas

An important step toward identifying reasonable progress measures is to identify the key pollutants contributing to visibility impairment at each Class I area. To understand the relative benefit of further reducing emissions from different pollutants, source sectors, and geographic areas, VISTAS developed emission sensitivity model runs using CMAQ to evaluate visibility and air quality impacts from various groups of emissions and pollutant scenarios in the Class I areas on the 20 percent worst visibility days.

Regarding which pollutants are most significantly impacting visibility in the VISTAS region, VISTAS' contribution assessment, based on IMPROVE monitoring data, demonstrated that ammonium sulfate is the major contributor to $PM_{2.5}$ mass and visibility impairment at Class I areas in the VISTAS and neighboring states. On the 20 percent worst visibility days in 2000–2004, ammonium sulfate accounted for greater than 70 percent of the calculated light extinction at Class I areas in the Southern Appalachians. In particular, for Great Smoky Mountains National Park, sulfate particles resulting from $SO_2$ emissions contribute roughly 84 percent to the calculated light extinction on the haziest days. In contrast, ammonium nitrate contributed less than five percent of the calculated light extinction at VISTAS Class I areas on the 20 percent worst visibility days. Particulate organic matter (organic carbon) accounted for 10–20 percent of light extinction on the 20 percent worst visibility days.

VISTAS grouped its 18 Class I areas into two types, either "coastal" or "inland" (sometimes referred to as "mountain") sites, based on common/similar characteristics (*e.g.* terrain, geography, meteorology), to better represent variations in model sensitivity and performance within the VISTAS region, and to describe the common factors influencing visibility conditions in the two types of Class I areas. Tennessee's Class I areas are both "inland" areas.

Results from VISTAS' emission sensitivity analyses indicate that sulfate particles resulting from $SO_2$ emissions are the dominant contributor to visibility impairment on the 20 percent worst days at all Class I areas in VISTAS, including the two Tennessee areas. Tennessee concluded that reducing $SO_2$ emissions from EGU and non-EGU point sources in the VISTAS states would have the greatest visibility benefits for the Tennessee Class I areas. Because ammonium nitrate is a small contributor to $PM_{2.5}$ mass and visibility impairment on the 20 percent worst days at the inland Class I areas in VISTAS, which include Joyce-Kilmer Wilderness Area and Great Smoky Mountains National Park, the benefits of reducing $NO_X$ and $NH_3$ emissions at these sites are small.

The VISTAS sensitivity analyses show that VOC emissions from biogenic sources such as vegetation also contribute to visibility impairment. However, control of these biogenic sources of VOC would be extremely difficult, if not impossible. The anthropogenic sources of VOC emissions are minor compared to the biogenic sources. Therefore, controlling anthropogenic sources of VOC emissions would have little if any visibility benefits at the Class I areas in the VISTAS region, including Tennessee. The sensitivity analyses also show that reducing primary carbon from point sources, ground level sources, or fires is projected to have small to no visibility benefit at the VISTAS Class I areas.

Tennessee considered the factors listed in under 40 CFR 51.308(d)(3)(v) and in section III.E. of this action to develop its LTS as described below. Tennessee, in conjunction with VISTAS, demonstrated in its SIP that elemental carbon (a product of highway and non-road diesel engines, agricultural burning, prescribed fires, and wildfires), fine soils (a product of construction activities and activities that generate fugitive dust), and ammonia are relatively minor contributors to visibility impairment at the Class I areas in Tennessee. Tennessee considered agricultural and forestry smoke management techniques to address visibility impacts from elemental carbon. TDEC is currently working with the Tennessee Division of Forestry to develop a smoke management program that utilizes basic smoke management practices and addresses the issues laid out in the EPA's 1998 *Interim Air Quality Policy on Wildland and Prescribed* Fires available at: *http://www.epa.gov/ttncaaa1/t1/memoranda/firefnl.pdf.* With regard to fine soils, the State considered those activities that generate fugitive dust, including construction activities. With regard to construction activities, the Tennessee Department of Transportation has agreed to include discussions related to the control of road construction project dust emissions as part of its contract bid specifications. In addition, TDEC's Rule 1200–3–8–.03 requires additional control measures in air source operating permits to control dust emissions. The State has chosen not to develop controls for fine soils in this first implementation period because of its relatively minor contribution to visibility impairment. With regard to ammonia emissions from agricultural sources, TDEC will wait for the results of emissions sampling and Best Management Practices arising from EPA's Combined Animal Feeding Operation Consent Order Agreements prior to initiating any control measures for agricultural ammonia. EPA concurs with the State's technical demonstration

showing that elemental carbon, fine soils and ammonia are not significant contributors to visibility in the State's Class I areas, and therefore, finds that Tennessee has adequately satisfied 40 CFR 51.308(d)(3)(v). EPA's TSD to this **Federal Register** action and Tennessee's SIP provide more details on the State's consideration of these factors for Tennessee's LTS.

The emissions sensitivity analyses conducted by VISTAS predict that reductions in $SO_2$ emissions from EGU and non-EGU industrial point sources will result in the greatest improvements in visibility in the Class I areas in the VISTAS region, more than any other visibility-impairing pollutant. Specific to Tennessee, the VISTAS sensitivity analysis projects visibility benefits in Great Smoky Mountains National Park and Joyce-Kilmer Slickrock Wilderness Area from $SO_2$ reductions from EGUs in eight of the 10 VISTAS states: Alabama, Georgia, Kentucky, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia. Additional, smaller benefits are projected from $SO_2$ emission reductions from non-utility industrial point sources. $SO_2$ emissions contributions to visibility impairment from other RPO regions are comparatively small in contrast to the VISTAS states' contributions, and thus, controlling sources outside of the VISTAS region is predicted to provide less significant improvements in visibility in the Class I areas in VISTAS.

Taking the VISTAS sensitivity analyses results into consideration, Tennessee concluded that reducing $SO_2$ emissions from EGU and non-EGU point sources in certain VISTAS states would have the greatest visibility benefits for the Tennessee Class I areas. The State chose to focus solely on evaluating certain $SO_2$ sources contributing to visibility impairment to the State's Class I areas for additional emission reductions for reasonable progress in this first implementation period (described in sections V.4. and V.5. of this notice). EPA agrees with the State's analyses and conclusions used to determine the pollutants and source categories that most contribute to visibility impairment in the Tennessee Class I areas, and finds the State's approach to focus on developing a LTS that includes largely additional measures for point sources of $SO_2$ emissions to be appropriate.

$SO_2$ sources for which it is demonstrated that no additional controls are reasonable in this current implementation period will not be exempted from future assessments for controls in subsequent implementation periods or, when appropriate, from the five-year periodic SIP reviews. In future implementation periods, additional controls on these $SO_2$ sources evaluated in the first implementation period may be determined to be reasonable, based on a reasonable progress control evaluation, for continued progress toward natural conditions for the 20 percent worst days and to avoid further degradation of the 20 percent best days. Similarly, in subsequent implementation periods, the State may use different criteria for identifying sources for evaluation and may consider other pollutants as visibility conditions change over time.

4. Procedure for Identifying Sources To Evaluate for Reasonable Progress Controls in Tennessee and Surrounding Areas

As discussed in section V.C.3. of this notice, through comprehensive evaluations by VISTAS and the Southern Appalachian Mountains Initiative (SAMI),[11] the VISTAS states concluded that sulfate particles resulting from $SO_2$ emissions account for the greatest portion of the regional haze affecting the Class I areas in VISTAS states, including those in Tennessee. Utility and non-utility boilers are the main sources of $SO_2$ emissions within the southeastern United States. VISTAS developed a methodology for Tennessee, which enables the State to focus its reasonable progress analysis on those geographic regions and source categories that impact visibility at each of its Class I areas. Recognizing that there was neither sufficient time nor adequate resources available to evaluate all emission units within a given area of influence (AOI) around each Class I area that Tennessee's sources impact, the State established a threshold to determine which emission units would be evaluated for reasonable progress control. In applying this methodology, TDEC first calculated the fractional contribution to visibility impairment from all emission units within the $SO_2$ AOI for each of its Class I areas, and those surrounding areas in other states potentially impacted by emissions from emission units in Tennessee. The State then identified those emission units with a contribution of one percent or more to the visibility impairment at that particular Class I area, and evaluated each of these units for control measures for reasonable progress, using the following four "reasonable progress factors" as required under 40 CFR 51.308(d)(1)(i)(A): (i) Cost of compliance; (ii) time necessary for compliance; (iii) energy and non-air quality environmental impacts of compliance; and (iv) remaining useful life of the emission unit.

Tennessee's $SO_2$ AOI methodology captured greater than 60 percent of the total point source $SO_2$ contribution to visibility impairment in the two Class I areas in Tennessee, and required an evaluation of 15 emission units. Capturing a significantly greater percentage of the total contribution would involve an evaluation of many more emission units that have substantially less impact. EPA believes the approach developed by VISTAS and implemented for the Class I areas in Tennessee is a reasonable methodology to prioritize the most significant contributors to regional haze and to identify sources to assess for reasonable progress control in the State's Class I areas. The approach is consistent with EPA's Reasonable Progress Guidance. The technical approach of VISTAS and Tennessee was objective and based on several analyses, which included a large universe of emission units within and surrounding the State of Tennessee and all of the 18 VISTAS Class I areas. It also included an analysis of the VISTAS emission units affecting nearby Class I areas surrounding the VISTAS states that are located in other RPOs' Class I areas.

5. Application of the Four CAA Factors in the Reasonable Progress Analysis

TDEC identified 15 emission units at 10 facilities in Tennessee (see Table 4) with $SO_2$ emissions that were above the State's minimum threshold for reasonable progress evaluation because they were modeled to fall within the sulfate AOI of any Class I area and have a one percent or greater contribution to the sulfate visibility impairment to at least one Class I area.[12] Of these 15 units, 13 emission units were exempted from preparing a reasonable progress analysis because they were already subject to BART or CAIR, had shut down, or provided additional information documenting that they had been improperly identified as meeting

[11] Prior to VISTAS, the southern states cooperated in a voluntary regional partnership "to identify and recommend reasonable measures to remedy existing and prevent future adverse effects from human-induced air pollution on the air quality related values of the Southern Appalachian Mountains". States cooperated with FLMs, the USEPA, industry, environmental organizations, and academia to complete a technical assessment of the impacts of acid deposition, ozone, and fine particles on sensitive resources in the Southern Appalachians. The SAMI Final Report was delivered in August 2002.

[12] See also EPA's TSD, section III.C.2, fractional contribution analysis tables for each Class I area, excerpted from the Tennessee SIP, Appendix H.

the State's minimum threshold for reasonable progress evaluation.

TABLE 4—TENNESSEE FACILITIES SUBJECT TO REASONABLE PROGRESS ANALYSIS

| |
|---|
| Facilities With a Unit Subject to Reasonable Progress Analysis: |
| Bowater Newsprint and Directory—Calhoun (Bowater), Unit 015 |
| Invista—Hixon/Chattanooga (INVISTA), Unit 0002 |
| Facilities With Unit(s) Exempt from Reasonable Progress Analysis: |
| EGUs Subject to BART and CAIR |
| Tennessee Valley Authority—Cumberland Facility, Units 001, 002 |
| Tennessee Valley Authority—Bull Run Facility, Unit 001 |
| Non-EGUs Subject to BART |
| Alcoa—South Plant, Units 09, 16, 17 |
| Eastman Chemical Company Units 021520, 020101, 261501 |
| Shut down Facility |
| Intertrade Holdings, Inc. |
| Exempted With Updated Information |
| A.E. Staley Manufacturing Company |
| APAC–TN, Inc./Harrison Construction Division |
| U.S. DOE—Y–12 Plant |

*A. Facilities With an Emissions Unit Subject to Reasonable Progress Analysis*

TDEC analyzed whether $SO_2$ controls should be required for two facilities, Bowater Newsprint and Directory—Calhoun, unit 015 (Bowater), and Invista-Hixson/Chattanooga, unit 0002 (INVISTA), based on a consideration of the four factors set out in the CAA and EPA's regulations. For the limited purpose of evaluating the cost of compliance for the reasonable progress assessment in this first regional haze SIP for the non-EGUs, TDEC concluded that it was not equitable to require non-EGUs to bear a greater economic burden than EGUs for a given control strategy. Using the CAIR rule as a guide, a cost of $2,000 per ton of $SO_2$ controlled or reduced was used as a determiner of cost effectiveness.

1. Bowater

Bowater is a Kraft pulp mill with three coal-fired boilers burning 1.1 percent sulfur coal. Bowater presented information and data in its reasonable progress control analysis that led TDEC to conclude that Bowater should not be required to install $SO_2$ post-combustion controls or to switch to lower sulfur fuels during this first regional haze SIP implementation period. Bowater evaluated switching to a lower sulfur (0.6 percent) western sub-bituminous coal and determined that it is not technologically feasible since Bowater's boilers were designed to burn eastern bituminous coal, and the different physical properties (*e.g.,* ash fusion temperature, *etc.*) of western sub-bituminous coal make its use incompatible with the Bowater boilers. Bowater also evaluated installing $SO_2$ wet scrubbers, which is technically feasible, but the estimated cost-effectiveness exceeds $5,000 per ton of $SO_2$ removed, which exceeds the State's $2,000 cost-effectiveness threshold for reasonableness. Other environmental factors affecting the application of wet scrubbers are the water scarcity in the local area due to seasonal droughts and the treatment and disposal of wastewater and sludge.

2. INVISTA

INVISTA produces polymers and fibers and operates three coal-fired boilers. $SO_2$ emissions from these boilers averaged 944 tons per year over three years (2004, 2005, and 2006). The current title V permit limits coal sulfur content to 1.25 percent; however, actual sulfur content has averaged nearly 1.0 percent over these three years. INVISTA evaluated the following options: low sulfur coals, wet Flue Gas Desulfurization (FGD) System (wet scrubbers), Spray Dryer Absorber (SDA) System, Fluidized Bed Combustion (FBC) with Limestone, and Dry Sorbent Injection (DSI) System. Of these options, only low sulfur coal fell below the $2,000 per ton cost threshold TDEC used to determine reasonableness.

A wet FGD system was determined to be a technically feasible option for control of $SO_2$ emissions from the boilers used by INVISTA, but cost prohibitive. Cost-effectiveness was calculated to be approximately $3,508 per ton of $SO_2$ removed, which exceeds the State's cost threshold for reasonableness. In assessing other environmental impacts, the company raised the possibility of causing a steam plume from the installation of a scrubber. It is not known whether the possible presence of a persistent, highly opaque steam plume from the scrubbers' stacks would be an issue. If it is, additional costs would be incurred from installing a separate stack to address this problem.

Similarly, an SDA system was determined to be a technically feasible control option but also cost prohibitive. The cost-effectiveness of applying SDA to this unit is estimated to be at least $4,000 per ton of $SO_2$ removed. In addition, this option has the potential to result in an overall ash with properties so different from the current ash that it will no longer be acceptable for sale to cement kilns. If that becomes the case, INVISTA would be required to truck the ash offsite for disposal in a landfill at a substantial increase in cost relative to the current disposal cost.

As was the case for FGD and SDA, TDEC determined that the DSI system was also technically feasible but cost prohibitive as a control option. The cost-effectiveness of applying DSI was estimated to be at least $4,037 per ton of $SO_2$ removed. As with SDA, this option could result in an overall ash with properties so different from the ash that is currently produced that it will no longer be acceptable for sale to cement kilns. If that becomes the case, INVISTA would be required to truck the ash offsite for disposal in a landfill at a substantial increase in cost relative to the current disposal cost.

Finally, INVISTA evaluated switching to a lower sulfur (0.75 percent) western sub-bituminous coal, and determined that this is both a technologically feasible and cost effective control technology option. The cost-effectiveness was calculated to be approximately $1,225 per ton of $SO_2$ removed. The decrease in $SO_2$ emissions from the facility's baseline by switching to lower sulfur coal was calculated to be approximately 214 tons of $SO_2$ per year. INVISTA concluded that the cost of switching to a lower sulfur coal would

cost more than the $2,000 per ton used by TDEC to determine reasonableness of control costs and therefore, it was a cost prohibitive option. INVISTA based its conclusion on research that demonstrated that the $1,225 per ton control cost used by TDEC was unjustifiable because it was based on the current cost of low sulfur coal instead of the future costs it would be expected to pay. Taking into consideration INVISTA's entire analysis, TDEC agreed that although fuel-switching seemed to be a favored option among a number of sources, the future cost of coal switching at the INVISTA facility may be cost prohibitive. For this reason, TDEC is deferring a decision to require INVISTA to use the fuel-switching option during this implementation period.

3. EPA Assessment

As noted in EPA's Reasonable Progress Guidance, the states have wide latitude to determine appropriate additional control requirements for ensuring reasonable progress, and there are many ways for a state to approach identification of additional reasonable measures. In determining reasonable progress, states must consider, at a minimum, the four statutory factors, but states have flexibility in how to take these factors into consideration.

Tennessee applied the methodology developed by VISTAS for identifying appropriate sources to be considered for additional controls under reasonable progress for the implementation period addressed by this SIP, which ends in 2018. Using this methodology, TDEC first identified those emissions and emissions units most likely to have an impact on visibility in the State's Class I areas. Units with emissions of $SO_2$ with a relative contribution to visibility impairment of at least a one percent contribution at any Class I area were then subject to further analysis to determine whether it would be appropriate to require controls on these units for purposes of reasonable progress. As noted above, of the emission units in Tennessee, two were subject to this analysis. TDEC concluded, based on their evaluation of these two facilities, Bowater and INVISTA, that no further controls were warranted at this time.

Having reviewed TDEC's methodology and analyses presented in the SIP materials prepared by TDEC, EPA is proposing to approve Tennessee's conclusion that no further controls are reasonable for this implementation period for the reviewed sources. EPA agrees with the State's approach of identifying the key pollutants contributing to visibility impairment at its Class I areas, and consider their methodology to identify sources of $SO_2$ most likely to have an impact on visibility on any Class I area, to be an appropriate methodology for narrowing the scope of the State's analysis. In general, EPA also finds Tennessee's evaluation of the four statutory factors for reasonable progress to be reasonable. Although the use of a specific threshold for assessing costs means that Tennessee may not have fully considered other available emissions reduction measures above their threshold, EPA believes that the Tennessee SIP still ensures reasonable progress. EPA notes that given the emissions reductions resulting from CAIR, Tennessee's BART determinations, and the measures in nearby states, the visibility improvements projected for the affected Class I areas are in excess of that needed to be on the uniform rate of progress glidepath. In considering Tennessee's approach, EPA is also proposing to place great weight on the fact that there is no indication in the SIP submittal that Tennessee, as a result of using a specific cost effectiveness threshold, rejected potential reasonable progress measures that would have had a meaningful impact on visibility in its Class I areas.

EPA also finds that TDEC's conclusion regarding the fuel switching option evaluated for INVISTA acceptable. Although the $1,225 per ton of $SO_2$ reduced is below the cost-effectiveness threshold established by TDEC, a 214 ton per year reduction in $SO_2$ is expected to produce limited visibility improvement at the only Class I area that INVISTA impacts (Cohutta Wilderness Class I Area in Georgia) and is therefore an acceptable basis for deferral of consideration of additional controls to the next assessment period. In addition, EPA finds that Tennessee fully evaluated, in terms of the four reasonable progress factors, all control technologies available at the time of its analysis and applicable to these facilities. EPA also finds that Tennessee consistently applied its criteria for reasonable compliance costs, and where it differed, the State included justification for the other factors influencing the control determination.

*B. Emission Units Exempted From Preparing a Reasonable Progress Control Analysis*

1. EGUs Subject to BART and CAIR

Three of the 15 emission units identified for a reasonable progress control analysis are EGUs. These three EGUs are subject to CAIR and were also found to be subject to BART, as discussed in section V.C.6. These three EGUs, located at two facilities, are Tennessee Valley Authority [13] (TVA) Bull Run Fossil Plant, unit 001, and TVA Cumberland Fossil Plant, units 001 and 002.

To determine whether any additional controls beyond those required by CAIR would be considered reasonable for Tennessee's EGUs for this first implementation period, TDEC evaluated the $SO_2$ reductions expected from the EGU sector, factoring in updated information provided by TVA, which owns and operates the EGUs in Tennessee. The EGUs located in Tennessee are expected to reduce their 2002 $SO_2$ emissions by approximately 75 percent by 2018. TDEC believes it has an accurate understanding of where EGU emission reductions will occur in Tennessee based upon existing and planned installations of post combustion FGD scrubber controls.

To further evaluate whether CAIR requirements will satisfy reasonable progress for $SO_2$ for EGUs, TDEC considered the four reasonable progress factors set forth in EPA's RHR as they apply to the State's entire EGU sector for available control technologies in section 7.6 of the Tennessee SIP. The State also reviewed CAIR requirements that include 2015 as the "earliest reasonable deadline for compliance" for EGUs installing retrofits. *See* 70 FR 25162, 25197–25198 (May 12, 2005). This is a particularly relevant consideration because CAIR addresses the reasonable progress factors of cost and time necessary for compliance. In the preamble to CAIR, EPA recognized there are a number of factors that influence compliance with the emission reduction requirements set forth in CAIR, which make the 2015 compliance date reasonable. For example, each EGU retrofit requires a large pool of specialized labor resources, which exist in limited quantities. In addition, retrofitting an EGU is a very capital-intensive venture and therefore undertaken with caution. Hence, allowing retrofits to be installed over time enables the industry to learn from early installations. Lastly, EGU retrofits over time minimize disruption of the power grid by enabling industry to take advantage of planned outages.

[13] On April 14, 2011, a landmark CAA settlement was achieved with TVA involving 59 units across the TVA system. Information on the settlement may be obtained at: *http://yosemite.epa.gov/opa/admpress.nsf/2467feca6036872985257359004044 3d/45cbf1a4262af67b8525787200516dd7!OpenDocument.* This settlement will assure that these facilities have controls consistent with Best Available Control Technology.

Since EPA made the determination in CAIR that the earliest reasonable deadline for compliance for reducing emissions was 2015, TDEC concluded that the emission reductions required by CAIR constitute reasonable measures for Tennessee EGUs during this first assessment period (between baseline and 2018). In addition, TDEC notes that while the reasonable progress evaluation only applies to existing sources, the State will continue to follow the visibility analysis requirements as part of all new major source review (NSR) and prevention of significant deterioration (PSD) permitting actions.

Prior to the CAIR remand by the DC Circuit, EPA believed the State's demonstration that no additional controls beyond CAIR are reasonable for $SO_2$ for affected EGUs for the first implementation period to be acceptable on the basis that the CAIR requirements reflected the most cost-effective controls that can be achieved over the CAIR $SO_2$ compliance timeframe, which spans out to 2015. However, as explained in section IV of this notice, the State's demonstration regarding CAIR and reasonable progress for EGUs, and other provisions in this SIP revision, are based on CAIR and thus, the Agency proposes today to issue a limited approval and a limited disapproval of the State's regional haze SIP revision.

2. Non-EGUs Subject to BART

Six of the 15 non-EGU emission units in Tennessee falling within the sulfate AOI of a Class I area are industrial facilities that TDEC found to be also subject to BART: Aluminum Company of America (Alcoa)—South Plant, units 09, 16, 17, and Eastman Chemical Company, units 021520, 020101, 261501. TDEC has concluded that, for this implementation period, the application of BART constitutes reasonable progress for these six units and thus, is not requiring any additional controls for reasonable progress. As discussed in EPA's Reasonable Progress Guidance, since the BART analysis is based, in part, on an assessment of many of the same factors that must be addressed in establishing the RPG, EPA believes it is reasonable to conclude that any control requirements imposed in the BART determination also satisfy the RPG-related requirements for source review in the first implementation period.[14] Thus, EPA agrees with the State's conclusions that the BART control evaluations satisfy reasonable progress for the first implementation period for these six non-EGU emission units at Alcoa and Eastman Chemical.

3. Other Units Exempted From Preparing a Reasonable Progress Control Analysis

Four other facilities have emission units that were later determined to be exempt from preparing a reasonable progress control analysis. The emission unit 001 at Intertrade Holdings, Inc. that was to be considered for evaluation for reasonable progress shut down prior to analysis. In addition, TDEC identified three emission units that should not have been included on the list of sources to evaluate because updated information showed they did not meet Tennessee's minimum threshold for evaluation for reasonable progress control. A.E. Staley Manufacturing (now Tate & Lyle) Company, unit 005, was already subject to emission limits contained in a construction permit issued March 9, 2007, that reduces $SO_2$ emissions from unit 005, the power boiler, by approximately 62 percent. APAC–TN, Inc./Harrison Construction Division, unit 002, was erroneously modeled at almost 10 times its allowable emission rate. Finally, unit 002 (coal-fired boilers) at the U.S. Department of Energy's Y–12 Plant was repowered to operate on natural gas, virtually eliminating its $SO_2$ emissions.

6. BART

BART is an element of Tennessee's LTS for the first implementation period. The BART evaluation process consists of three components: (a) An identification of all the BART-eligible sources, (b) an assessment of whether the BART-eligible sources are subject to BART and (c) a determination of the BART controls. These components, as addressed by TDEC and TDEC's findings, are discussed as follows.

*A. BART-Eligible Sources*

The first phase of a BART evaluation is to identify all the BART-eligible sources within the state's boundaries. TDEC identified the BART-eligible sources in Tennessee by utilizing the three eligibility criteria in the BART Guidelines (70 FR 39158) and EPA's regulations (40 CFR 51.301): (1) One or more emission units at the facility fit within one of the 26 categories listed in the BART Guidelines; (2) emission unit(s) was constructed on or after August 6, 1962, and was in existence prior to August 6, 1977; and (3) potential emissions of any visibility-impairing pollutant from subject units are 250 tons or more per year.

The BART Guidelines also direct states to address $SO_2$, $NO_X$ and direct PM (including both $PM_{10}$ and $PM_{2.5}$) emissions as visibility-impairment pollutants, and to exercise judgment in determining whether VOC or ammonia emissions from a source impair visibility in an area. 70 FR 39160. VISTAS modeling demonstrated that VOC from anthropogenic sources and ammonia from point sources are not significant visibility-impairing pollutants in Tennessee, as discussed in section V.C.3. of this action. TDEC has determined, based on the VISTAS modeling, that with one exception (PCS Nitrogen facility near Memphis, Tennessee), ammonia emissions from the State's point sources are not anticipated to cause or contribute significantly to any impairment of visibility in Class I areas and should be exempt for BART purposes.

*B. BART-Subject Sources*

The second phase of the BART evaluation is to identify those BART-eligible sources that may reasonably be anticipated to cause or contribute to visibility impairment at any Class I area, *i.e.,* those sources that are subject to BART. The BART Guidelines allow states to consider exempting some BART-eligible sources from further BART review because they may not reasonably be anticipated to cause or contribute to any visibility impairment in a Class I area. Consistent with the BART Guidelines, Tennessee required each of its BART-eligible sources to develop and submit dispersion modeling to assess the extent of their contribution to visibility impairment at surrounding Class I areas.

1. Modeling Methodology

The BART Guidelines allow states to use the CALPUFF[15] modeling system (CALPUFF) or another appropriate model to predict the visibility impacts from a single source on a Class I area and to therefore, determine whether an individual source is anticipated to cause or contribute to impairment of visibility in Class I areas, *i.e.,* "is subject to BART." The Guidelines state that EPA believes CALPUFF is the best regulatory modeling application currently available for predicting a single source's

[14] EPA's Reasonable Progress Guidance, pages 4.2–4–3.

[15] Note that our reference to CALPUFF encompasses the entire CALPUFF modeling system, which includes the CALMET, CALPUFF, and CALPOST models and other pre and post processors. The different versions of CALPUFF have corresponding versions of CALMET, CALPOST, *etc.* which may not be compatible with previous versions (*e.g.,* the output from a newer version of CALMET may not be compatible with an older version of CALPUFF). The different versions of the CALPUFF modeling system are available from the model developer on the following Web site: *http://www.src.com/verio/download/download.htm.*

contribution to visibility impairment (70 FR 39162). Tennessee, in coordination with VISTAS, used the CALPUFF modeling system to determine whether individual sources in Tennessee were subject to or exempt from BART.

The BART Guidelines also recommend that states develop a modeling protocol for making individual source attributions, and suggest that states may want to consult with EPA and their RPO to address any issues prior to modeling. The VISTAS states, including Tennessee, developed a "Protocol for the Application of CALPUFF for BART Analyses." Stakeholders, including EPA, FLMs, industrial sources, trade groups, and other interested parties, actively participated in the development and review of the VISTAS protocol.

VISTAS developed a post-processing approach to use the new IMPROVE equation with the CALPUFF model results so that the BART analyses could consider both the old and new IMPROVE equations. TDEC sent a letter to EPA justifying the need for this post-processing approach, and the EPA Region 4 Regional Administrator sent the State a letter of approval dated October 5, 2007. Tennessee's justification included a method to process the CALPUFF output and a rationale on the benefits of using the new IMPROVE equation. The State's description of the new post-processing methodology and the State and Region 4 letters are located in the Tennessee regional haze SIP submittal and the docket for this action.

2. Contribution Threshold

For states using modeling to determine the applicability of BART to single sources, the BART Guidelines note that the first step is to set a contribution threshold to assess whether the impact of a single source is sufficient to cause or contribute to visibility impairment at a Class I area. The BART Guidelines state that, "A single source that is responsible for a 1.0 deciview change or more should be considered to 'cause' visibility impairment." The BART Guidelines also state that "the appropriate threshold for determining whether a source 'contributes to visibility impairment' may reasonably differ across states," but, "[a]s a general matter, any threshold that you use for determining whether a source 'contributes' to visibility impairment should not be higher than 0.5 deciviews." The Guidelines affirm that states are free to use a lower threshold if they conclude that the location of a large number of BART-eligible sources in proximity of a Class I area justifies this approach.

Tennessee used a contribution threshold of 0.5 deciview for determining which sources are subject to BART. EPA agrees with the State's rationale for choosing this threshold value. There are a limited number of BART-eligible sources in close proximity to each of the State's Class I areas, and the overall impact of the BART-eligible sources on visibility near Class I areas is relatively minimal. In addition, the results of the visibility impacts modeling demonstrated that the majority of the individual BART-eligible sources had visibility impacts well below 0.5 deciview.

TDEC demonstrated that there is a clear spatial separation of sources across the State and little risk of multiple source interactions. For example, there are no clusters of Tennessee BART-eligible sources near the Great Smoky Mountains and Joyce Kilmer Class I areas. In addition, only two sources, TVA–Bull Run and Alcoa, are located within 32 kilometers from each other and the remainder of the State's BART-eligible sources are over 100 kilometers from one another with respect to these Class I areas. Similarly, with regard to Class I areas in nearby states, Tennessee's BART sources are all located greater than 180 kilometers from the Class I areas of Mingo Wilderness (MO), Sipsey Wilderness (AL), and Mammoth Cave (KY).

3. Identification of Sources Subject to BART

Tennessee initially identified 16 facilities with BART-eligible sources. The State subsequently determined that four sources are exempt from being considered BART-eligible. Liberty Fibers Corporation has permanently shut down, and the BART-eligible boilers located at the facility have been dismantled. Intertrade Holdings, Inc. has permanently shut down the acid plant that was determined to be BART-eligible. Similarly, the power boiler at the Weyerhaeuser facility (formerly Willamette Industries) in Sullivan County has been retired and is no longer BART-eligible. Finally, Holston Army Ammunition Plant requested and was issued an operating permit (February 25, 2008) with a 249 tons per year Federally enforceable emission limit for $NO_X$ for the eight emission units that make up their acid plant which enabled it to exempt these units from consideration as a BART-eligible source. Table 5 identifies the remaining 12 BART-eligible sources located in Tennessee, and identifies the four sources subject to BART.

TABLE 5—TENNESSEE BART-ELIGIBLE AND SUBJECT-TO-BART SOURCES

| |
|---|
| Facilities With Unit(s) Subject to BART Analysis: |
| Alcoa—South Plant |
| Eastman Chemical Company—Tennessee Operations |
| E.I. DuPont de Nemours and Company, Inc. (Old Hickory) |
| TVA—Cumberland Fossil Plant |
| Facilities With Unit(s) Found Not Subject to BART: |
| EGU CAIR and BART Modeling (PM only) Sources [16] |
| TVA—Bull Run Fossil Plant |
| Non-EGU BART Modeling |
| E.I. DuPont de Nemours and Company, Inc. (Shelby County) |
| DuPont White Pigment and Mineral Products (Humphreys County) |
| Lucite International |
| Owens Corning |
| Packaging Corporation of America |
| PCS Nitrogen |
| Zinifex |

Tennessee found that four of its BART-eligible sources (*i.e.,* Alcoa—South Plant, Eastman Chemical Company—Tennessee Operations, DuPont—Old Hickory and TVA—Cumberland Fossil Plant) had modeled visibility impacts of more than the 0.5 deciview threshold for BART exemption. These four facilities are considered to be subject to BART and submitted State permit applications including their proposed BART determinations.

The remaining eight sources demonstrated that they are exempt from being subject to BART by modeling less than a 0.5 deciview visibility impact at the affected Class I areas. The two Tennessee EGU sources, TVA—Cumberland and TVA—Bull Run, only modeled $PM_{10}$ emissions because Tennessee relied on CAIR to satisfy BART for $SO_2$ and $NO_X$ for its EGUs in CAIR, in accordance with 40 CFR 51.308(e)(4). The TVA—Bull Run Fossil Plant demonstrated that its $PM_{10}$ emissions do not contribute to visibility impairment in any Class I area. Modeling at the TVA—Cumberland Fossil Plant, on the other hand, demonstrated that its $PM_{10}$ emissions exceeded the 0.5 deciview contribution threshold and thus, required a BART analysis. Prior to the CAIR remand, the State's reliance on CAIR to satisfy BART for $NO_X$ and $SO_2$ for affected CAIR EGUs was fully approvable and in accordance with 40 CFR 51.308(e)(4). However, as explained in section IV of this notice, the BART assessments for CAIR EGUs for $NO_X$ and $SO_2$ and other provisions in this SIP revision are based on CAIR, and thus, the Agency proposes today to issue a limited approval and a limited disapproval of the State's April 4, 2008, regional haze SIP revision.

*C. BART Determinations*

Four BART-eligible sources (*i.e.,* Alcoa South Plant, Eastman Chemical Company—Tennessee Operations, DuPont Old Hickory, and TVA—Cumberland Fossil Plant) had modeled visibility impacts of more than the 0.5 deciview threshold for BART exemption. These four facilities are therefore considered to be subject to BART. Consequently, they each submitted to the State permit applications that included their proposed BART determinations.

In accordance with the BART Guidelines, to determine the level of control that represents BART for each source, the State first reviewed existing controls on these units to assess whether these constituted the best controls currently available, then identified what other technically feasible controls are available, and finally, evaluated the technically feasible controls using the five BART statutory factors. The State's evaluations and conclusions, and EPA's assessment, are summarized below.

1. Alcoa

a. Background

The Alcoa facility, located in Alcoa, Tennessee, is a BART-eligible source containing 24 BART-eligible emission units. Potlines 1 and 2 emit $SO_2$ and PM, and the anode bake furnace emits $SO_2$, $NO_X$, and PM. Two of the remaining 21 material-handling transfer operations are negligible sources of VOC and the remaining 19 emit PM only. Each pollutant and its effect on the visibility on Class I areas was analyzed by the State. Although eventually considered when taken together, for ease of reference, the analysis of existing controls for each pollutant is set forth below.

b. Potlines 1 and 2, and Anode Bake Furnace

*(1) PM BART Review.* Potlines 1 and 2 and the anode bake furnace are already equipped with a sophisticated fluidized reactor emission control system followed by fabric filters for PM control. Tennessee determined that these controls are BART for PM for these units. Given that this high-efficiency control system is superior or equal to other feasible control options, no further analysis of PM controls for these three units was performed, as allowed by the BART Guidelines in cases where the best level of control is already in place.

*(2) $SO_2$ BART Review.* For potline $SO_2$ emissions, TDEC evaluated eight different $SO_2$ control options as having potential application as part of the BART analysis. Of the eight control options, TDEC identified two technically feasible options for controlling $SO_2$ emissions from the potlines and anode bake furnace: adding a wet scrubber to the potline and/or anode bake furnace exhausts, and limiting the sulfur content in the coke used to produce anodes to three percent. Tennessee determined BART for $SO_2$ for Potlines 1 and 2, and the anode bake furnace, to be a limit of three percent sulfur in the coke used to manufacture anodes. This limit will cap potline $SO_2$ emissions below current allowable emissions. Use of wet scrubbing technology to reduce potline $SO_2$ emissions was rejected as BART due to excessive costs. The estimated total cost-effectiveness of wet scrubbing was $7,500 per ton of $SO_2$ removed, and capital and total annualized costs were estimated to be $200,000,000 and $39,000,000 per year, respectively. The potlines were not identified as being a source of $NO_X$.

[16] EGUs were only evaluated for PM emissions. Tennessee relied on CAIR to satisfy BART for $SO_2$ and $NO_X$ for its EGUs in CAIR, in accordance with 40 CFR 51.308(e)(4). Thus, $SO_2$ and $NO_X$ were not analyzed.

*(3) $NO_X$ BART Review.* The potlines were not identified as being a source of $NO_X$, however, the company did identify the anode bake furnace as a source of $NO_X$. The company also identified two potentially applicable $NO_X$ emission controls for the anode bake furnace: Advanced firing systems and add-on controls. TDEC determined that add-on controls were not feasible because of the low temperature (less than 450° F) and presence of tar vapor. Add-on controls for $NO_X$ typically require elevated temperatures (in excess of 850° F) and tar vapor would foul a catalyst. Advanced firing systems, which reduce $NO_X$ formation by using less natural gas to operate, were found to be technically feasible for anode baking and were evaluated further as part of the BART determination analysis.

TDEC determined that $NO_X$ emissions from the anode bake furnace could be reduced by installing an advanced firing system, which not only reduces total gas usage (by 20 percent), but also reduces $NO_X$ emissions by 20 percent, or approximately 17 tons per year. While the advanced firing system for the anode bake furnace is cost neutral (meaning the savings in reduced natural gas consumption would offset the cost of the installation of the system), the visibility impact analysis predicts only a 0.001 deciview improvement in visibility at the nearest Class I area from use of this technology. Based on the negligible change in visibility resulting from the installation of an advanced firing system, Tennessee concluded that this technology does not represent BART for $NO_X$ for the Alcoa anode bake furnace. Tennessee also determined that the available controls are not reasonable and that it was reasonable to find that BART for the anode baking furnace at the Alcoa facility located in Alcoa, Tennessee was no control for $NO_X$ emissions.

c. Support Operations

The remaining 21 BART-eligible emission units at Alcoa are material handling and transfer operations that support the potlines and the anode bake furnace. Two of these support operations are negligible sources of VOC. TDEC has determined that controlling anthropogenic sources of VOC emissions would have little, if any, visibility benefits at the Class I areas in or nearby Tennessee, and, thus, as noted in section V.C.1 of this action, Tennessee did not further evaluate VOC emissions sources for potential controls under BART or reasonable progress.

*PM BART Review.* Emissions from the remaining 19 support operations consist of relatively small amounts of PM that are controlled by fabric filter control devices. Fabric filters effectively remove greater than 99 percent of particulate emissions. Based on a control technology review, this type of control represents the best available control for the material handling and transfer operations at the Alcoa facility. Given that fabric filters represent the best available control for PM, and the relatively low level of PM emissions, these emission sources were excluded from both visibility modeling and further BART engineering analysis, as allowed by the BART Guidelines in cases where the best level of control is already in place (70 FR 39163–39164). Additionally, based on modeling results provided by Alcoa, visibility impacts from individual fabric filters are projected to be less than or equal to 0.01 deciview. Therefore, Tennessee determined that BART for PM for these 19 support operations is the existing level of control.

d. EPA Assessment

EPA agrees with Tennessee's analyses and conclusions for the BART emission units located at this Alcoa facility. EPA has reviewed the Tennessee analyses and concluded they were conducted in a manner that is consistent with EPA's BART Guidelines and EPA's *Air Pollution Control Cost Manual* (*http://www.epa.gov/ttncatc1/products.html#cccinfo*). Therefore the conclusions reflect a reasonable application of EPA's guidance to this source.

2. Eastman Chemical

a. Background

The Eastman Chemical facility located in Kingsport, Tennessee ("Kingsport plant") is a BART-eligible source with nine emission units including: Five tangentially fired 655 million British Thermal Units per hour (MMBtu/hr), pulverized coal boilers (boilers 25–29), two cracking furnaces, a batch chemical manufacturing operation, and a 500 MMBtu/hr stoker boiler (boiler 24).

b. Boilers 25–29

Boilers 25–29 are used for co-production of steam and electricity in support of manufacturing operations at the Kingsport plant.

*(1) $SO_2$ BART Review.* The average $SO_2$ emission rate for calendar year 2005 was 1.4 pounds of $SO_2$ per MMBtu of heat input (lb $SO_2$/MMBtu). TDEC identified four technically feasible technologies for control of $SO_2$ emissions from boilers 25–29: (1) Spray dryer absorbers with fabric filters (SDA–FF); (2) sodium hydroxide (caustic) scrubbers; (3) wet-FGD (*i.e.,* limestone scrubbing with forced oxidation); and (4) dual alkali systems. TDEC concluded that it would be reasonable to install SDA–FF on boilers 25–29. To meet an emission rate of 0.2 lb/MMBtu or 92 percent $SO_2$ control using the current regionally available coal supply, Eastman Chemical will also need to convert the existing electrostatic precipitator (ESP) to fabric filters. TDEC established as BART for $SO_2$ from Boilers 25–29 as the less stringent of the following limits: 0.20 lb $SO_2$/MMBtu, or a reduction in uncontrolled $SO_2$ emissions by 92 percent. TDEC also recognized in its SIP that the $SO_2$ emission limits for BART will require the installation of additional PM controls, which will further reduce PM, but since the facility is already well controlled for PM, the State did not adopt as BART any additional PM limits for these boilers. Installing SDA–FF on Boilers 25–29 will reduce the three-year average of the maximum 98th percentile impact on visibility, as modeled, from 2.38 deciviews to 0.95 deciviews.

*(2) PM and $NO_X$ BART Review.* In the early 1990s, an ESP was installed on each unit to control PM emissions. As discussed in the previous subsection V.C.6.C, 2.b.(1), *$SO_2$ BART review,* additional PM controls must be installed on Boilers 25–29 to meet the new BART $SO_2$ limits. During 2001–2003, the burners on these boilers were retrofitted with a vaned close coupled overfire-air system to control $NO_X$ emissions. At lower loads, the boiler's mode of operation is equivalent to a $NO_X$ control strategy known as Burner Out of Service, and results in significantly lower $NO_X$ emissions.

For $NO_X$, TDEC concluded that while the available technologies (running low-$NO_X$ burners year-round and application of Separated Over-Fire Air (SOFA)) might be considered cost-effective on a dollars per ton basis, there are other environmental factors that, when weighed against the visibility benefits, led the State to conclude that existing seasonal $NO_X$ controls would be considered BART. The impact of reducing the $NO_X$ would be to reduce the three-year average of the maximum 98th percentile impact on visibility, as modeled for this source, from 0.95 deciviews to 0.76 deciviews.

The environmental factors include: (a) disposal of fly ash rather than sales to the concrete industry would increase use of aggregate by the cement manufacturing industry and increase waste being sent to landfills, and (b) an increase in emissions associated with burning coal (*i.e.,* $SO_2$ and PM) due to an increase in fuel use caused by a loss

of boiler efficiency due to higher amounts of unburned carbon in the fly ash. The efficiency loss is projected to be around 0.5 percent, which is equivalent to about an extra 3,500 tons of coal that must be burned each year to generate the same output.

c. Cracking Furnaces

The two cracking furnaces are used to fire natural gas to provide heat to drive a cracking reaction of acetic acid that occurs inside the tube assemblies of the furnaces. The furnaces also burn a fuel gas which is off-gassed from the manufacturing process. $SO_2$ and PM emissions from these units are negligible.

The $NO_X$ emissions potential from these small furnaces is low (10.5 tons per year each). Therefore, post-combustion technologies such as selective non-catalytic reduction (SNCR) or selective catalytic reduction (SCR) would not be cost-effective. Although several different combustion control technologies were considered, only the replacement of the 24 natural gas burners with new low $NO_X$ burners (LNB) was considered to be cost-effective. However, because $NO_X$ emissions are already low using the current technology, the impact on visibility from the LNB would be very limited. Additionally, replacing the existing burners with LNB would change the natural gas flame profile, which would have unknown effects on the heat profile. Changing the heat profile could adversely affect the ability of the cracking furnaces to provide for the cracking reaction to take place and to continue to provide for 98 percent reduction of the total organic carbon in the fuel gas. The cracking furnaces also serve as control devices for the New Source Performance Standards (NSPS) under 40 CFR 60 Subpart NNN. CALPUFF model runs show that the visibility impairment caused by these emission units for the 98th percentile daily maximum impact is 0.01 deciviews at Great Smoky Mountains National Park. For these reasons, TDEC concluded that there are no $NO_X$ control technologies that are both technically feasible and reasonably cost-effective to reduce visibility in Class I Areas for these furnaces.

d. Batch Chemical Manufacturing

The batch chemical manufacturing operation has an operating permit to emit $NO_X$, $SO_2$, ammonia and PM. The operation is a compilation of specialty organic chemical batch manufacturing equipment located in five different buildings. Each of these pieces of equipment is controlled by fabric filters, water scrubbers, or caustic scrubbers.

$SO_2$ is controlled by caustic scrubbers, which are estimated to achieve 98 percent control. PM is controlled to a minimum efficiency of 95 percent. $NO_X$ has not been emitted by this unit in several years. However, if products were to be manufactured that emitted $NO_X$, they would be controlled by caustic scrubbers and the annual emissions would be limited to 14 tons. Ammonia emissions are controlled by water scrubbers which achieve control efficiencies from 20–60 percent and are limited to annual emissions of 22.4 tons. Given these high control efficiencies and the low total annual emissions allowed, TDEC concluded further control of $SO_2$, $NO_X$, ammonia, and PM would not be reasonable for the batch chemical manufacturing operation.

e. Boiler 24

Boiler 24 burns bituminous coal along with wastewater treatment biosludge and liquid chemical wastes. This unit is used for co-production of steam and electricity in support of manufacturing operations at the Kingsport plant as well as the destruction of biosludge from Eastman's wastewater treatment facility and waste chemicals.

Boiler 24 is equipped with an ESP for PM, and an overfire air system is built into the stoker design for $NO_X$ emission control. Additionally, because this boiler routinely burns a wastewater treatment biosludge that is about 85 percent water, the injection of this material cools the flame temperature and reduces $NO_X$ by approximately 20 percent. No additional $NO_X$ control technology was considered technically feasible. The most cost-effective option for control of $SO_2$ that is technically feasible has a cost-effectiveness of about $3,000–$4,000 per ton.

Eastman Chemical evaluated several $SO_2$ scrubbing options for boiler 24. Boiler 24 is in a different building than boilers 25–29. Therefore, there is no economy of scale with the lime handling system or caustic storage system. Also, there is little available space adjacent to Boiler 24. The absorber would have to be either elevated above the adjacent rail yard or located some distance away with ductwork spanning railroad tracks or a roadway. Similarly, to accommodate a new fabric filter, Eastman Chemical's options include retrofitting the ESP to a fabric filter, or demolishing the existing ESP and building a baghouse in its place. As a result, the most cost-effective option for control of $SO_2$ that is technically feasible has a cost-effectiveness of about $3,000-$4,000 per ton, and would reduce the three-year average of the maximum 98th percentile impact on visibility by approximately 0.1 deciview. TDEC concluded that no additional control of PM, $NO_X$ or $SO_2$ for BART should be required for Boiler 24.

f. EPA Assessment

EPA reviewed the TDEC BART determinations summarized above and agrees with Tennessee's analyses and conclusions for BART for Eastman Chemical, because the analyses were conducted consistent with EPA's BART Guidelines and EPA's *Air Pollution Control Cost Manual,* and reflect a reasonable application of EPA's guidance to this source.

3. TVA Cumberland

a. Background

The TVA Cumberland Fossil Plant has two pulverized-coal-fired steam generators that are considered BART-eligible. Units 1 and 2 are nominally rated at about 1,325 megawatts each.

b. BART Assessment

EGU Units 1 and 2 are both equipped with FGD for $SO_2$ control, SCR systems for controlling $NO_X$, and ESPs to control PM emissions. In addition, TVA Cumberland currently uses hydrated lime injection on both units to mitigate stack opacity.

*(1) $SO_2$ and $NO_X$ BART Review.* The two emission units at TVA Cumberland are also subject to the EPA CAIR. TVA Cumberland has already installed scrubbers and $NO_X$ controls on the emission units at this facility. As discussed in section V.C., Tennessee has opted to rely on CAIR to satisfy BART for $SO_2$ and $NO_X$ for its EGUs subject to CAIR, as allowed by 40 CFR 51.308(e)(4). Thus, TVA Cumberland submitted a BART exemption modeling demonstration for PM emissions only.

*(2) PM BART Review.* TDEC prepared an engineering analysis to determine whether there is a technically and economically feasible control scenario that represents BART for PM. The modeling analysis demonstrated that approximately 96 percent of the visibility impacts at the affected Class I areas can be attributed to condensable $PM_{10}$ emissions (*i.e.,* sulfites ($SO_3$)). Thus, the engineering evaluation for TVA Cumberland focuses on control of $SO_3$/sulfuric acid ($H_2SO_4$) emissions. The only option identified as technically feasible for controlling PM was to reduce additional $SO_3$ emissions at the Cumberland facility with a wet ESP. While application of a wet ESP would reduce visibility impacts, TDEC determined that not only would the

costs associated with retrofitting the facility with a wet ESP be high, but that the ESP would also require large volumes of water to operate it. TDEC estimated that the total capital investment required to install a wet ESP at this facility is approximately $176 million per emission unit, with total annual costs of approximately $50.5 million per year, and a corresponding cost-effectiveness of over $85,000 per ton of PM removed.

TDEC determined that for the TVA Cumberland Fossil Plant, no additional controls for PM will be required. Since the facility is currently well controlled for $SO_2$ and PM, additional control was removed from consideration during this implementation period based on cost and environmental impacts. Consistent with this determination, TDEC has adopted into the SIP and as a title V permit condition a limit of 0.5 lbs $SO_2$ per MMBtu of heat input which can be met with existing controls.

c. EPA Assessment

EPA agrees with Tennessee's analyses and conclusions for BART for the TVA Cumberland facility for PM. EPA notes that while TVA Cumberland presently operates a sorbent injection system on each unit to reduce $SO_3/H_2SO_4$ emissions to seven parts per million by volume, recent advances in this technology can also allow this technology to achieve emission rates comparable to those of a wet ESP at much lower cost. EPA expects Tennessee will evaluate this improved technology further in the next implementation period as part of its reasonable progress assessment. EPA concludes that the analyses conducted for the PM emissions are consistent with EPA's BART Guidelines and EPA's *Air Pollution Control Cost Manual,* and the conclusions reflect a reasonable application of EPA's guidance to this source.

Prior to the CAIR remand by the, EPA believed the State's demonstration that CAIR satisfies BART for $SO_2$ and $NO_X$ for affected EGUs for the first implementation period to be approvable and in accordance with 40 CFR 51.308(e)(4). However, as explained in section IV of this notice, the State's demonstration regarding CAIR and BART for EGUs, and other provisions in this SIP revision, are based on CAIR and thus, the Agency proposes today to issue a limited approval and a limited disapproval of the State's regional haze SIP revision.

4. DuPont-Old Hickory Plant

a. Background

The DuPont-Old Hickory Plant operates two BART-eligible units, boilers 20 and 24. Boiler 20 is a tangentially-fired coal unit with a rated capacity of 445 MMBtu/hr. Boiler 24 is a tangentially fired coal unit with a rated capacity of 315 MMBtu/hr. Boiler 24 is presently operated only during periods of peak demand, which typically occur in the winter, when boiler 20 has insufficient capacity to meet both the process and space heating demands of the facility.

b. BART Assessment

TDEC evaluated nine control strategies for reducing $SO_2$ and seven strategies for reducing $NO_X$ emissions. Based on boiler operating data supplied by DuPont Old Hickory, TDEC concluded that none of the control strategies were appropriate because the strategies did not address the different ways the boilers were operated during the year, depending upon the season. The strategies all overstated the actual impacts of the facility on regional haze. Therefore, instead of requiring the installation of control technology on the boilers, TDEC adopted seasonal operating limits in the DuPont operating permit. These limits constrain the ability of both boilers to operate at the same time, with more stringent limits in the summer when visibility impacts are the greatest. With these new limits, the facility's impacts on visibility near the Mammoth Cave Class I area are less than 0.5 deciview.

The emission limits adopted by TDEC, and incorporated into DuPont's title V operating permit, reduce the combined allowable $SO_2$ emissions from the boilers 20 and 24 by 20,834 lbs per day (lbs/d) in the summer (May through September) to 32,256 lbs/d and by 14,522 lbs/d in the winter (October through April) to 38,568 lbs/d. Therefore, the facility is reducing allowable $NO_X$ emissions from these units by 3,978 lbs/d in the summer to 6,120 lbs/d and by 3,330 lbs/d in the winter to 6,768 lbs/d. CALPUFF modeling based on these operating rates results in a reduction in visibility impact due to the facility's contribution which falls below the 0.5 deciview threshold TDEC applied for determining whether BART-eligible sources are subject to BART.

c. EPA Assessment

EPA agrees with Tennessee's analyses and conclusions for BART for the DuPont-Old Hickory Plant because the analyses were conducted in a manner that is consistent with EPA's BART Guidelines and EPA's *Air Pollution Control Cost Manual.* In addition, the conclusions reflect a reasonable application of EPA's guidance to this source.

5. Enforceability of Limits

The BART determinations for each of the facilities discussed above and the resulting BART emission limits were adopted by Tennessee into the State's regional haze SIP. TDEC incorporated the BART emission limits into state operating permits, and submitted these permits as part the State's regional haze SIP. The BART limits will also be added to the facilities' title V permits according to the procedures established in 40 CFR part 70 or 40 CFR part 71. The BART limits adopted in the SIP are as follows: (a) for Alcoa, a limitation of three percent sulfur in the petroleum coke used in the facility's electrode production operations; (b) for Eastman Chemical, a condition requiring compliance with more stringent $SO_2$ limitation on its boilers (*i.e.,* boilers 25–29 shall comply with the less stringent of the following emission limits: 0.20 lb $SO_2$/MMBtu of heat input or reduce uncontrolled $SO_2$ emissions by 92 percent); (c) for TVA-Cumberland Fossil Plant, emission limits consistent with existing controls (*i.e.,* 0.5 lb $SO_2$/MMBtu of heat input) are denoted as BART with no additional control measures; and (d) for DuPont-Old Hickory, a limit on the total combined daily emissions for boilers 20 and 24, based upon seasonal operating limits that reduce allowable $SO_2$ emissions from the affected units to 32,256 lbs/d in the summer and to 38,568 lbs/d in the winter, and allowable $NO_X$ emissions from these units to 6,120 lbs/d in the summer and to 6,768 lbs/d in the winter.

Tennessee is requiring Eastman Chemical, DuPont-Old Hickory and Alcoa to comply with these BART emission limits as follows: "*No later than five (5) years after publication in the Federal Register of U.S. EPA's approval of Tennessee's Regional Haze State Implementation Plan revision* * * *" to allow time for needed operational changes. The emission limits for TVA-Cumberland are consistent with existing controls and thus, are immediately effective. (For further details of the specific BART requirements, *see* also EPA's TSD to this action, section III.D.4, or section 7.5.2 of the Tennessee SIP Narrative.)

7. RPGs

The RHR at 40 CFR 51.308(d)(1) requires states to establish RPGs for each Class I area within the state

(expressed in deciviews) that provide for reasonable progress towards achieving natural visibility. VISTAS modeled visibility improvements under existing Federal and state regulations for the period 2004–2018, and additional control measures which the VISTAS states planned to implement in the first implementation period. At the time of VISTAS modeling, some of the other states with sources potentially impacting visibility at the Tennessee Class I areas had not yet made final control determinations for BART and/or reasonable progress, and thus, these controls were not included in the modeling submitted by Tennessee. Any controls resulting from those determinations will provide additional emissions reductions and resulting visibility improvement, which give further assurances that Tennessee will achieve its RPGs. This modeling demonstrates that the 2018 base control scenario provides for an improvement in visibility better than the uniform rate of progress for both of the Tennessee Class I areas for the most impaired days over the period of the implementation plan and ensures no degradation in visibility for the least impaired days over the same period.

As shown in Table 6 below, Tennessee's RPGs for the 20 percent worst days provide greater visibility improvement by 2018 than the uniform rate of progress for the State's Class I areas (*i.e.,* 25.79 deciviews in 2018). Also, the RPGs for the 20 percent best days provide greater visibility improvement by 2018 than current best day conditions. The modeling supporting the analysis of these RPGs is consistent with EPA guidance prior to the CAIR remand. The regional haze provisions specify that a state may not adopt a RPG that represents less visibility improvement than is expected to result from other CAA requirements during the implementation period. 40 CFR 51.308(d)(1)(vi). Therefore, the CAIR states with Class I areas, like Tennessee, took into account emission reductions anticipated from CAIR in determining their 2018 RPGs.[17]

TABLE 6—TENNESSEE 2018 RPGS

[In deciviews]

| Class I area | Baseline visibility—20 percent worst days | 2018 RPG—20 percent worst days (improvement from baseline) | Uniform rate of progress at 2018—20 percent worst days | Baseline visibility—20 percent best days | 2018 RPG—20 percent best days (improvement from baseline) |
|---|---|---|---|---|---|
| Great Smoky Mountains National Park | 30.28 | 23.50 (6.78) | 25.79 | 13.58 | 12.11 (1.47) |
| Joyce Kilmer-Slickrock Wilderness Area | 30.28 | 23.50 (6.78) | 25.79 | 13.58 | 12.11 (1.47) |

The RPGs for the Class I areas in Tennessee are based on modeled projections of future conditions that were developed using the best available information at the time the analysis was done. These projections can be expected to change as additional information regarding future conditions becomes available. For example, new sources may be built, existing sources may shut down or modify production in response to changed economic circumstances, and facilities may change their emission characteristics as they install control equipment to comply with new rules. It would be both impractical and resource-intensive to require a state to continually adjust the RPG every time an event affecting these future projections changed.

EPA recognized the problems of a rigid requirement to meet a long-term goal based on modeled projections of future visibility conditions, and addressed the uncertainties associated with RPGs in several ways. EPA made clear in the RHR that the RPG is not a mandatory goal. *See* 64 FR at 35733. At the same time, EPA established a requirement for a midcourse review and, if necessary, correction of the states' regional haze plans. *See* 40 CFR 52.308(g). In particular, the RHR calls for a five year progress review after submittal of the initial regional haze plan. The purpose of this progress review is to assess the effectiveness of emission management strategies in meeting the RPG and to provide an assessment of whether current implementation strategies are sufficient for the state or affected states to meet their RPGs. If a state concludes, based on its assessment, that the RPGs for a Class I area will not be met, the RHR requires the state to take appropriate action. *See* 40 CFR 52.308(h). The nature of the appropriate action will depend on the basis for the state's conclusion that the current strategies are insufficient to meet the RPGs. Tennessee specifically committed to follow this process in the long-term strategy portion of its submittal.

EPA anticipates that the Transport Rule will result in similar or better improvements in visibility than predicted from CAIR. Because the Transport Rule is not final, however, EPA does not know at this time how it will affect any individual Class I area and cannot accurately model future conditions based on its implementation. By the time Tennessee is required to undertake its five year progress review, however, it is likely that the impact of the Transport Rule and other measures can be meaningfully assessed. If, in particular Class I areas, the Transport Rule does not provide similar or greater benefits than CAIR and meeting the RPGs at one of its Class I Federal areas is in jeopardy, the State will be required to address this circumstance in its five year review. Accordingly, EPA proposes to approve Tennessee's RPGs for the Great Smoky Mountains National Park and the Joyce Kilmer-Slickrock Wilderness Area.

### *D. Coordination of RAVI and Regional Haze Requirements*

EPA's visibility regulations direct states to coordinate their RAVI LTS and monitoring provisions with those for regional haze, as explained in sections III.F and III.G. of this action. Under EPA's RAVI regulations, the RAVI portion of a state SIP must address any integral vistas identified by the FLMs pursuant to 40 CFR 51.304. An *integral vista* is defined in 40 CFR 51.301 as a "view perceived from within the mandatory Class I Federal area of a specific landmark or panorama located outside the boundary of the mandatory Class I Federal area." Visibility in any mandatory Class I Federal area includes any integral vista associated with that

[17] Many of the CAIR states without Class I areas similarly relied on CAIR emission reductions within the state to address some or all of their contribution to visibility impairment in other states' Class I areas, which the impacted Class I area state(s) used to set the RPGs for their Class I area(s). Certain surrounding non-CAIR states also relied on reductions due to CAIR in nearby states to develop their regional haze SIP submittals.

area. The FLMs did not identify any integral vistas in Tennessee. In addition, neither Class I area in Tennessee is experiencing RAVI, nor are any of its sources affected by the RAVI provisions. Thus, the April 4, 2008, Tennessee regional haze SIP submittal does not explicitly address the two requirements regarding coordination of the regional haze with the RAVI LTS and monitoring provisions. However, Tennessee previously made a commitment to address RAVI should the FLM certify visibility impairment from an individual source.[18] EPA finds that this regional haze submittal appropriately supplements and augments Tennessee's RAVI visibility provisions to address regional haze by updating the monitoring and LTS provisions as summarized below in this section.

In the April 4, 2008, submittal, TDEC updated its visibility monitoring program and developed a LTS to address regional haze. Also in this submittal, TDEC affirmed its commitment to complete items required in the future under EPA's RHR. Specifically, TDEC made a commitment to review and revise its regional haze implementation plan and submit a plan revision to EPA by July 31, 2018, and every 10 years thereafter. *See* 40 CFR 51.308(f). In accordance with the requirements listed in 40 CFR 51.308(g) of EPA's regional haze regulations and 40 CFR 51.306(c) of the RAVI LTS regulations, TDEC made a commitment to submit a report to EPA on progress towards the RPGs for each mandatory Class I area located within Tennessee, and in each mandatory Class I area located outside Tennessee which may be affected by emissions from within Tennessee. The progress report is required to be in the form of a SIP revision and is due every five years following the initial submittal of the regional haze SIP. Consistent with EPA's monitoring regulations for RAVI and regional haze, Tennessee will rely on the IMPROVE network for compliance purposes, in addition to any RAVI monitoring that may be needed in the future. *See* 40 CFR 51.305, 40 CFR 51.308(d)(4). Also, the Tennessee NSR rules, previously approved in the State's SIP, continue to provide a framework for review and coordination with the FLMs on new sources which may have an adverse impact on visibility in either form (*i.e.,* RAVI and/or regional haze) in any Class I Federal area. The Tennessee SIP contains a plan addressing the associated monitoring and reporting requirements. *See* 62 FR 35681 (July 2, 1997); 40 CFR 52.2239(c)(147). Although EPA's approvals of these rules neglected to remove the Federally promulgated provisions set forth in 40 CFR 52.2234, EPA corrected this omission in a separate rulemaking on April 21, 2010 (75 FR 20783).

[18] Tennessee submitted its visibility SIP revisions addressing RAVI on February 9, 1993, and December 19, 1994, which EPA approved on July 2, 1997 (62 FR 35681). Tennessee also submitted a SIP revision addressing PSD/NSR visibility provisions on January 17, 1995, that EPA approved on July 18, 1996 (61 FR 37387).

*E. Monitoring Strategy and Other Implementation Plan Requirements*

The primary monitoring network for regional haze in Tennessee is the IMPROVE network. As discussed in section V.B.2. of this notice, there is currently one IMPROVE site in Tennessee, which serves as the monitoring site for both the Great Smoky Mountains National Park and Joyce Kilmer-Slickrock Wilderness Area, both of which lie partly in Tennessee and partly in North Carolina.

IMPROVE monitoring data from 2000–2004 serves as the baseline for the regional haze program, and is relied upon in the April 4, 2008, regional haze submittal. In the submittal, Tennessee states its intention to rely on the IMPROVE network for complying with the regional haze monitoring requirement in EPA's RHR for the current and future regional haze implementation periods.

Data produced by the IMPROVE monitoring network will be used nearly continuously for preparing the five-year progress reports and the 10-year SIP revisions, each of which relies on analysis of the preceding five years of data. The Visibility Information Exchange Web System (VIEWS) Web site has been maintained by VISTAS and the other RPOs to provide ready access to the IMPROVE data and data analysis tools. Tennessee is encouraging VISTAS and the other RPOs to maintain the VIEWS or a similar data management system to facilitate analysis of the IMPROVE data.

In addition to the IMPROVE measurements, there is long-term limited monitoring by FLMs which provides additional insight into progress toward regional haze goals. Such measurements include:

- Web cameras operated by the National Park Service at Look Rock, Tennessee at the Great Smoky Mountains National Park
- An integrating nephelometer for continuously measuring light scattering, operated by the National Park Service at Look Rock, Tennessee
- A Tapered Element Oscillating Microbalance for continuously measuring $PM_{2.5}$ mass concentration, operated by the National Park Service at Look Rock, Tennessee.

In addition, Tennessee and the local air agencies in the State operate a comprehensive $PM_{2.5}$ network of filter-based Federal reference method monitors, continuous mass monitors, filter based speciated monitors and the continuous speciated monitors.

*F. Consultation With States and FLMs*

1. Consultation With Other States

In December 2006 and in May 2007, the State Air Directors from the VISTAS states held formal interstate consultation meetings. The purpose of the meetings was to discuss the methodology proposed by VISTAS for identifying sources to evaluate for reasonable progress. The states invited FLM and EPA representatives to participate and to provide additional feedback. The Directors discussed the results of analyses showing contributions to visibility impairment from states to each of the Class I areas in the VISTAS region.

TDEC has evaluated the impact of Tennessee sources on Class I areas in neighboring states. The state in which a Class I area is located is responsible for determining which sources, both inside and outside of that state, to evaluate for reasonable progress controls. Because many of these states had not yet defined their criteria for identifying sources to evaluate for reasonable progress, Tennessee applied its AOI methodology to identify sources in the State that have emission units with impacts large enough to potentially warrant further evaluation and analysis. The State identified 13 emission units in Tennessee with a contribution of one percent or more to the visibility impairment at the following four Class I areas in three neighboring states: Cohutta Wilderness area, Georgia; Mammoth Cave National Park, Kentucky; and Linville Gorge and Shining Rock Wilderness areas, North Carolina. Based on an evaluation of the four reasonable progress statutory factors, Tennessee determined that there are no additional control measures for these Tennessee emission units that would be reasonable to implement to mitigate visibility impacts in Class I areas in these neighboring states. TDEC has consulted with these states regarding its reasonable progress control evaluations showing no cost-effective controls available for those emission units in Tennessee contributing at least one percent to visibility impairment at Class I areas in the states. Additionally, TDEC sent letters to the other states in the VISTAS region documenting its

analysis using the State's AOI methodology that no $SO_2$ emission units in Tennessee contribute at least one percent to the visibility impairment at the Class I areas in those states. No adverse comments were received from the other VISTAS states. The documentation for these formal consultations is provided in Appendix J of Tennessee's SIP.

Regarding the impact of sources outside of the State on Class I areas in Tennessee, TDEC sent letters to Alabama, Arkansas, Georgia, Kentucky, Missouri, Mississippi, North Carolina, South Carolina, Virginia and West Virginia pertaining to emission units within these states that the State believes contributed one percent or higher to visibility impairment in the Tennessee Class I areas. At that time, these neighboring states were still in the process of evaluating BART and reasonable progress for their sources. Any controls resulting from those determinations will provide additional emissions reductions and resulting visibility improvement, which gives further assurances that Tennessee will achieve its RPGs. Therefore, to be conservative, Tennessee opted not to rely on any additional emission reductions from sources located outside the State's boundaries beyond those already identified in the State's regional haze SIP submittal and as discussed in section V.C.1. (Federal and state controls in place by 2018) of this action.

Tennessee received letters from the Mid-Atlantic/Northeast Visibility Union (MANE–VU) RPO States of Maine, New Jersey, New Hampshire, and Vermont in the spring of 2007, stating that based on MANE–VU's analysis of 2002 emissions data, Tennessee contributed to visibility impairment to Class I areas in those states. The MANE–VU states identified five TVA EGU stacks [19] in Tennessee that they would like to see controlled to 90 percent efficiency. They also requested a control strategy to provide a 28 percent reduction in $SO_2$ emissions from sources other than EGUs that would be equivalent to MANE–VU's proposed low sulfur fuel oil strategy. Working with Tennessee, TVA has controlled or is expecting to control three of the EGUs, (Kingston 1 & 2 and John Sevier), by the end of 2011. The remaining two EGUs, (Gallatin and Johnsonville), have been discussed with TVA. TVA has indicated that it will either repower or shut down the Johnsonville facility by the next implementation period in 2018 and will ultimately control Gallatin if needed to meet its CAIR obligations or more stringent controls to meet increasingly stringent NAAQS. TDEC evaluated both EGU and non-EGU sources to determine what controls are reasonable in this first implementation period. TDEC believes that these emissions reductions satisfy MANE–VU's request.

EPA finds that Tennessee has adequately addressed the consultation requirements in the RHR and appropriately documented its consultation with other states in its SIP submittal.

2. Consultation With the FLMs

Through the VISTAS RPO, Tennessee and the nine other member states worked extensively with the FLMs from the U.S. Departments of the Interior and Agriculture to develop technical analyses that support the regional haze SIPs for the VISTAS states. The proposed regional haze plan for Tennessee was out for public comment and FLM discussions in the November to December 2007 period. Tennessee subsequently modified the plan to address comments received on this initial version and reissued it for a second round of public participation in the February to March 2008 period. The FLMs submitted no significant adverse comments regarding the State's regional haze SIP. The FLMs requested that Tennessee add more details to support the State's conclusions. Additionally, some of the FLM staff had difficulty in navigating through the compact disc of electronic support materials. Improvements were made to improve navigability. To address the requirement for continuing consultation procedures with the FLMs under 40 CFR 51.308(i)(4), TDEC made a commitment in the SIP to ongoing consultation with the FLMs on regional haze issues throughout implementation of its plan, including annual discussions. TDEC also affirms in the SIP that FLM consultation is required for those sources subject to the State's NSR regulations.

*G. Periodic SIP Revisions and Five-Year Progress Reports*

As also summarized in section V.D. of this action, consistent with 40 CFR 51.308(g), TDEC affirmed its commitment to submitting a progress report in the form of a SIP revision to EPA every five years following this initial submittal of the Tennessee regional haze SIP. The report will evaluate the progress made towards the RPGs for each mandatory Class I area located within Tennessee and in each mandatory Class I area located outside Tennessee which may be affected by emissions from within Tennessee. Tennessee also offered recommendations for several technical improvements that, as funding allows, can support the State's next LTS. These recommendations are discussed in detail in the Tennessee submittal in Appendix K.

If another state's regional haze SIP identifies that Tennessee's SIP needs to be supplemented or modified, and if, after appropriate consultation Tennessee agrees, today's action may be revisited, or additional information and/or changes will be addressed in the five-year progress report SIP revision.

**VI. What action is EPA proposing to take?**

EPA is proposing a limited approval and a limited disapproval of a revision to the Tennessee SIP submitted by the State of Tennessee on April 4, 2008, as meeting some of the applicable regional haze requirements as set forth in sections 169A and 169B of the CAA and in 40 CFR 51.300–308, as described previously in this action.

**VII. Statutory and Executive Order Reviews**

*A. Executive Order 12866, Regulatory Planning and Review*

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled "Regulatory Planning and Review."

*B. Paperwork Reduction Act*

Under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* OMB must approve all "collections of information" by EPA. The Act defines "collection of information" as a requirement for answers to * * * identical reporting or recordkeeping requirements imposed on ten or more persons * * *. 44 U.S.C. 3502(3)(A). The Paperwork Reduction Act does not apply to this action.

*C. Regulatory Flexibility Act (RFA)*

The RFA generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the CAA do not create any new

[19] These five TVA EGUs have been addressed by the April 14, 2011, CAA settlement discussed in V.C.5.B.1.

requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-state relationship under the CAA, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

*D. Unfunded Mandates Reform Act*

Under sections 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that today's proposal does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action proposes to approve pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

*E. Executive Order 13132, Federalism*

*Federalism* (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by state and local governments, or EPA consults with state and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts state law unless the Agency consults with state and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

*F. Executive Order 13175, Coordination With Indian Tribal Governments*

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This proposed rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments. Thus, Executive Order 13175 does not apply to this rule. EPA specifically solicits additional comment on this proposed rule from tribal officials.

*G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks*

*Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

*H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use*

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) because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use "voluntary consensus standards" (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen oxides, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

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

Dated: May 31, 2011.

**A. Stanley Meiburg,**

*Acting Regional Administrator, Region 4.*

[FR Doc. 2011–14292 Filed 6–8–11; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

**47 CFR Part 4**

**[PS Docket No. 11–82; FCC 11–74]**

## Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The purpose of this document is to seek comment on a proposal to extend the Commission's communications outage reporting requirements to interconnected Voice over Internet Protocol (VoIP) service providers and broadband Internet Service Providers (ISPs). This action will help ensure that our current and future 9–1–1 systems are as reliable and resilient as possible and assist our Nation's preparedness for man-made or natural disasters, such as Hurricane Katrina.

**DATES:** Submit comments on or before August 8, 2011. Submit reply comments on or before October 7, 2011. 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 August 8, 2011.

**ADDRESSES:** You may submit comments, identified by PS Docket No. 11–82, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments on the Commission's Electronic Comment Filing System (ECFS).
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, *etc.*) by e-mail: *FCC504@fcc.gov* or phone: (202) 418–0530 or TTY: (202) 418–0432.

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 the Federal Communications Commission via e-mail to *PRA@fcc.gov* and to Nicholas A. Fraser, Office of Management and Budget, via e-mail to *Nicholas_A._Fraser@omb.eop.gov* or via fax at 202–395–5167. For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Gregory Intoccia, Public Safety and Homeland Security Bureau, at (202) 418–1300, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554; or via the Internet to *Gregory.Intoccia@fcc.gov.*

For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an e-mail to *PRA@fcc.gov* or contact Judith Boley Herman at (202) 418–0214 or *judith.b.herman@fcc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

1. Broadband technologies delivering communications services to end users have changed behaviors and revolutionized expectations in American life and are fast becoming substitutes for communications services provided by older, legacy communications technologies. In 2010, 28 percent of the more than 89 million residential telephone subscriptions were provided by interconnected VoIP providers. Broadband networks now carry a substantial volume of 9–1–1 traffic. They are also a significant form of communications in times of crisis. Communications outages to broadband facilities threaten the public's ability to summon in emergency situations. The National Security and Emergency Preparedness posture of the United States depends on the availability of broadband communications during times of emergencies, and it is one of the core responsibilities of the Commission. In 2010 alone, there were a number of significant outages to broadband networks and services in various parts of the Nation.

2. The resilience of the broadband communications infrastructure directly impacts the emergency preparedness and readiness posture of the United States. Outages to broadband networks can have a significant impact on emergency services, consumers, businesses, and governments. The most practical, effective way to maintain emergency preparedness and readiness is to work continuously to minimize the incidence of routine outages.

3. Since 2005, the Commission has required providers of interconnected VoIP services to supply 9–1–1 emergency calling capabilities to their customers as a mandatory feature of the service. "Interconnected" VoIP services allow a user generally to receive calls from and make calls to the legacy telephone network. Under the Commission's rules, interconnected VoIP providers must deliver all 9–1–1 calls to the local emergency call center; deliver the customer's call-back number and location information where the emergency call center is capable of receiving it; and inform their customers of the capabilities and limitations of their VoIP 9–1–1 service. By Presidential Directives and Executive Orders the FCC has been assigned a critical role in the Nation's emergency preparedness and response efforts. Presidential Directives and Executive Orders and their implementing documents charge the FCC with ensuring the resiliency and reliability of the Nation's commercial and public safety communications infrastructure.

4. The Commission has many years of experience working with communications providers to improve communications resiliency and emergency readiness. The Commission's current outage reporting rules, applicable to legacy communications systems, allows the Commission staff to collect and analyze key outage data that has helped to reduce outages. With the percent of VoIP-only households and businesses increasing, it is essential for safety reasons that we extend outage reporting to VoIP.

5. The Commission's existing approach includes the analysis and response to information received during an emergency. During Hurricane Katrina, the Commission's outage reporting data was the Federal government's primary and best source of information about the condition of critical communications infrastructure in the disaster area. Using this information the Commission was able to contact affected reporting providers to establish an *ad hoc* data-driven working group to help manage the crisis.

6. Currently, only providers of legacy circuit-switched voice and/or paging communications over wireline, wireless, cable, and satellite communications services must report communications outages. Commission analysis of industry-wide outage reports has led to improvements in the engineering, provisioning, and deployment of communications infrastructure and services. The Commission has been able to share its analysis with members of industry, providing an understanding of recurring problems nationwide that an individual provider cannot know by itself. This process has also made communications networks more robust

to the effects of natural or man-made disasters, thereby improving our Nation's readiness posture. Reducing the number of communications outages greatly improves the resiliency of the communications critical infrastructure to withstand disruptions that would otherwise jeopardize the Nation's ability to communicate during emergency events, including to the Nation's 9–1–1 system.

7. In this proceeding, we seek to extend these benefits to the broadband communications networks frequently used for emergency response today. We propose to extend the Commission's Part 4 communications outage reporting requirements to include both interconnected VoIP service providers and broadband ISPs. This change would allow the Commission, and other Federal agencies, to track and analyze information on outages affecting broadband networks. The availability of this information would also help the Commission determine the extent of the problem nationwide, identify recurring problems, determine whether action can be taken immediately to help providers recover or prevent future outages, and ensure to the extent possible that broadband networks are prepared for disasters. Our proposed action will allow the Commission to use the same successful process it currently uses with wireline and wireless providers to refine best practices to prepare broadband communications networks better for emergency situations.

8. In this *Notice of Proposed Rulemaking* (*NPRM*), with respect to both interconnected VoIP service and broadband Internet service we seek comment on reporting thresholds based on circumstances specific to each different type of service or technology. Because requiring interconnected VoIP service providers and broadband ISPs to report outages may impose a burden on them, we welcome comments quantifying this burden and recommendations to mitigate it. We believe that the type of information that would be collected for outage reporting is already collected by providers for their own internal use, and that reporting the information on a confidential basis to the Commission would create a minimal burden.

9. We encourage comments on the thresholds or circumstances that should be included to improve our ability to address communication system vulnerabilities and to help prevent future outages through the development and refinement of best practices. We encourage interested parties to address these issues in the contexts of interconnected VoIP service and broadband Internet service. We also encourage commenters to address how the proposed information collection would facilitate best practices development and increased network security, reliability and resiliency throughout the United States and its Territories. We also seek comment on sources of authority.

10. 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, Public Law 104–13. Public and agency comments are due August 8, 2011. 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; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

## II. Background

11. In this section, we review the key prior Commission policies and results of those policies leading up to the present rules and the current proposal for extending the Commission's outage reporting requirements to interconnected VoIP service providers and broadband Internet service providers. In its initial 1992 *Initial Outage Reporting Order,* released on February 27, 1992 and published in the **Federal Register** at 57 FR 7883, March 5, 1992, the Commission established network outage reporting requirements for wireline providers. In 2004, in the *Second Outage Reporting Order,* released on August 19, 2004 and published in the **Federal Register** at 69 FR 70316, Dec. 3, 2004, the Commission extended outage reporting requirements to include providers of wireless (including paging), cable, and satellite communications.

12. The Commission uses outage information submitted pursuant to Part 4 of its rules to, among other things, address communication system vulnerabilities and help prevent future outages. The Commission staff accomplishes this objective by using statistically meaningful trends in data as well as associated technical analysis to gather communications providers together in coordinated efforts to improve security, reliability and resiliency. Where necessary, the Commission also recommends policy changes to address persistent problems. The Commission works with each individual reporting service provider to monitor and address specific communications vulnerabilities identified in outage reports.

13. As a result of reporting pursuant to the Commission's Part 4 outage reporting rules, positive results have been achieved. For example, the frequency of wireline outages, which had spiked in 2008, has dramatically decreased since the issue was identified through the Commission's ongoing analyses of monthly wireline outages. Estimated lost 9–1–1 calls due to wireline outages were reduced by more than 50 percent from peak when the Commission worked with the Network Reliability Steering Committee (NRSC) to reduce wireline outages. As a result of the conclusions drawn and the additional work of the NRSC, providers were able to take corrective action. These reductions occurred because of the Commission's analysis of outage reporting data and the sharing of data among Commission and industry network experts. Thus the Commission's existing outage reporting has increased the resiliency of the communications infrastructure and increased the availability of public safety communication services.

14. On March 16, 2010, the Commission delivered to Congress the National Broadband Plan, which recommended that the Commission extend its Part 4 outage reporting rules to broadband ISPs and interconnected VoIP service providers as "the lack of data limits our understanding of network operations and of how to prevent future outages."

15. In July 2010, the Public Safety and Homeland Security Bureau released a *Public Notice* in which it sought comment on a variety of issues related to whether, and if so how, the Commission should extend coverage of its Part 4 rules to apply to broadband ISPs and interconnected VoIP service

providers. The Bureau considered this information in preparing this *NPRM.*

## III. Extending Outage Reporting Requirements

### *A. Interconnected VoIP Service Providers*

16. Interconnected VoIP services increasingly are viewed by consumers as a substitute for traditional telephone service. This is also reflected in our 9–1–1 emergency call system today, where we estimate that approximately 28 percent of residential wireline 9–1–1 calls are made using VoIP service. In keeping with increased public reliance on interconnected VoIP services, we propose to extend our outage reporting rules to interconnected VoIP service providers. In 2010, there were 29 million interconnected residential and business VoIP subscriptions in the United States. Between June 2009 and June 2010, interconnected residential and business VoIP subscriptions increased from 24 million to 29 million and retail switched access lines decreased from 133 million to 122 million. Unlike wireline service, currently the Commission has no mechanism to identify outages of VoIP service that impact end users and cannot address the cause of 9–1–1 outages relating to VoIP service. Applying outage reporting requirements to these services brings the reporting requirements into line with existing E9–1–1 obligations.

17. We propose to apply our outage reporting requirements to both facilities-based and non-facilities-based interconnected VoIP service providers. Both groups are subject to our E9–1–1 obligation. A reporting requirement that extends only to facilities-based interconnected VoIP service providers would not result in reporting of all significant VoIP service outages experienced by end users and may put in jeopardy the ability to receive 9–1–1 calls. Our current rules require communications providers to report on service outages that affect their customers even if they do not own or operate the facilities that failed. We seek comment on this proposal.

18. Currently, under the Commission's Part 4 outage reporting rules, an "outage" is defined to include "a significant degradation in the ability of an end user to establish and maintain a channel of communications as a result of failure or degradation in the performance of a communications provider's network." Our rules tailor the definition of a reportable significant degradation to communications over cable, telephony carrier tandem, satellite, System Signaling 7 ("SS7"), wireless, or wireline facilities. Broadband networks operate differently than legacy networks, so the impact of outages is likely to be different. We seek comment on the definition of "outage" as applicable to these providers. We believe that a complete loss of the ability to complete calls should be included. We seek comment on whether there should also be a threshold based on lost or delayed packets. Should the Commission use a concept such as "loss of generally-useful availability or connectivity" and if so, how should we define it? Should we adopt the metrics used by the Internet Engineering Task Force (IETF), such as packet loss, round-trip latency, and jitter? The Commission recognizes that wireless and satellite networks include specific latency challenges not found in wireline-only networks. Should the thresholds be altered to address the unique architectural characteristics and challenges of wireless, satellite, cable, and wireline systems used by interconnected VoIP service providers? If the thresholds need to be altered, what values should be used to represent the loss of generally-useful availability and connectivity? How should the concept itself be revised to provide more useful information for analysis purposes? What voice quality-related network metrics are routinely reported to operations support systems in carrier-operated VoIP architectures? Do the Real-time Transport Control Protocol (RTCP) round-trip and Session Initiation Protocol (SIP) Event Package for Voice Quality Reporting provide guidance for suitable metrics that are already being collected for purposes other than outage reporting? How should the number of potentially affected users be counted for interconnected VoIP service providers? Can the number of assigned telephone numbers for non-mobile VoIP service users be used in a manner similar to what is used for wireline service providers? We recognize the difficulty of distinguishing precisely when a VoIP end system cannot place a call as opposed to when it is simply temporarily disconnected from the network due to user choice or home network failure. Can statistical measures that compare typical to current device registration counts (*e.g.,* number of active SIP registration entries) be used to detect and measure large-scale outages?

19. For wireless service providers, the current rules require the service provider to estimate the simultaneous call capacity lost and then multiply the result by a concentration ratio of eight (to convert the number of users affected to the number of potentially affected users). Should a similar construct be used for mobile VoIP service users? Is there a direct estimate of the number of potentially affected users that would be preferable? For both wireline and wireless service providers, should the failure of core routers, network servers, SIP proxy servers, Serving General Packet Radio Service (GPRS) and Gateway GPRS support nodes, call session control function (CSCF), home subscriber servers (HSS), root name servers, provider-operated Domain Name System (DNS) servers, Dynamic Host Control Protocol (DHCP) servers, Call Agents, Session Border Controllers, Signaling Gateways, or some other type of communications equipment be reportable similar to the current reporting requirement for Mobile Switching Center failures? Should special considerations be given to services provided via VoIP to PSAPs? How should outages that are observable by end users as performance degradations (*e.g.,* increased latency and/or jitter) be addressed? How should we account for those differences in our outage reporting rules? Should the same or a different standard apply to interconnected VoIP service providers who provide service to end users with wireless applications?

20. Based on how interconnected VoIP service is typically configured and provided, we propose that a significant degradation of interconnected VoIP service exists and must be reported when an interconnected VoIP service provider has experienced an outage or service degradation for at least 30 minutes: (a) On any major facility (*e.g.,* Call Agent, Session Border Controller, Signaling Gateway, CSCF, HSS) that it owns, operates, leases, or otherwise utilizes; (b) potentially affecting generally useful availability and connectivity of at least 900,000 user minutes (*e.g.,* average packet loss of greater than one percent for 30,000 users for 30 minutes); or (c) otherwise potentially affecting special offices, or special facilities, including 9–1–1 PSAPs. We seek comment on whether the proposed reporting thresholds are appropriate. Should some other analogous threshold be considered for interconnected VoIP service providers? Should the thresholds be equally applied to redundant facilities?

### *B. Broadband Internet Service Providers*

21. Interconnected VoIP services ride over broadband networks. If the underlying communications network fails, the VoIP service, including its Commission-mandated 9–1–1

capabilities, will fail as well. Thus we propose to extend our outage reporting rules to include broadband ISPs, a term which includes broadband Internet access service providers and broadband backbone ISPs. While there is increasing evidence that major outages are occurring on these providers' facilities, and those outages may disable 9–1–1 and other service capabilities, currently there are no Commission requirements to report such outages. The Commission accordingly is unable to analyze underlying causes, support the development of best practices that would lead to better overall network performance. We seek comment on all aspects of this proposal.

22. We seek comment on whether both facilities-based and non-facilities based broadband ISPs should be required to report outages that meet a certain threshold. Inclusion of both of these types of providers we believe would ensure outage reporting covers Internet consumers and businesses that purchase Internet access through less traditional access arrangements (*e.g.,* prepaid Internet access cards).

23. Some broadband ISPs provide Internet access directly connecting to end users, while others provide the connectivity and related services needed to establish and maintain end-to-end IP communications among independently-operated networks. While we identify two broad categories of broadband ISPs, we seek comment on whether there are other categories of ISPs the Commission should consider for outage reporting purposes.

24. A broadband Internet access service provider aggregates end-user communications, usually within a specific geographic region. For this proceeding, we propose to define a "broadband Internet access service provider" as a provider of mass-market retail service by wire or radio that is able to support interconnected VoIP service as defined in our E11 rules. Alternatively, we could define a "broadband Internet access service provider" as a provider of mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term would also encompass providers of any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence. We seek comment on this alternative approach and any other alternative definitions.

25. We propose to define a "broadband backbone ISP" to be one that provides long-haul transmission for one or more broadband Internet access service providers (*e.g.,* typically connecting traffic among major cities). We seek comment on this proposed definition.

26. We distinguish between broadband Internet access service providers and broadband backbone ISPs because of the different roles that they perform. Often a single organization may fulfill both types of broadband ISP roles, providing roles as broadband Internet access service provider and as broadband backbone ISP. We seek comment on the definitions that we should use for purposes of outage reporting.

27. *Broadband Internet Access Service Providers.* Broadband Internet access service providers aggregate end-user communications, usually within a specific geographic region. Examples of broadband Internet access service providers are local exchange carriers that provide end-user traffic access to the Internet, and cable system operators that aggregate the traffic of residential end users using cable modem technology and offer access to the Internet.

28. Broadband Internet access service providers are the conduit for delivering broadband services to the American public and business community. When outages occur that severely degrade the delivery of the broadband services, end users are negatively affected, which can include 9–1–1 services. Without a reporting requirement, however, it is nearly impossible to determine the extent, the effect, and the consequences of broadband outages.

29. Broadband Internet access service providers continue to show significant growth in subscribership. Between 1999 and 2009, the number of fixed-location business and residential connections grew at an annual compound rate of 42 percent, increasing from 2 million to 81 million connections. This growth reflects the American public's increasing reliance on broadband Internet access service to conduct important daily communications.

30. We therefore propose to extend the outage reporting requirements in Part 4 of our rules to broadband Internet access service providers. Consistent with the current definition of "outage" in Part 4 of the Commission's rules, which places emphasis on a "significant degradation" of communications, we propose that an outage in the context of broadband Internet access service provider be defined as "the loss to the end user of generally-useful availability and Internet connectivity."

31. Should we measure "generally-useful availability and connectivity" of broadband Internet service as it relates to a broadband Internet access service provider as the operational state in which the transmission from the end user to the broadband ISP Point of Presence (PoP) is operating as designed for normal use, the logical functions and relay systems required from ISPs are operating as designed for normal use, and the end user is not prevented by the broadband Internet access service provider from establishing communications with any destination device on the global Internet that has an assigned Internet Protocol address?

32. We seek comment on whether for broadband Internet access service providers the "loss of generally-useful availability and connectivity" can be measured using the metrics defined by the IETF, such as packet loss, round-trip latency, or jitter from the source to the destination host? Are there additional metrics that should be used to trigger outage reporting? There are differences in the various architectures of different types of communications systems employed by broadband Internet access service providers that may affect the delivery of Internet services. We seek comment on the applicability of the IETF metrics and their values for these types of service providers. Based on an examination of commercial practices, and considering the apparent lack of standardized values for the metrics presented here, we believe that the appropriate values should be packet loss of one percent or more, round-trip latency of 100 ms or more, or jitter of 4 ms or more from the source to the destination host in order to trigger outage reporting. Are these values appropriate for all types of broadband Internet access service providers? Are there more appropriate values? What are they and why are they better? How should the number of potentially affected users be counted for broadband Internet access service providers? For non-mobile users, can the number of IP addresses be used as a direct estimate of the number of potentially affected non-mobile users? In the cases where Dynamic Host Configuration Protocol (DHCP) is used to assign IP addresses by Internet access service providers, how does its use affect the estimate of the number of potentially affected users given the dynamic re-use of IP addresses? Should there be a multiplier introduced to improve the estimate? For wireless service providers, the current rules require the service provider to

estimate the simultaneous call capacity lost and then multiply the result by a concentration ratio of eight (to convert the number of users affected to the number of potentially affected users). Should a similar construct be used for non-mobile broadband access users? Is there a direct estimate of the number of potentially affected users that would be preferable? We also understand that performance degradations on control elements in ISP networks can result in Internet service that is neither generally useful nor available to end users. We seek comment on what thresholds should be set to measure outages of this nature. We seek comment on whether these outage definitions are appropriate, and how these user-centric metrics might be aggregated into a more meaningful metric that can be the basis for reporting.

33. Should we require a broadband Internet access service provider to submit reports in cases similar to the current reporting requirements for voice service providers? We seek comment on requiring a report when the provider has experienced an outage or service degradation for at least 30 minutes: (a) On any major facility (*e.g.,* authoritative DNS server, DHCP server, HSS) that it owns, operates, leases, or otherwise utilizes; (b) potentially affecting generally-useful availability and connectivity of at least 900,000 user minutes (*e.g.,* average packet loss of greater than one percent for 30,000 users for 30 minutes); or (c) that affects any special offices and facilities, including major military installations, key government facilities, nuclear power plants, airports, and Public Safety Answering Points (PSAPs). Are there other special facilities for which outage reporting would be appropriate? Should a different standard apply to broadband access providers that provide service to end users with wireless applications? How should potentially affected mobile users be counted?

34. *Broadband Backbone ISPs.* A broadband backbone ISP interconnects a broadband Internet access service provider to other broadband Internet access service providers. Broadband backbone ISPs also connect to each other through network access points (NAPs) or private peering arrangements. Broadband backbone ISPs route all traffic incoming from broadband Internet access service providers and provide the infrastructure needed for Internet connectivity between the broadband Internet access service providers.

35. Based on the role that they serve, we believe it possible that an outage suffered by a broadband backbone ISP could cause greater impact, as measured by the number of affected users, than a similar outage experienced by an access ISP. Such outages could severely impact the ability of users to reach 9–1–1 during an emergency. We therefore propose to require that broadband backbone ISPs report outages whenever the broadband backbone ISP experiences an outage or service degradation affecting other ISPs or end users. Reporting of these types of service disruptions would serve as a foundation for the development of network best practices to guard against future disruptions of this magnitude that have the potential to compromise public safety and have a widespread negative effect on consumers.

36. We seek comment on what threshold of disruption should constitute a reportable broadband backbone ISP service outage. Consistent with the current definition of "outage" in Part 4 of our rules that places emphasis on a "significant degradation" of communications, we propose that an outage in the context of a broadband backbone ISP be defined as the loss of "generally-useful availability and Internet connectivity."

37. Should we define "generally-useful availability and Internet connectivity" of broadband Internet service as it relates to a broadband backbone ISP as: (a) The operational state in which the transmission between ISP PoPs is operating as designed for normal use; (b) the logical functions and relay systems required from ISPs are operating as designed for normal use; and/or (c) the connected access ISP networks are not prevented from establishing communications with any destination device on the global Internet that has an assigned Internet Protocol address. Can the "loss of generally-useful availability and connectivity" for broadband backbone ISPs be measured using the metrics defined by the IETF, including packet loss, round-trip latency, or jitter as measured from source to destination PoP? Are there additional metrics that should be used to trigger outage reporting? We seek comment on these metrics and the values in this proposal. Based on commercial practices, and considering the lack of standardized values for the metrics presented here, we believe that the appropriate values should be packet loss of one percent or more, round-trip latency of 100 ms or more, or jitter of 4 ms or more as measured from source to destination PoP in order to trigger outage reporting. Are these values appropriate for all types of broadband backbone ISPs? Are there more appropriate values? What are they and why are they better?

38. Due to the Nation's growing dependence on ISPs to deliver critical IP communication services, we seek comment on requiring a broadband backbone ISP to submit outage reports when it experiences an outage or service degradation for at least 30 minutes: (a) On any major facility (*e.g.,* PoP, Exchange Point, core router, root name server, ISP-operated DNS server, or DHCP server) that it owns, operates, leases, or otherwise utilizes; (b) potentially affecting generally-useful availability and connectivity for any Internet PoP-to-Internet PoP (PoP-to-PoP) pair for which they lease, own or operate at least one of the PoPs where the "loss of generally useful availability and connectivity" is defined as: (1) An average packet loss of one percent or greater; (2) average round-trip delay of 100 ms or greater; or (3) average jitter of 4 ms or greater with measurements taken in each of at least six consecutive five-minute intervals as measured from source to destination PoP. We also seek comment on the proposed packet loss, latency, and jitter threshold values. Should the failure of routers, network servers, or some other type of communications equipment be reportable? Should failure of a PoP, core router, root name server, or authoritative DNS server be included in the list of such equipment?

### *C. Application of Part 4 Rules to Service Using New Wireless Technologies*

39. In the 2004 *Second Outage Reporting Order,* the Commission extended its outage reporting requirements beyond wireline providers to include wireless providers. In the decision, the Commission enumerated several types of licensees providing wireless service that would be covered by the Part 4 outage reporting obligations. Since that time, licensing in additional spectrum bands, *e.g.,* Advanced Wireless Services (AWS) and 700 MHz licensing, has become available for wireless services. The 2004 *Second Outage Reporting Order* suggests that the Commission intended to extend the scope of outage reporting to include all non-wireline providers, including new technologies developed after the adoption of the 2004 *Second Outage Reporting Order.* We seek comment on whether we should amend our rules to clarify and reflect this meaning. For instance, should our rules be amended to state that the requirement also applies to new services using spectrum bands or new wireless technologies that come into being after the adoption of the rule? With respect

to AWS and 700 MHz licensees, are the current Part 4 outage reporting rules adequate to cover outage reporting obligations by these providers (*e.g.,* reporting thresholds, and nature of information to be submitted)? Should the rules be amended so as to exclude AWS and 700 MHz providers from reporting requirements because the services that they provide have not reached sufficiently high levels such that outage reporting would be desirable? For AWS and 700 MHz providers, what are their respective usage levels such that an outage would have a significantly large impact on telecommunications networks and users so as to warrant collecting such data?

**IV. Mandatory Reporting and Other Alternatives**

40. For the Commission to obtain as complete a picture of service outages from interconnected VoIP service providers and broadband ISPs, and to allow the Commission to assist in facilitating a resolution of outages and preventing future outages, we propose that the outage reporting described herein be mandatory, just as it is today for services covered under our Part 4 rules. Because of the importance of the reliability and resiliency of broadband communications for the Nation's 9–1–1 system and overall emergency response, we believe mandatory reporting is appropriate. We note that a voluntary outage reporting trial was attempted, without success, prior to the imposition of our original Part 4 rules. Hence, mandatory outage reporting was adopted to ensure timely, accurate reporting.

41. We note that Japan requires outage reporting from broadband communications providers. We seek comment on what role the Japanese outage reporting requirements played in restoring communications during the recent earthquake-related events. We seek comment also on current proposals in other countries to require outage reporting by broadband communications providers and, specifically, how those proposals are tailored to ensure valuable data is collected while imposing the least amount of burden on reporting providers.

42. We seek comment on whether mandatory reporting is necessary to obtain a comprehensive view of outages experienced by customers that may impact 9–1–1 and other services. Alternatively, if we were to adopt a voluntary reporting scheme, how could the Commission be confident that it is not missing important information? What other regulatory alternatives should the Commission consider for interconnected VoIP service provider and broadband ISP outage reporting? What aspects of the information that providers share, as part of their voluntary ongoing public-private coordination, should we adopt?

**V. Reporting Process**

43. Under our Part 4 rules, communications providers are required to submit a Notification within two hours of discovering a reportable outage. An Initial Report is due within 72 hours after discovering the outage, and a Final Report is due within 30 days after discovering the outage. Final Reports must be submitted by a person authorized by the provider to submit such reports to the Commission and to bind the provider legally to the truth, completeness, and accuracy of the information contained in the report. The Final Communications Outage Report must contain all potentially significant information known about the outage after a good faith effort has been made to obtain it, including any information that was not contained in, or that has changed from that provided in, the Initial Report. We propose to follow the same reporting process for the reporting of outages experienced by interconnected VoIP service providers and broadband ISPs. We seek comment on this proposal.

44. We currently provide an electronic reporting template to facilitate outage reporting by those types of providers currently subject to our Part 4 rules. We believe that this approach to collecting data has ensured that the Commission learns of major outages in a timely fashion and, at the same time, minimizes the amount of time and effort required to comply with the reporting requirements. We propose to utilize a very similar electronic reporting template to collect outage reports from interconnected VoIP service providers and broadband ISPs. We seek comment on this proposal.

45. We believe this process is reasonable in light of the significant benefits conferred by the ability to analyze and address network outages. In addition, we believe that interconnected VoIP service providers and broadband ISPs are currently collecting in the ordinary course of their business much of the information, and perhaps even a broader range of information, than we propose be reported. Therefore, we believe that, in the usual case, complying with our proposed reporting requirements would not result in an undue administrative burden. We seek comment on the reasonableness of the reporting process proposed herein, and we request comment on relevant types of outage information already being collected by interconnected VoIP service providers and broadband ISPs so that we could align our metrics with what is already available to them.

46. We seek comment on whether collecting and reporting as proposed would be no more burdensome for interconnected VoIP service providers and broadband ISPs than current Part 4 reporting requirements are for traditional providers. Is the burden greater on smaller VoIP service providers and smaller broadband ISPs? If so, to what degree? Are there alternative ways to accomplish the aims of this proceeding in a less burdensome manner? For example, what alternatives processes, if any, could be followed which would enable the Commission to collect the types of data specified in this proceeding without requiring a direct interface between the Commission and VoIP service providers and broadband ISPs? Analysis of outage reports by both Commission staff and reporting providers has led to a significant reduction in the frequency and scope of outages on the providers' networks. Is the burden of reporting outweighed by the benefits from the ability to analyze reported outages to help prevent future outages and assist better responses to actual outages?

**VI. Sharing of Information and Confidentiality**

47. Data collected pursuant to the Commission's outage reporting requirements is presumptively confidential. Currently, to the extent that the Commission shares the outage information it receives, sharing is done on a presumptively confidential basis pursuant to the procedures in Part 0 of our rules for sharing information not generally available for inspection. We seek comment on whether the outage information collected from broadband ISPs and interconnected VoIP service providers should also be treated as presumptively confidential. We seek comment on publicly reporting aggregated information across companies, *e.g.,* total number of incidents by root cause categories. Also, we seek comment on whether the Commission should share the information with other Federal agencies on a presumptively confidential basis.

**VII. Legal Authority**

48. We believe the Commission has authority under the Communications Act to promulgate the reporting rules proposed here. In section 615a–1 of the Communications Act, Congress imposed a "duty" on "each IP-enabled voice

service [interconnected VoIP] provider to provide 9–1–1 service and enhanced 9–1–1 service to its subscribers in accordance with the requirements of the Federal Communications Commission." The Commission has express statutory authority to adopt rules implementing that requirement. We seek comment on this interpretation.

49. In addition, we believe that the Commission has authority to ensure both that interconnected VoIP providers fulfill their duty to provide 9–1–1 services and to address obstacles, such as failures in underlying communications networks, to their doing so. Under the definition of ancillary authority recently adopted by the U.S. Court of Appeals for the District of Columbia Circuit, the Commission may exercise ancillary authority when "(1) The Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." Both prongs are met here with respect to interconnected VoIP providers. The provision of interconnected VoIP is "communication by wire or radio" within the general jurisdictional grant of section 2 of the Act. Second, as explained above, collecting outage information from interconnected VoIP providers as proposed in this Notice is "reasonably ancillary" to ensuring that interconnected VoIP providers are able to satisfy their 9–1–1 obligations under the Act as implemented in our Part 9 rules, and to enable the Commission to assist in improving the reliability of these mandated services. We seek comment on this analysis.

50. We believe that the Commission has authority, under the test stated by the DC Circuit, to collect outage information from broadband Internet service providers. We believe that broadband services fall within the Commission's general jurisdictional grant as "communication by wire or radio." The network outage reporting proposals for broadband Internet service providers are reasonably ancillary to ensuring that interconnected VoIP providers are able to satisfy their 9–1–1 duties under the Act. This is because Interconnected VoIP services by definition depend on broadband networks. If a broadband network fails, interconnected VoIP traffic—including calls to 9–1–1—cannot travel over that network. A broadband failure would potentially prevent interconnected VoIP providers from satisfying their duty under the Act and our rules to provide 9–1–1 services. For these reasons, and as authorized by section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), we believe we have ancillary authority to collect outage information from broadband Internet service providers. We seek comment on this analysis. We also ask commenters to address other potentially relevant sources of authority, or to otherwise explain why they believe that the Commission has no legal authority to extend outage reporting requirements in the manner proposed.

## VIII. Procedural Matters

### *A. Ex Parte Rules—Permit-But-Disclose*

51. 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.

### *B. Comment Period and Procedures*

52. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

53. Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov.* Filers should follow the instructions provided on the Web site for submitting comments. All comments shall be filed in PS Docket No. 07–114 and WC Docket No. 05–196. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov,* and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

54. Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW–A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

55. People With Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

56. 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.

### *C. Initial Regulatory Flexibility Analysis*

57. As required by the Regulatory Flexibility Act of 1980 (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in the *NPRM.* We request written public comment on the IRFA analysis. Comments must be filed by the same dates as listed in the first page of this document, and must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *NPRM,* including the IRFA, to the

Chief Counsel for Advocacy of the Small Business Administration.

Need for, and Objectives of, the Proposed Rules

58. In 2005, the Commission adopted rules requiring providers of interconnected Voice over Internet Protocol (VoIP) service to supply E9–1–1 capabilities to their customers as a standard feature from wherever the customer is using the service. In 2008, Congress enacted the New and Emerging Technologies 9–1–1 Improvement Act of 2008 that amended the 9–1–1 Act to codify the Commission's E9–1–1 rules for interconnected VoIP providers. Interconnected VoIP service providers generally must transmit all 9–1–1 calls, including Automatic Number Identification (ANI) and the caller's Registered Location for each call, to the PSAP, designated statewide default answering point, or appropriate local emergency authority. Currently, however, the Commission's outage reporting rules covering legacy circuit-switched voice and/or paging communications over wireline, wireless, cable and satellite communications services do not also cover interconnected VoIP service providers or the broadband Internet Service Providers (ISPs) on whose networks interconnected VoIP services are carried. As a result, the Commission currently cannot monitor the reliability and availability of 9–1–1 and E9–1–1 communications that depend on these systems.

59. With the objective of ensuring reliability of related networks and services, the *NPRM* proposes to extend the Commission's mandatory outage reporting rules under Part 4 of its rules to cover interconnected VoIP service providers and "broadband Internet service providers" meaning "broadband Internet access service providers" and "broadband backbone Internet service providers." Under the proposal, mandatory reporting to the Commission would be required when certain threshold conditions are present that are specific to the technology of each category of service provider.

60. The proposed reporting to the Commission would use the Commission-approved Web-based outage reporting templates. The proposed reporting process for outages experienced by interconnected VoIP service providers and broadband ISPs would follow the existing reporting process for legacy communications providers, such as wireline communications providers.

61. The Commission traditionally has addressed reliability issues by helping to develop and promote best practices that address vulnerabilities in the communications network, and by measuring the effectiveness of best practices through outage reporting. Under the Commission's current rules, the outage reporting process has been effective in improving the reliability, resiliency and security of the legacy services. Collaborating with providers and industry bodies, the Commission staff has been able to achieve dramatic reductions in outages affecting legacy services. The aim of extending outage reporting process to cover interconnected VoIP service providers and broadband ISPs is to achieve a similar result: Improve the reliability, resiliency and security of their services.

Legal Basis

62. **Authority:** The legal basis for any action that may be taken pursuant to this *NPRM* is contained in sections 1, 2, 4(i)–(k), 4(o), 218, 219, 230, 256, 301, 302(a), 303(f), 303(g), 303(j), 303(r), 403, 615a–1, 621(b)(3), 621(d), 1302(a), and 1302(b) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i)–(k), 154(o), 218, 219, 230, 256, 301, 302(a), 303(f), 303(g), 303(j), 303(r), 403, 615a–1, 621(b)(3), 621(d), 1302(a), and 1302(b), and section 1704 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1998, 44 U.S.C. 3504.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Would Apply

63. 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 adopted herein. 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: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

64. *Total Small Entities.* Our action may affect small entities that are not easily categorized. We therefore describe three comprehensive, statutory small entity size standards. First, nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA. In addition, a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, as of 2007, there were approximately 1,621,315 small organizations. Finally, the term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States. We estimate that, of this total, as many as 88,506 entities may qualify as "small governmental jurisdictions." Thus, we estimate that most governmental jurisdictions are small.

65. *Interconnected VoIP and Broadband ISPs.* The 2007 Economic Census places these firms, the services of which might include Voice over Internet protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications facilities, or over client-supplied telecommunications connections. The former are within the category of Wired Telecommunications Carriers, which has an SBA small business size standard of 1,500 or fewer employees. These are also labeled "broadband." The latter are within the category of All Other Telecommunications, which has a size standard of annual receipts of $25 million or less. These are labeled non-broadband.

66. The most current Economic Census data for all such firms are 2007 data. For the first category, the data show that 396 firms operated for the entire year, of which only 2 operated with more than 1,000 employees. For the second category, the data show that 2,383 firms operated for the entire year. Of those, only 37 had annual receipts of more than $25,499,999 per year. We estimate that the majority of ISP firms are small entities. To ensure that this IRFA describes the universe of small entities that our action might affect, we discuss below several different types of entities that might be currently providing interconnected VoIP service, Internet access service, or broadband backbone Internet service.

67. *Wireline Providers: Incumbent Local Exchange Carriers (Incumbent LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census Bureau data

for 2007 show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these incumbent local exchange service providers can be considered small.

68. The Commission has included small incumbent LECs in this present RFA analysis. A "small business" under the RFA is one that, inter alia, meets the pertinent small business size standard and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope. The Commission has therefore included small incumbent LECs in this RFA analysis.

69. *Wireline Providers: Interexchange Carriers.* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census Bureau data for 2007 show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the Commission estimates that the majority of interexchange carriers are small entities that may be affected by our proposed action.

70. Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and 2 have more than 1,500 employees. Consequently, the Commission estimates that the majority of operator service providers are small entities that may be affected by our proposed action.

71. *Wireless Providers—Fixed and Mobile.* To the extent the wireless services listed below are used by wireless firms for fixed and mobile broadband Internet access services, the *NPRM's* proposed rules may have an impact on those small businesses as set forth above and further below. For those services subject to auctions, we note that, as a general matter, the number of winning bidders that claim to qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service.

72. *Wireless Providers—Fixed and Mobile Wireless: Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category. Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year. Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. According to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Using available data, we estimate that the majority of wireless firms can be considered small.

73. *Wireless Providers—Fixed and Mobile: Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years. The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, seven bidders won 31 licenses that qualified as very small business entities, and one bidder won one license that qualified as a small business entity.

74. *Wireless Providers—Fixed and Mobile: 1670–1675 MHz Services.* This service can be used for fixed and mobile uses, except aeronautical mobile. An auction for one license in the 1670–1675 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

75. *Wireless Providers—Fixed and Mobile: Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. A total of 413 carriers reported that they were engaged in wireless telephony. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Therefore, more than half of these entities can be considered small.

76. *Wireless Providers—Fixed and Mobile: Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a "small business" for C- and F-Block licenses as an entity that has average gross revenues of $40 million or less in the three previous calendar years. For F-Block licenses, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small business status won approximately 40 percent of the 1,479 licenses in the first auction for the D, E, and F Blocks. On April 15, 1999, the Commission completed the re-auction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22. Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

77. On January 26, 2001, the Commission completed the auction of 422 C- and F-Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29 claimed small business status. Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 242 C-, D-, E-, and F-Block licenses in Auction No. 58. Of the 24 winning bidders in that auction, 16 claimed small business status and won 156 licenses. On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71. Of the 12 winning bidders in that auction, five claimed small business status and won 18 licenses. On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block Broadband PCS licenses in Auction No. 78. Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.

78. *Wireless Providers—Fixed and Mobile: Specialized Mobile Radio Licenses.* The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards "very small entity" bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

79. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band and qualified as small businesses under the $15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded. Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all four auctions, 41 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small businesses.

80. There are numerous incumbent site-by-site SMR licenses and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. In addition, we do not know how many of these firms have 1,500 or fewer employees, which is the SBA-determined size standard. We assume that all of the remaining extended implementation authorizations are held by small entities, as defined by the SBA.

81. *Wireless Providers—Fixed and Mobile: Lower 700 MHz Band Licenses.* The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. The Commission defined a "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Additionally, the lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (MSA/RSA) licenses—"entrepreneur"—which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA approved these small size standards. An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses. Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses. On July 26, 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band (Auction No. 60). There were three winning bidders for five licenses. All three winning bidders claimed small business status.

82. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order.* An auction of 700 MHz licenses commenced January 24, 2008 and closed on March 18, 2008, which included 176 Economic Area licenses in the A Block, 734 Cellular Market Area licenses in the B Block, and 176 EA licenses in the E Block. Twenty winning bidders, claiming small business status (those with attributable average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years) won 49 licenses. Thirty-three winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years) won 325 licenses.

83. *Wireless Providers—Fixed and Mobile: Upper 700 MHz Band Licenses.* In the *700 MHz Second Report and Order,* the Commission revised its rules regarding Upper 700 MHz licenses. On January 24, 2008, the Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band were available for licensing: 12 Regional Economic Area Grouping licenses in the C Block, and one nationwide license in the D Block. The auction concluded on March 18, 2008, with 3 winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years) and winning five licenses.

84. *Wireless Providers—Fixed and Mobile: 700 MHz Guard Band Licensees.* In 2000, in the 700 MHz Guard Band

Order, the Commission adopted size standards for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. SBA approval of these definitions is not required. An auction of 52 Major Economic Area licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

85. *Wireless Providers—Fixed and Mobile: Air-Ground Radiotelephone Service.* The Commission has previously used the SBA's small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.,* an entity employing no more than 1,500 persons. There are fewer than 10 licensees in the Air-Ground Radiotelephone Service, and under that definition, we estimate that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $40 million. A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million. These definitions were approved by the SBA. In May 2006, the Commission completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction No. 65). On June 2, 2006, the auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

86. *Wireless Providers—Fixed and Mobile: AWS Services (1710–1755 MHz and 2110–2155 MHz bands (AWS–1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS–2); 2155–2175 MHz band (AWS–3)).* For the AWS–1 bands, the Commission has defined a "small business" as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, and a "very small business" as an entity with average annual gross revenues for the preceding three years not exceeding $15 million. In 2006, the Commission conducted its first auction of AWS–1 licenses. In that initial AWS–1 auction, 31 winning bidders identified themselves as very small businesses. Twenty-six of the winning bidders identified themselves as small businesses. In a subsequent 2008 auction, the Commission offered 35 AWS–1 licenses. Four winning bidders identified themselves as very small businesses, and three of the winning bidders identified themselves as a small business. For AWS–2 and AWS–3, although we do not know for certain which entities are likely to apply for these frequencies, we note that the AWS–1 bands are comparable to those used for cellular service and personal communications service. The Commission has not yet adopted size standards for the AWS–2 or AWS–3 bands but has proposed to treat both AWS–2 and AWS–3 similarly to broadband PCS service and AWS–1 service due to the comparable capital requirements and other factors, such as issues involved in relocating incumbents and developing markets, technologies, and services.

87. *Wireless Providers—Fixed and Mobile: 3650–3700 MHz band.* In March 2005, the Commission released a *Report and Order and Memorandum Opinion and Order* that provides for nationwide, non-exclusive licensing of terrestrial operations, utilizing contention-based technologies, in the 3650 MHz band (*i.e.,* 3650–3700 MHz). As of April 2010, more than 1270 licenses have been granted and more than 7433 sites have been registered. The Commission has not developed a definition of small entities applicable to 3650–3700 MHz band nationwide, non-exclusive licensees. However, we estimate that the majority of these licensees are Internet Access Service Providers (ISPs) and that most of those licensees are small businesses.

88. *Wireless Providers—Fixed and Mobile: Fixed Microwave Services.* Microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), and the 24 GHz Service, where licensees can choose between common carrier and non-common carrier status. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, the Commission will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.,* an entity with no more than 1,500 persons is considered small. For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year. Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

89. *Wireless Providers—Fixed and Mobile: Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. In the 1998 and 1999 LMDS auctions, the Commission defined a small business as an entity that has annual average gross revenues of less than $40 million in the previous three calendar years. Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than $15 million in the previous three years. These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA. In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, the Commission believes that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity

LMDS providers as defined by the SBA and the Commission's auction rules.

90. *Wireless Providers—Fixed and Mobile: Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years. The BRS 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. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS 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 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission offered three levels of bidding credits: (i) A bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

91. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS 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. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use the most current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: All such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

92. *Satellite Service Providers.* Two economic census categories address the satellite industry. The first category has a small business size standard of $15 million or less in average annual receipts, under SBA rules. The second has a size standard of $25 million or less in annual receipts.

93. *Satellite Service Providers: Satellite Telecommunications Providers.* The category of Satellite Telecommunications "comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications." Census Bureau data for 2007 show that 512 Satellite Telecommunications firms that operated for that entire year. Of this total, 464 firms had annual receipts of under $10 million, and 18 firms had receipts of $10 million to $24,999,999. Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

94. *Satellite Service Providers: All Other Telecommunications.* The second category of Satellite Service Providers, *i.e.,* "All Other Telecommunications" comprises "establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or Voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry." For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year. Of this total, 2,346 firms had annual receipts of under $25 million and 37 firms had annual receipts of $25 million to $49,999,999. Consequently, the Commission estimates that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

95. *Cable Service Providers.* Because Section 706 requires us to monitor the deployment of broadband regardless of technology or transmission media employed, we anticipate that some broadband service providers may not provide telephone service. Therefore, we describe below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

96. *Cable Service Providers: Wired Telecommunications Carriers.* The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired

telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry." The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers." Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007, which supersede data from the 2002 Census, show that 3,188 firms operated n 2007 as Wired Telecommunications Carriers. 3,144 had 1,000 or fewer employees, while 44 operated with more than 1,000 employees.

97. *Cable Service Providers: Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide. Industry data indicate that all but ten cable operators nationwide are small under this size standard. In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers. Industry data indicate that, of 6,101 systems nationwide, 4,410 systems have under 10,000 subscribers, and an additional 258 systems have 10,000–19,999 subscribers. Thus, under this standard, most cable systems are small.

98. *Cable Service Providers: Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

99. The rules proposed in this *NPRM* would require broadband backbone Internet service providers to report those outages that: (1) Last at least 30 minutes, and (2) meet or exceed a proposed specified technical threshold. The rules proposed also would require interconnected VoIP service providers and broadband Internet access service providers to report those outages that: (1) last at least 30 minutes, (2) meet or exceed a proposed specified technical threshold, and (3) affect at least 900,000 user minutes. Under the Commission's current outage reporting rules, which apply only to legacy circuit-switched voice and/or paging communications over wireline, wireless, cable, and satellite communications services, about 11,000 outage reports per year from all reporting sources combined are filed with the Commission. As a result of the proposed rules, we anticipate that fewer than 2,000 additional outage reports would be filed annually. We estimate that if the proposed rules are adopted, the total number of reports from all outage reporting sources filed, pursuant to the current and proposed rules, combined would be fewer than 13,000 annually. Occasionally, the proposed outage reporting requirements could require the use of professional skills, including legal and engineering expertise. We believe that in the usual case, the only burden associated with the proposed reporting requirements contained in this NPRM would be the time required to complete the initial and final reports. We anticipate that electronic filing, through the type of template that we are proposing, should minimize the amount of time and effort that will be required to comply with the rules that we propose in this proceeding.

100. We expect that the outage reporting and analysis that would follow could lead to the development and refinement of best practices. There may be additional thresholds that should also be included to improve the process of developing and improving best practices. We encourage interested parties to address these issues in the context of the applicable technologies and to develop their comments in the context of the ways in which the proposed information collection would facilitate best practices development and increased communications security, reliability and resiliency throughout the United States and its Territories.

Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

101. 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: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

102. Over the past decade, the proportion of communications services provided over a broadband platform has increased substantially, and our Nation increasingly relies on broadband-based services not only for day-to-day consumer use but also for Homeland Defense and National Security. Over the past three years, the number of outages reported each year has remained relatively steady at about 11,000. We believe that the proposed outage reporting requirements are the minimum necessary to assure that we receive adequate information to perform our statutory responsibilities with respect to 9–1–1 services and ensure the reliability of communications and critical infrastructures. Also, we believe that the magnitude of the outages needed to trigger the proposed reporting requirements are sufficiently high as to make it unlikely that small businesses would be impacted significantly by the proposed rules. We also believe the choice of performance-based, as opposed to design-based, degradation characteristics and the corresponding thresholds chosen to trigger the outage reporting will not unduly burden smaller entities. We have also carefully considered the notion of a waiver for small entities from coverage of the proposed rules, but declined to propose one, as a waiver of this type would unduly frustrate the purpose of the proposed requirements and run counter to the objectives of the *NPRM.* We believe that the proposed requirement

that outage reports be filed electronically would significantly reduce the burdens and costs currently associated with manual filing processes.

103. The proposed rules in the *NPRM* are generally consistent with current industry practices, so the costs of compliance should be small. We believe that the costs of the reporting rules that we propose in the *NPRM* are outweighed by the expected benefits of being able to ensure communications reliability that we fully expect would result due to learning about the reasons that outages are occurring, which would take place as a consequence of the proposed requirements' reporting. We have excluded from the proposed requirements any type of competitively sensitive information, information that would compromise network security, and information that would undermine the efficacy of reasonable network management practices. We anticipate that the record will suggest alternative ways in which the Commission could increase the overall benefits for, and lessen the overall burdens on, small entities.

104. We ask parties to include comments on possible alternatives that could satisfy the aims of the proceeding in a less costly, less burdensome, and/or more effective manner, and to comment on the sources of legal authority for the proposal assuming the Commission were to decide to adopt the proposal. We also seek comments on an analysis of the costs, burdens, and benefits of the various proposed rules set forth in this proceeding. We ask commenters to address particularly the following concerns: What are the costs, burdens, and benefits associated with any proposed rule? Entities, especially small businesses and small entities, more generally, are encouraged to quantify the costs and benefits of the proposed reporting requirements. How could any proposed rule be tailored to impose the least cost and the least amount of burden on those affected? What potential regulatory approaches would maximize the potential benefits to society? To the extent feasible, what explicit performance objectives should the Commission specify? How can the Commission best identify alternatives to regulation, including fees, permits, or other non-regulatory approaches?

105. Comments are sought on all aspects of this proposal, including the proposed extension of such requirements, the definitions and proposed reporting thresholds, and the proposed reporting process that would follow essentially the same approach that currently applies to outage reporting on legacy services. Parties should include in their comments whether the proposed rules would satisfy the Commission's intended aims, described herein, and would promote the reliability, resiliency and security of interconnected VoIP, broadband Internet access, and broadband backbone Internet services that support 9–1–1 communications. Commenters are asked to address our tentative conclusions that: Expanding Part 4 outage reporting requirements to interconnected VoIP service providers and broadband ISPs would allow the Commission to analyze outages of the services that they provide; would provide an important tool for network operators to prevent future outages; and would help to ensure the reliability of critical communications networks and services.

106. We welcome comments on: the proposal itself; whether it would achieve the intended objectives; whether there are performance objectives not mentioned that we should address; whether better alternatives exist that would accomplish the proceeding's objectives; the legal authority to take the contemplated actions described herein; and the costs, burdens and benefits of our proposal.

Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

107. None.

D. Initial Paperwork Reduction Analysis

108. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 2011–14311 Filed 6–8–11; 8:45 am]

**BILLING CODE 6712–01–P**

# Notices

Federal Register
Vol. 76, No. 111
Thursday, June 9, 2011

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT

### Board for International Food and Agricultural Development; Notice of Meeting

Pursuant to the Federal Advisory Committee Act, notice is hereby given of the public meeting of the Board for International Food and Agricultural Development (BIFAD). The meeting will be held from 9 a.m. to 1 p.m. on June 24, 2011 at the National Press Club located at 529 14th St., NW., Washington, DC. "The Role of Higher Education in the Feed the Future Initiative" will be the central theme of the meeting.

Dr. Brady Deaton, the new Chair of BIFAD, will preside over the proceedings. Dr. Deaton is the Chancellor of the University of Missouri at Columbia.

The announcement of the 2011 World Food Prize Laureate at the State Department on June 21 and the "Feed the Future" Research Forum from June 21 to 23 provide the backdrop for the BIFAD public meeting on June 24. The meeting will include the participation of five new BIFAD presidential appointments. Including Dr. Deaton, those new members are Jo Luck, President of Heifer International, Marty McVey of McVey & Company Investments Inc., Gebisa Ejeta, Distinguished Professor, Department of Agronomy, Purdue University and Catherine Bertini, Chair, International Relations Program and Professor, Maxwell School of Citizenship and Public Affairs, Syracuse University. Board members with continuing service include Elsa Murano, Professor and President Emerita of Texas A&M University and William DeLauder, President Emeritus of Delaware State University. After opening remarks by Dr. Deaton, USAID Administrator Rajiv Shah will formally swear in the new Board members and make a short presentation. At the conclusion of Dr. Shah's remarks, Dr. Deaton will acknowledge immediate past Chair Robert Easter and the other outgoing Board members for their service.

The BIFAD Spring public meeting will focus heavily on the USAID Feed the Future (FtF) Initiative. The first session will offer USAID and USDA perspectives on progress to date, taking into account specifically Title XII university perspectives. The panel of speakers will include Paul Weisenfeld, Assistant to the Administrator of the Bureau for Food Security; Julie Howard, Deputy Coordinator of the Feed the Future Initiative, and a USDA representative. Deanna Behring, Director of International Agriculture Programs at Penn State University will serve as respondent and provide university perspectives.

The second FtF session will review outcomes of the Association of Public and Land-grant Universities (APLU)-led consultative process in response to the FTF research strategy. Dr. Montague Demment, Professor of Ecology at University of California-Davis and Associate Vice President for International Development of APLU, will provide an overview of the consultative process for the Board. USAID staff will provide an overview of the research priority outcomes. Because the Collaborative Research Support Programs (CRSPs) are among the major Title XII university-based research programs, a member of the CRSP Council will serve as a respondent to address additional issues.

The Board meeting is open to the public, and time will be allotted for a public comment period. The Board benefits greatly in hearing from the stakeholder community and others. To ensure that as many people as possible have the opportunity to contribute to the morning's discussions, comments will be restricted to 3 minutes for each commenter. At the conclusion of the public comment period, the Board will adjourn the meeting to proceed to a luncheon and executive meeting (closed to the public).

Those wishing to attend the meeting or obtain additional information about BIFAD should contact Susan Owens, Executive Director and Designated Federal Officer for BIFAD. Interested persons may write her in care of the U.S. Agency for International Development, Ronald Reagan Building, Bureau for Food Security, 1300 Pennsylvania Avenue, NW., Room 7.8–061, Washington, DC 20523–2110 or telephone her at (202) 712–0218 or fax (202) 216–3124.

**Susan J. Owens,**

*Executive Director and USAID Designated Federal Officer for BIFAD, Office of Development Partners, U.S. Agency for International Development.*

[FR Doc. 2011–14245 Filed 6–8–11; 8:45 am]

**BILLING CODE 6116–01–P**

## DEPARTMENT OF AGRICULTURE

### Foreign Agricultural Service

### Agricultural Policy Advisory Committee for Trade; Renewal

**AGENCY:** Foreign Agricultural Service, USDA.

**ACTION:** Notice.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, notice is hereby given that the Secretary of Agriculture (Secretary), in coordination with the United States Trade Representative (USTR), has renewed the Agricultural Policy Advisory Committee for Trade (APAC).

**DATES:** *Effective:* June 9, 2011.

**FOR FURTHER INFORMATION CONTACT:** Inquiries or comments regarding the renewal of this committee may be sent by electronic mail to: *Lorie.Fitzsimmons@fas.usda.gov* and *Steffon.Brown@fas.usda.gov,* in the Office of Agreements and Scientific Affairs (OASA), or by fax to (202) 720–0340. OASA may be reached by telephone at (202) 720–6219, with inquiries directed to Lorie Fitzsimmons or Steffon Brown.

**SUPPLEMENTARY INFORMATION:**

#### Introduction

The APAC is authorized by sections 135(c)(1) and (2) of the Trade Act of 1974, as amended (Pub. L. 93–618, 19 U.S.C. 2155). The purpose of this committee is to advise the Secretary and the USTR concerning agricultural trade policy. The committee is intended to ensure that representative elements of the private sector have an opportunity to express their views to the U.S. Government.

**Rechartering of Existing Committees**

Pursuant to the Federal Advisory Committee Act (5 U.S.C. Appendix), FAS gives notice that the Secretary and the USTR have renewed the APAC.

In 1974, Congress established a private sector advisory committee system to ensure that U.S. trade policy and negotiation objectives adequately reflect U.S. commercial and economic interests. The private sector advisory committee system currently consists of the following three tiers:

- The President's Advisory Committee on Trade and Policy Negotiations;
- Five general policy advisory committees, including the APAC; and
- Twenty-two technical advisory committees, including the Agricultural Technical Advisory Committees for Trade (ATACs).

The renewal of the APAC is in the public interest in connection with USDA's performance of duties imposed on USDA by the Trade Act of 1974, as amended.

Dated: June 3, 2011.

**Suzanne Heinen,**

*Administrator, Foreign Agricultural Service.*

[FR Doc. 2011–14290 Filed 6–8–11; 8:45 am]

**BILLING CODE 3410–10–P**

## DEPARTMENT OF AGRICULTURE

### Foreign Agricultural Service

### Agricultural Technical Advisory Committees for Trade; Renewal

**AGENCY:** Foreign Agricultural Service, USDA.

**ACTION:** Notice.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, notice is hereby given that the Secretary of Agriculture (Secretary), in coordination with the United States Trade Representative (USTR), has renewed the six Agricultural Technical Advisory Committees for Trade (ATACs).

**DATES:** *Effective:* June 9, 2011.

**FOR FURTHER INFORMATION CONTACT:** Inquiries or comments regarding the renewal of these committees may be sent by electronic mail to: *Lorie.Fitzsimmons@fas.usda.gov* and *Steffon.Brown@fas.usda.gov,* or by fax to (202) 720–0340. The Office of Agreements and Scientific Affairs may be reached by telephone at (202) 720–6219, with inquiries directed to Lorie Fitzsimmons or Steffon Brown.

**SUPPLEMENTARY INFORMATION:**

**Introduction**

The ATACs are authorized by sections 135(c)(1) and (2) of the Trade Act of 1974, as amended (Pub. L. 93–618, 19 U.S.C. 2155). The purpose of these committees is to advise the Secretary and the USTR concerning agricultural trade policy. The committees are intended to ensure that representative elements of the private sector have an opportunity to express their views to the U.S. Government.

**Rechartering of Existing Committees**

Pursuant to the Federal Advisory Committee Act (5 U.S.C. Appendix), FAS gives notice that the Secretary and the USTR have renewed the following four ATACs:

- Animals and Animal Products;
- Fruits and Vegetables;
- Processed Foods, and;
- Sweeteners and Sweetener Products.

Pursuant to the Federal Advisory Committee Act (5 U.S.C. App. II), FAS gives notice that the Secretary and the USTR are reorganizing and then renewing the following two ATACs:

- Grains, Feed, Oilseeds and Planting Seeds.
- Tobacco, Cotton and Peanuts.

These ATACs are being reorganized by removing representation of the planting seeds industry from the Tobacco, Cotton, Peanuts and Planting Seeds (TCPPS) ATAC and adding representation of the planting seeds sector to the Grains, Feed and Oilseeds (GFO) ATAC. The justification for this structural change is that many of the issues that the GFO committee addresses, such as genetically modified organisms, new technologies and international negotiations, are common within the U.S. planting seeds industry. The proposed changes will result in the Tobacco, Cotton and Peanuts (TCP) ATAC and the Grains, Feed, Oilseeds, and Planting Seeds (GFOPS) ATAC.

In 1974, Congress established a private sector advisory committee system to ensure that U.S. trade policy and negotiation objectives adequately reflect U.S. commercial and economic interests. The private sector advisory committee system currently consists of the following three tiers:

- The President's Advisory Committee on Trade and Policy Negotiations;
- Five general policy advisory committees, including the Agricultural Policy Advisory Committee for Trade, and;
- Twenty-two technical advisory committees, including the ATACs.

The reorganizing and renewal of such committees is in the public interest in connection with USDA's performance of duties imposed on USDA by the Trade Act of 1974, as amended.

Dated: June 3, 2011.

**Suzanne Heinen,**

*Administrator, Foreign Agricultural Service.*

[FR Doc. 2011–14298 Filed 6–8–11; 8:45 am]

**BILLING CODE 3410–10–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Information Collection; Perceptions of Risk, Trust, Responsibility, and Management Preferences Among Fire-Prone Communities in the Western United States

**AGENCY:** Forest Service, USDA.

**ACTION:** Request for comment; notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and organizations on the revision of a currently approved information collection, Perceptions of Risk, Trust, Responsibility, and Management Preferences among Fire-Prone Communities in the Western United States.

**DATES:** Comments must be received in writing on or before August 8, 2011 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

**ADDRESSES:** Comments concerning this notice should be addressed to Patricia L. Winter, Pacific Southwest Research Station, Forest Service, USDA, 4955 Canyon Crest Drive, Riverside, CA 92507.

Comments also may be submitted via facsimile to 951 680–1501 or by e-mail to: *pwinter@fs.fed.us.*

The public may inspect comments received at Building One Reception, 4955 Canyon Crest Drive, Riverside, CA 92507, during normal business hours. Visitors are encouraged to call ahead to (951) 680–1500 to facilitate entry to the building.

**FOR FURTHER INFORMATION CONTACT:** Patricia L. Winter, Pacific Southwest Research Station, USDA FS, 951–680–1557. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 twenty-four hours a day, every day of the year, including holidays.

**SUPPLEMENTARY INFORMATION:**

*Title:* Perceptions of Risk, Trust, Responsibility, and Management Preferences among Fire-Prone

Communities in the Western United States.

*OMB Number:* 0596–0186.

*Expiration Date of Approval:* July 31, 2011.

*Type of Request:* Revision of a currently approved collection.

*Abstract:* Forest Service and university researchers will contact community residents within or adjacent to national forests in the Western United States. Through those contacts, researchers will evaluate concerns about fire and fire risk, knowledge about fire, values focused on fire management, trust, objectives, and alternatives for fire management, personal experiences with fire, stressors associated with fire and fire risk, responsibility and accomplishments for fire management, sources of concern about fire, future orientation, and sociodemographics.

The results will help researchers improve ability to provide information to natural resource managers on public perceptions of fire and fire management. To gather the information, residents within or adjacent to national forests in the Western United States will be contacted through mailed or e-mail correspondence, or by telephone, inviting their participation in a focus group study. Willing or interested parties will contact the researcher and be scheduled into sessions in their community. Those agreeing to participate will be involved in a focus group discussion and complete a self-administered survey.

A Forest Service researcher and analyst/technician will collect and analyze the information with the assistance of a cooperating university researcher. The primary researcher is an expert in applied social psychology and survey research. The cooperator will be experienced in conducting community based focus groups.

Participants will first complete a questionnaire focused on concern about fire, knowledge about fire, values similarity with the Forest Service, trust, objectives for fire management, personal experience with fire, stressors of fire and fire risk, responsibility for risk reduction, accomplishment of risk reduction, sources of concern about fire, future orientation, and sociodemographics. Participants will then participate in a discussion on the following topics: objectives, values, and concerns in fire management; alternatives for accomplishing objectives; values/goals and trust; and information needs and interests.

Invitations are sent by mail, e-mail, or via telephone to individuals aged 18 or older residing in the selected communities. When possible, multiple sessions will be held in each community to accommodate as many participants as are interested. Responses will be voluntary and anonymous.

Responses will be used to evaluate the values linked to fire and fire management among forest community residents; personal experiences with fire and how participants have addressed fire risk; perceived responsibility and accomplishments in addressing fire risk; and personal characteristics that might influence these responses. The data collected will assist researchers in determining public perception and expectations regarding fire management and risk, as well as providing information on how residents address these issues. Such data is valuable to forest resource managers, who use the information when selecting long and short-term fire management strategies, and in developing public information strategies on fire and fire management.

Without this information, managers will have to rely on the scant information otherwise available on current and changing public views regarding fire and fire management, and the anecdotal information collected through direct experiences with the public regarding impacts of fire and fire risk. The intent is to share the collected data with other researchers studying fire management, and other natural resource management values and objectives.

*Estimate of Annual Burden:* 2.3 hours.

*Type of Respondents:* Respondents are community residents in various locations within or adjacent to national forests in the Western United States.

*Estimated Annual Number of Respondents:* 200.

*Estimated Annual Number of Responses per Respondent:* 2.

*Estimated Total Annual Burden on Respondents:* 460.

**Comment Is Invited**

Comment is invited on: (1) Whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the Agency, including whether the information will have practical or scientific utility; (2) the accuracy of the Agency's estimate of the burden of the 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 the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the request for Office of Management and Budget approval.

Dated: June 1, 2011.

**Jimmy L. Reaves,**

*Deputy Chief, Research & Development.*

[FR Doc. 2011–14281 Filed 6–8–11; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Wrangell-Petersburg Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Wrangell-Petersburg Resource Advisory Committee will meet by video-teleconference in Petersburg, Alaska and Wrangell, Alaska. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) (the Act) and in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II of the Act. The meeting is open to the public. The purpose of the meeting is to review project proposals and make project funding recommendations.

**DATES:** The meeting will be held on Saturday, June 25, 2011 from 8 a.m. to Noon.

**ADDRESSES:** Committee members will meet at the Wrangell Ranger District office at 525 Bennett Street in Wrangell, Alaska and at the Petersburg Ranger District office at 12 North Nordic Drive in Petersburg, Alaska. Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Petersburg Ranger District office at 12 North Nordic Drive or the Wrangell Ranger District office at 525 Bennett Street during regular office hours (Monday through Friday 8 a.m.–4:30 p.m.).

**FOR FURTHER INFORMATION CONTACT:** Christopher Savage, Petersburg District

Ranger, P.O. Box 1328, Petersburg, Alaska, 99833, phone (907) 772–3871, e-mail *csavage@fs.fed.us,* or Robert Dalrymple, Wrangell District Ranger, P.O. Box 51, Wrangell, AK 99929, phone (907) 874–2323, e-mail *rdalrymple@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday. Requests for reasonable accommodation for access to the facility or proceedings may be made by contacting the person listed for further information.

**SUPPLEMENTARY INFORMATION:** The following business will be conducted: Evaluation of project proposals and recommendation of projects for funding. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. A one-hour public input session will be provided beginning at 9 a.m. Individuals wishing to make an oral statement should request in writing by June 20 to be scheduled on the agenda.

Written comments and requests for time for oral comments should be sent to Christopher Savage, Petersburg District Ranger, P.O. Box 1328, Petersburg, Alaska 99833, or Robert Dalrymple, Wrangell District Ranger, P.O. Box 51, Wrangell, AK 99929. Comments may also be sent via e-mail to *csavage@fs.fed.us,* or via facsimile to 907–772–5995.

Dated: May 31, 2011.

**Christopher S. Savage,**

*District Ranger.*

[FR Doc. 2011–14278 Filed 6–8–11; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

*Agency:* International Trade Administration.

*Title:* Survey of Participating Companies in the United States-European Union and United States-Switzerland Safe Harbor Frameworks.

*OMB Control Number:* None.

*Form Number(s):* None.

*Type of Request:* Regular submission (new information collection).

*Burden Hours:* 343.

*Number of Respondents:* 1,030.

*Average Hours per Response:* 20 minutes.

*Needs and Uses:* The Office of Technology and Electronic Commerce in the Manufacturing and Services Unit of the International Trade Administration (ITA) administers the U.S.-European Union (EU) and U.S.-Swiss Safe Harbor Frameworks (Frameworks). These Frameworks allow U.S. companies to meet the requirements of the European Union's Data Protection Directive and the Swiss Federal Act on Data Protection, respectively. This is significant because the Frameworks ensure uninterrupted transfers of personal information worth billions of dollars in trade between the United States and the EU and Switzerland.

In line with the President's National Export Initiative, ITA is interested in gathering information from U.S. companies that use the U.S.-EU and U.S.-Swiss Safe Harbor Frameworks to better evaluate the programs and how they support U.S. exports. The information will be obtained via a survey using the questions in 76 FR 8337.

*Affected Public:* Business or other for-profit Organizations.

*Frequency:* Annually.

*Respondent's Obligation:* Voluntary.

*OMB Desk Officer:* Wendy Liberante, (202) 395–3647.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov.*

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Wendy Liberante, OMB Desk Officer, number (202) 395–5167, or via the Internet at *Wendy_L._Liberante@omb.eop.gov.*

Dated: June 3, 2011.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011–14217 Filed 6–8–11; 8:45 am]

**BILLING CODE 3510–DR–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA484**

### Endangered Species; Permit No. 16439

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

**ACTION:** Notice; receipt of application.

**SUMMARY:** Notice is hereby given that the New York State Department of Environmental Conservation, 21 South Putt Corners Rd., New Paltz, NY 12561 [Responsible Party: Kathryn Hattala] has applied in due form to take shortnose sturgeon (*Acipenser brevirostrum*) for purposes of scientific research.

**DATES:** Written, telefaxed, or e-mail comments must be received on or before July 11, 2011.

**ADDRESSES:** The application and related documents are available for review by selecting "Records Open for Public Comment" from the *Features* box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov/,* and then selecting File No. 16439 from the list of available applications.

These documents are available upon written request or by appointment in the following offices:

- 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
- Northeast Region, NMFS, 55 Great Republic Drive, Gloucester, MA 01930; phone (978) 281–9328; fax (978) 281–9394.

Written comments on this application should be submitted to the Chief, Permits, Conservation and Education Division.

- By e-mail to *NMFS.Pr1Comments@noaa.gov* (include the File No. in the subject line)
- By facsimile to (301) 713–0376, or
- At the address listed above.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits, Conservation and Education Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

**FOR FURTHER INFORMATION CONTACT:** Malcolm Mohead or Colette Cairns, (301) 713–2289.

**SUPPLEMENTARY INFORMATION:** The subject permit is requested 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 applicant proposes a five-year scientific research permit characterizing the habitat use, population abundance, reproduction, juvenile recruitment, age and growth, temporal and spatial distribution, diet selectivity, and contaminant load of shortnose sturgeon captured from the Hudson River Estuary from New York Harbor to Troy Dam. Anchored and drift gill nets and trawl nets would be used to capture up to 240 and 2,340 shortnose sturgeon in year one through three and year four and five, respectively. Other research activities would include: measuring, weighing; tagging unmarked individuals with passive integrated transponder tags, and dart tags; and genetic tissue sampling. A first subset of fish would be anesthetized and tagged with acoustic transmitters; a second subset would have fin rays sampled for ageing; and a third subset of fish would be gastrically lavaged for diet analysis, as well as have blood samples taken for contaminant testing. A total of nine unintended mortalities are requested over the life of the permit.

Dated: June 3, 2011.

**P. Michael Payne,**

*Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2011–14333 Filed 6–8–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA436**

### Incidental Taking of Marine Mammals; Taking of Marine Mammals Incidental to the Explosive Removal of Offshore Structures in the Gulf of Mexico

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

**ACTION:** Notice; issuance of letters of authorization.

**SUMMARY:** In accordance with the Marine Mammal Protection Act (MMPA) and implementing regulations, notification is hereby given that NMFS has issued one-year Letters of Authorization (LOA) to take marine mammals incidental to the explosive removal of offshore oil and gas structures (EROS) in the Gulf of Mexico.

**DATES:** These authorizations are effective from July 1, 2011 through June 30, 2012, and September 3, 2011 through September 2, 2012.

**ADDRESSES:** The application and LOAs are available for review by writing to P. Michael Payne, Chief, Permits, Conservation, and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3235 or by telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**), or online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

**FOR FURTHER INFORMATION CONTACT:** Howard Goldstein or Jolie Harrison, Office of Protected Resources, NMFS, 301–713–2289.

**SUPPLEMENTARY INFORMATION:** Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce (who has delegated the authority to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region, if certain findings are made 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 any marine mammal.

Authorization for incidental taking, in the form of annual LOAs, may be granted by NMFS for periods up to five 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) for subsistence uses (where relevant). In addition, NMFS must prescribe regulations that include permissible methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat (*i.e.,* mitigation), and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating rounds, and areas of similar significance. The regulations also must include requirements pertaining to the monitoring and reporting of such taking.

Regulations governing the taking of marine mammals incidental to EROS were published on June 19, 2008 (73 FR 34875), and remain in effect through July 19, 2013. For detailed information on this action, please refer to that **Federal Register** notice. The species that applicants may take in small numbers during EROS activities are bottlenose dolphins (*Tursiops truncatus*), Atlantic spotted dolphins (*Stenella frontalis*), pantropical spotted dolphins (*Stenella attenuata*), Clymene dolphins (*Stenella clymene*), striped dolphins (*Stenella coeruleoalba*), spinner dolphins (*Stenella longirostris*), rough-toothed dolphins (*Steno bredanensis*), Risso's dolphins (*Grampus griseus*), melon-headed whales (*Peponocephala electra*), short-finned pilot whales (*Globicephala macrorhynchus*), and sperm whales (*Physeter macrocephalus*). NMFS received requests for LOAs from El Paso Exploration & Production Company, L.P. (El Paso) and EOG Resources, Inc. (EOG Resources) for activities covered by EROS regulations.

### Reporting

NMFS regulations require timely receipt of reports for activities conducted under the previously issued LOA and a determination that the required mitigation, monitoring and reporting were undertaken. NMFS Galveston Laboratory's Platform Removal Observer Program (PROP) has provided reports for El Paso and EOG Resources removal of offshore structures in 2010. NMFS PROP observers reported the following during El Paso and EOG Resources' EROS operations in 2010 to 2011:

| Company | Structure | Dates | Marine mammal sightings (individuals) | Biological impacts observed to marine mammals |
|---|---|---|---|---|
| El Paso | Ship Shoal Area, Block 278, Platform A. | August 14 to 23, 2010 | None | None. |
| El Paso | West Cameron Area, Block 150, Platform F. | August 20 to 21, 2010 | Bottlenose Dolphins (12) | None. |

| Company | Structure | Dates | Marine mammal sightings (individuals) | Biological impacts observed to marine mammals |
|---|---|---|---|---|
| El Paso | South Timbalier Area, Block 212, Platform C. | August 23 to 26, 2010 | None | None. |
| EOG Resources | Viosca Knoll Area, Block 31, Platform A. | September 9 to 12, 18, 20 to 22, 2010. | None | None. |
| EOG Resources | Viosca Knoll Area, Block 74, Platform 2. | September 1 to 4, 2010 | None | None. |
| EOG Resources | Viosca Knoll Area, Block 124, Platform A. | September 5 to 8, 2010 | None | None. |

Pursuant to these regulations, NMFS has issued an LOA to El Paso and EOG Resources. Issuance of the LOAs is based on a finding made in the preamble to the final rule that the total taking by these activities (with monitoring, mitigation, and reporting measures) will result in no more than a negligible impact on the affected species or stock(s) of marine mammals and will not have an unmitigable adverse impact on subsistence uses. NMFS will review reports to ensure that the applicants are in compliance with meeting the requirements contained in the implementing regulations and LOA, including monitoring, mitigation, and reporting requirements.

Dated: June 3, 2011.

**Helen M. Golde,**

*Deputy Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2011–14312 Filed 6–8–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA476**

### Pacific Fishery Management Council; Public Meeting

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

**ACTION:** Notice of a public meeting.

**SUMMARY:** The Pacific Fishery Management Council's (Pacific Council) Tule Chinook Workgroup (TCW) will hold a meeting to review work products and develop an abundance-based harvest management approach for Columbia River natural tule Chinook. This meeting of the TCW is open to the public.

**DATES:** The meeting will be held Thursday, July 14, 2011, from 9 a.m. to 4 p.m.

**ADDRESSES:** The meeting will be held at the Pacific Fishery Management Council, 7700 NE. Ambassador Place, Suite 101, Portland, OR 97220–1384; telephone: (503) 820–2280.

**FOR FURTHER INFORMATION CONTACT:** Mr. Chuck Tracy, Salmon Management Staff Officer, Pacific Fishery Management Council; telephone: (503) 820–2280.

**SUPPLEMENTARY INFORMATION:** This meeting of the TCW will involve review of initial work products and refining future work plans. Eventually, TCW work products will be reviewed by the Pacific Council, and if approved, would be submitted to NMFS for possible consideration in the next Lower Columbia River tule biological opinion for ocean salmon seasons in 2012 and beyond, and distributed to State and Federal recovery planning processes. In the event that a usable approach emerges from this process, the Pacific Council may consider a fishery management plan (FMP) amendment process beginning after November 2011 to adopt the approach as a formal conservation objective in the Salmon FMP.

Although non-emergency issues not contained in the meeting agenda may come before the TCW for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

### Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: June 6, 2011.

**Tracey L. Thompson,**

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

[FR Doc. 2011–14240 Filed 6–8–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA255**

### Takes of Marine Mammals Incidental to Specified Activities; Marine Geophysical Survey in the Central Gulf of Alaska, June 2011

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

**ACTION:** Notice; issuance of an incidental take authorization (ITA).

**SUMMARY:** In accordance with the Marine Mammal Protection Act (MMPA) regulation, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to the U.S. Geological Survey (USGS) to take marine mammals, by Level B harassment, incidental to conducting a marine geophysical survey in the central Gulf of Alaska (GOA), June 2011.

**DATES:** Effective June 5 through July 25, 2011.

**ADDRESSES:** A copy of the IHA and application are available by writing to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910 or by telephoning the contacts listed here.

A copy of the application containing a list of the references used in this document may be obtained by writing to the above address, telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**) or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* The following associated documents are also available at the same Internet address: Environmental Assessment (EA), prepared by USGS. The NMFS Biological Opinion will be available online at: *http://www.nmfs.noaa.gov/pr/consultation/opinions.htm.* Documents

cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

**FOR FURTHER INFORMATION CONTACT:** Howard Goldstein or Jolie Harrison, Office of Protected Resources, NMFS, 301–713–2289, ext. 172.

**SUPPLEMENTARY INFORMATION:**

## Background

Section 101(a)(5)(D) of the MMPA (16 U.S.C. 1371 (a)(5)(D)) directs the Secretary of Commerce (Secretary) to authorize, upon request, the incidental, but not intentional, taking of small numbers of marine mammals of a species or population stock, by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

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

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) of the MMPA establishes a 45-day time limit for NMFS's review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the public comment period, NMFS must either issue or deny the authorization. Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

16 U.S.C. 1362(18)

## Summary of Request

NMFS received an application on January 21, 2011, from USGS for the taking by harassment, of marine mammals, incidental to conducting a marine geophysical survey in the central GOA within the U.S. Exclusive Economic Zone (EEZ) and adjacent international waters in depths from approximately 2,000 meters (m) (6,561.7 feet [ft]) to greater than 6,000 m (19,685 ft). USGS plans to conduct the survey from approximately June 5 to 25, 2011. On April 1, 2011, NMFS published a notice in the **Federal Register** (76 FR 18167) disclosing the effects on marine mammals, making preliminary determinations and including a proposed IHA. The notice initiated a 30-day public comment period.

USGS plans to use one source vessel, the R/V *Marcus G. Langseth* (*Langseth*) and a seismic airgun array to collect seismic reflection and refraction profiles to be used to delineate the U.S. Extended Continental Shelf (ECS) in the GOA. In addition to the operations of the seismic airgun array, USGS intends to operate a multibeam echosounder (MBES) and a sub-bottom profiler (SBP) continuously throughout the survey.

Acoustic stimuli (*i.e.,* increased underwater sound) generated during the operation of the seismic airgun array may have the potential to cause a short-term behavioral disturbance for marine mammals in the survey area. This is the principal means of marine mammal taking associated with these activities and USGS has requested an authorization to take 13 species of marine mammals by Level B harassment. Take is not expected to result from the use of the MBES or SBP, for reasons discussed in this notice; nor is take expected to result from collision with the vessel because it is a single vessel moving at a relatively slow speed during seismic acquisition within the survey, for a relatively short period of time (approximately 21 days). It is likely that any marine mammal would be able to avoid the vessel.

## Description of the Specified Activity

USGS's planned seismic survey in the central GOA is between approximately 200 to 650 kilometers (km) (108 to 351 nautical miles [nmi]) offshore in the area 53 to 57° North, 135 to 148° West (see Figure 1 of the IHA application). Water depths in the survey area range from approximately 2,000 m (6,561.7 ft) to greater than 6,000 m (19,685 ft). The project is scheduled to occur from approximately June 5 to 25, 2011. Some minor deviation from these dates is possible, depending on logistics and weather.

The seismic survey will collect seismic reflection and refraction profiles to be used to delineate the U.S. ECS in the GOA. The ECS is the region beyond 200 nmi where a nation can show that it satisfies the conditions of Article 76 of the United Nations Convention on the Law of the Sea. One of the conditions in Article 76 is a function of sediment thickness. The seismic profiles are designed to identify the stratigraphic "basement" and to map the thickness of the overlying sediments. Acoustic velocities (required to convert measured travel times to true depth) will be measured directly using sonobuoys and ocean-bottom seismometers (OBSs), as well as by analysis of hydrophone streamer data. Acoustic velocity refers to the velocity of sound through sediments or crust.

The survey will involve one source vessel, the *Langseth*. The *Langseth* will deploy an array of 36 airguns as an energy source. The receiving system will consist of one 8 km (4.3 nmi) long hydrophone streamer and/or five OBSs. As the airgun is towed along the survey lines, the hydrophone streamer will receive the returning acoustic signals and transfer the data to the on-board processing system. The OBSs record the returning acoustic signals internally for later analysis.

The planned seismic survey (*e.g.,* equipment testing, startup, line changes, repeat coverage of any areas, and equipment recovery) will consist of approximately 2,840 km (1,533.5 nmi) of transect lines in the central GOA survey area (see Figure 1 of the IHA application), with an additional 140 km (75.6 nmi) of turns. The 36 airgun array (6,600 $in^3$) will be powered-down to one airgun (40 $in^3$) during turns. All of the survey will take place in water deeper than 1,000 m (3,280.8 ft). A multi-channel seismic (MCS) survey using the hydrophone streamer will take place along 17 MCS profile lines and 2 OBS lines. Following the MCS survey, five OBSs will be deployed and a refraction survey will take place along one of the 11 lines. If time permits, an additional 340 km (183.6 nmi) contingency line will be added to the MCS survey. In addition to the operations of the airgun array, a Kongsberg EM 122 MBES and Knudsen 320B SBP will also be

operated from the *Langseth* continuously throughout the cruise. There will be additional seismic operations associated with equipment testing, start-up, and possible line changes or repeat coverage of any areas where initial data quality is sub-standard. In USGS's calculations, 25% has been added for those additional operations.

All planned geophysical data acquisition activities will be conducted by Lamont-Doherty Earth Observatory (L–DEO), the *Langseth's* operator, with on-board assistance by the scientists who have planned the study. The Principal Investigators are Drs. Jonathan R. Childs and Ginger Barth of the USGS. The vessel will be self-contained, and the crew will live aboard the vessel for the entire cruise.

**Description of the Dates, Duration, and Specified Geographic Region**

The survey will occur in the central GOA, between approximately 200 and 650 km offshore, in the area 53 to 57° North, 135 to 148° West. The seismic survey will take place in water depths of 2,000 to greater than 6,000 m. The exact dates of the activities depend on logistics and weather conditions. The *Langseth* will depart from Dutch Harbor, Alaska on June 5, 2011, and return there on June 25, 2011. Seismic operations will be carried out for an estimated 12 to 14 days.

NMFS outlined the purpose of the program in a previous notice for the proposed IHA (76 FR 18167, April 1, 2011). The activities to be conducted have not changed between the proposed IHA notice and this final notice announcing the issuance of the IHA. For a more detailed description of the authorized action, including vessel and acoustic source specifications, the reader should refer to the proposed IHA notice (76 FR 18167, April 1, 2011), the IHA application and associated documents referenced above this section.

**Comments and Responses**

A notice of receipt of the USGS application and proposed IHA was published in the **Federal Register** on April 1, 2011 (76 FR 18167). During the 30-day public comment period, NMFS received comments from the Marine Mammal Commission (Commission) only. The Commission's comments are online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* Following are their comments and NMFS's responses:

*Comment 1:* The Commission recommends that the NMFS require the USGS to re-estimate the proposed exclusion and buffer zones and associated takes of marine mammals using site-specific information.

*Response:* In the water depths that the survey is to be conducted, site-specific source signature measurements are neither warranted nor practical. Site signature measurements are normally conducted commercially by shooting a test pattern over an ocean bottom instrument in shallow water. This method is neither practical nor valid in water depths as great as 2,000 m (6,561.7 ft). The alternative method of conducting site-specific attenuation measurements would require a second vessel, which is impractical both logistically and financially. Sound propagation is going to vary notably less between deep water sites than it would between shallow water sites (because of the reduced significance of bottom interaction), thus decreasing the importance of site-specific estimates.

Should the action agency endeavor to undertake a sound source verification study, confidence in the results is necessary in order to ensure for conservation purposes that appropriate monitoring and mitigation measures are implemented; therefore inappropriate or poorly executed efforts should be avoided and discouraged.

Based on these reasons, and the information provided by USGS in their IHA application and EA, NMFS is satisfied that the data supplied are sufficient for NMFS to conduct its analysis and make any determinations and therefore no further effort is needed by the applicant. While exposures of marine mammals to acoustic stimuli are difficult to estimate, NMFS is confident that the levels of take authorized herein are estimated based upon the best available scientific information and estimation methodology. The 160 dB zone used to estimate exposure is appropriate and sufficient for purposes of supporting NMFS's analysis and determinations required under section 101(a)(5)(D) of the MMPA and its implementing regulations. See NMFS's response to Comment 2 (below) for additional details.

*Comment 2:* The Commission recommends that if site-specific information is not used to estimate the proposed exclusion and buffer zones and associated takes of marine mammals, the USGS provide a detailed justification for basing the exclusion and buffer zones for the proposed survey in the GOA on empirical data collected in the GOM or on modeling that uses measurements from the GOM and that explains the significance of any deviations in survey method, such as the proposed change in tow depth.

*Response:* USGS has revised Appendix A in the EA to include information from the calibration study conducted on the *Langseth* in 2007 and 2008. This information is now available in the final EA on USGS's Web site at *http://walrus.wr.usgs.gov/EA/ECS_EA/* as well as on NSF's Web site at *http://www.nsf.gov/geo/oce/envcomp/index.jsp.* The revised Appendix A describes the L–DEO modeling process and compares the model results with empirical results of the 2007 to 2008 *Langseth* calibration experiment in shallow, intermediate, and deep water. The conclusions identified in Appendix A show that the model represents the actual produced levels, particularly within the first few kms, where the predicted exclusion zones (EZs, *i.e.,* safety radii) lie. At greater distances, local oceanographic variations begin to take effect, and the model tends to over predict. Further, since the modeling matches the observed measurement data, the authors have concluded that the models can continue to be used for defining EZs, including for predicting mitigation radii for various tow depths. The data results from the studies were peer reviewed and the calibration results, viewed as conservative, were used to determine the cruise-specific EZs.

At present, the L–DEO model does not account for site-specific environmental conditions. The calibration study of the L–DEO model predicted that using site-specific information may actually provide less conservative EZ radii at greater distances. The Draft Programmatic Environmental Impact Statement for Marine Seismic Research Funded by the National Science Foundation or Conducted by the U.S. Geological Survey (DPEIS) prepared pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) did incorporate various site-specific environmental conditions in the modeling of the Detailed Analysis Areas. The NEPA process associated with the DPEIS is still ongoing and the USGS and NSF have not yet issued a Record of Decision. Once the NEPA process for the PEIS has concluded, USGS and/or NSF will look at upcoming cruises on a site-specific basis for any impacts not already considered in the DPEIS.

The IHA issued to USGS, under section 101(a)(5)(D) of the MMPA provides monitoring and mitigation requirements that will protect marine mammals from injury, serious injury, or mortality. USGS is required to comply with the IHA's requirements. These analyses are supported by extensive scientific research and data. NMFS is

confident in the peer-reviewed results of the L–DEO seismic calibration studies which, although viewed as conservative, are used to determine cruise-specific EZs and which factor into exposure estimates. NMFS has determined that these reviews are the best scientific data available for review of the IHA application and to support the necessary analyses and determinations under the MMPA, Endangered Species Act (ESA; 16 U.S.C. 1531 *et seq.*) and NEPA.

Based on NMFS's analysis of the likely effects of the specified activity on marine mammals and their habitat, NMFS has determined that the EZs identified in the IHA are appropriate for the survey and that additional field measurement is not necessary at this time. While exposures of marine mammals to acoustic stimuli are difficult to estimate, NMFS is confident that the levels of take authorized herein are estimated based upon the best available scientific information and estimation methodology. The 160 dB zone used to estimate exposure are appropriate and sufficient for purposes of supporting NMFS's analysis and determinations required under section 101(a)(5)(D) of the MMPA and its implementing regulations.

*Comment 3:* The Commission recommends that the NMFS specify in the authorization all conditions under which an 8 min period could be followed by a resumption of the airguns at full power.

*Response:* In the instance of a power-down or shut-down based on the presence of a marine mammal in the EZ, USGS will restart the airgun array to the full operating source level (*i.e.,* 36 airguns 6,600 cubic inches [in$^3$]) only if the PSVO visually observes the marine mammal exiting the EZ for the full source level within an 8 min period of the shut-down or power-down. The 8 min period is based on the 180 dB radius for the 36 airgun subarray at a depth of 9 m in relation to the minimum planned speed of the *Langseth* while shooting (8.5 km/hr [4.6 kts]). In the event that a marine mammal would re-enter the EZ after reactivating the airguns, USGS would reinitiate a shut-down or power-down as required by the IHA.

Should the airguns be inactive or powered-down for more than 8 min, and the PSVO does not observe the marine mammal leaving the EZ, then USGS must wait 15 min (for small odontocetes and pinnipeds) or 30 min (for mysticetes and large odontocetes) after the last sighting before USGS can initiate ramp-up procedures. However, ramp-up will not occur as long as a marine mammal is detected within the EZ, which provides more time for animals to leave the EZ, and accounts for the position, swim speed, and heading for marine mammals within the EZ.

Finally, USGS may need to temporarily perform a shut-down due to equipment failure or maintenance. In this instance, USGS will restart the airgun array to the full source level within an 8 min period of the shut down only if the PSVOs do not observe marine mammals within the EZ for the full source level. If the airguns are inactive or powered-down for more than 8 min, then USGS would follow the ramp-up procedures required by the IHA. USGS would restart the airguns beginning with the smallest airgun in the array and add airguns in a sequence such that the source level of the array does not exceed approximately 6 decibels (dB) per 5 min period over a total duration of approximately 30 min. Again, the PSVOs would monitor the EZs for marine mammals during this time and would initiate a power-down or a shut-down, as required by the IHA.

*Comment 4:* The Commission recommends that the NMFS extend the 30 min period following a marine mammal sighting in the EZ to cover the full dive times of all species likely to be encountered.

*Response:* NMFS recognizes that several species of deep-diving cetaceans are capable of remaining underwater for more than 30 min (*e.g.,* sperm whales, Cuvier's beaked whales, Baird's beaked whales); however, for the following reasons NMFS believes that 30 min is an adequate length for the monitoring period prior to the ramp-up of airguns:

(1) Because the *Langseth* is required to monitor before ramp-up of the airgun array, the time of monitoring prior to start-up of any but the smallest array is effectively longer than 30 min (ramp-up will begin with the smallest airgun in the array and airguns will be added in sequence such that the source level of the array will increase in steps not exceeding approximately 6 dB per 5 min period over a total duration of 20 to 30 min;

(2) In many cases PSVOs are observing during times when USGS is not operating the seismic airguns and would observe the area prior to the 30 min observation period;

(3) The majority of the species that may be exposed do not stay underwater more than 30 min; and

(4) All else being equal and if deep-diving individuals happened to be in the area in the short time immediately prior to the pre-ramp-up monitoring, if an animal's maximum underwater dive time is 45 min, then there is only a one in three chance that the last random surfacing would occur prior to the beginning of the required 30 min monitoring period and that the animal would not be seen during that 30 min period.

Finally, seismic vessels are moving continuously (because of the long, towed array and streamer) and NMFS believes that unless the animal submerges and follows at the speed of the vessel (highly unlikely, especially when considering that a significant part of their movements is vertical [deep-diving]), the vessel will be far beyond the length of the EZ radii within 30 min, and therefore it will be safe to start the airguns again.

The effectiveness of monitoring is science-based and the requirement is that monitoring and mitigation measures be "practicable." NMFS believes that the framework for visual monitoring will: (1) Be effective at spotting almost all species for which take is requested; and (2) that imposing additional requirements, such as those suggested by the Commission, would not meaningfully increase the effectiveness of observing marine mammals approaching or entering the EZs and thus further minimize the potential for take.

*Comment 5:* The Commission recommends that the NMFS provide additional justification for its preliminary determination that the proposed monitoring program will be sufficient to detect, with a high level of confidence, all marine mammals within or entering the identified exclusion and buffer zones, which at a minimum should:

(1) Identify those species that it believes can be detected with a high degree of confidence using visual monitoring only;

(2) Describe detection probability as a function of distance from the vessel;

(3) Describe changes in detection probability under various sea state and weather conditions and light levels; and

(4) Explain how close to the vessel marine mammals must be for Protected Species Observers (PSOs) to achieve high nighttime detection rates.

*Response:* NMFS believes that the planned monitoring program will be sufficient to detect (using visual monitoring and passive acoustic monitoring [PAM]), with reasonable certainty, marine mammals within or entering identified EZs. This monitoring, along with the required mitigation measures, will result in the least practicable adverse impact on the affected species or stocks and will result in a negligible impact on the affected species or stocks of marine mammals.

Also, NMFS expects some animals to avoid areas around the airgun area ensonified at the level of the EZ.

NMFS acknowledges that the detection probability for certain species of marine mammals varies depending on animal size and behavior as well as sea state and weather conditions and light levels. The detectability of marine mammals likely decreases in low light (*i.e.,* darkness), higher Beaufort sea states and wind conditions, and poor weather (*e.g.,* fog and/or rain). However, at present, NMFS views the combination of visual monitoring and PAM as the most effective monitoring and mitigation techniques available for detecting marine mammals within or entering the EZ. The final monitoring and mitigation measures are the most effective feasible measures and NMFS is not aware of any additional measures which could meaningfully increase the likelihood of detecting marine mammals in and around the EZ. Further, public comment has not revealed any additional monitoring or mitigation measures that could be feasibly implemented to increase the effectiveness of detection.

USGS (the Federal funding agency for this survey), NSF, and L–DEO are receptive to incorporating proven technologies and techniques to enhance the current monitoring and mitigation program. Until proven technological advances are made, nighttime mitigation measures during operations include combinations of the use of Protected Species Visual Observers (PSVOs) for ramp-ups, PAM, night vision devices (NVDs), and continuous shooting of a mitigation airgun. Should the airgun array be powered-down, the operation of a single airgun would continue to serve as a sound source deterrent to marine mammals. In the event of a complete shut-down of the airgun array at night for mitigation or repairs, USGS suspends the data collection until one-half hour after nautical twilight-dawn (when PSVOs are able to clear the EZ). USGS will not activate the airguns until the entire EZ is visible for at least 30 min.

In cooperation with NMFS, L–DEO will be conducting efficacy experiments of NVDs during a future *Langseth* cruise. In addition, in response to a recommendation from NMFS, L–DEO is evaluating the use of handheld forward-looking thermal imaging cameras to supplement nighttime monitoring and mitigation practices. During other low power seismic and seafloor mapping surveys, USGS successfully used these devices while conducting nighttime seismic operations.

*Comment 6:* The Commission recommends that the NMFS consult with the funding agency (*i.e.,* NSF) and individual applicants (*e.g.,* USGS and L–DEO) to develop, validate, and implement a monitoring program that provides a scientifically sound, reasonably accurate assessment of the types of marine mammal taking and the number of marine mammals taken.

*Response:* Numerous studies have reported on the abundance and distribution of marine mammals inhabiting the GOA, which overlaps with the seismic survey area, and USGS has incorporated this data into their analyses used to predict marine mammal take in their application. NMFS believes that USGS's current approach for estimating abundance in the survey area (prior to the survey) is the best available approach.

There will be significant amounts of transit time during the cruise, and PSVOs will be on watch prior to and after the seismic portions of the survey, in addition to during the survey. The collection of this visual observational data by PSVOs may contribute to baseline data on marine mammals (presence/absence) and provide some generalized support for estimated take numbers, but it is unlikely that the information gathered from this single cruise alone would result in any statistically robust conclusions for any particular species because of the small number of animals typically observed.

NMFS acknowledges the Commission's recommendations and is open to further coordination with the Commission, USGS (the Federal research funding agency for this cruise), NSF (the vessel owner), and L–DEO (the ship operator on behalf of NSF), to develop, validate, and implement a monitoring program that will provide or contribute towards a more scientifically sound and reasonably accurate assessment of the types of marine mammal taking and the number of marine mammals taken. However, the cruise's primary focus is marine geophysical research and the survey may be operationally limited due to considerations such as location, time, fuel, services, and other resources.

*Comment 7:* The Commission recommends that NMFS require the applicant:

(1) To report on the number of marine mammals that were detected acoustically and for which a power-down or shut-down of the airguns was initiated;

(2) Specify if such animals also were detected visually; and

(3) Compare the results from the two monitoring methods (visual versus acoustic) to help identify their respective strengths and weaknesses.

*Response:* The IHA requires that PSAOs on the *Langseth* do and record the following when a marine mammal is detected by the PAM:

(i) Notify the on-duty PSVO(s) immediately of a vocalizing marine mammal so a power-down or shut-down can be initiated, if required;

(ii) Enter the information regarding the vocalization into a database. The data to be entered include an acoustic encounter identification number, whether it was linked with a visual sighting, date, time when first and last heard and whenever any additional information was recorded, position, and water depth when first detected, bearing if determinable, species or species group (*e.g.,* unidentified dolphin, sperm whale), types and nature of sounds heard (*e.g.,* clicks, continuous, sporadic, whistles, creaks, burst pulses, strength of signal, *etc.*), and any other notable information.

USGS reports on the number of acoustic detections made by the PAM system within the post-cruise monitoring reports as required by the IHA. The report also includes a description of any acoustic detections that were concurrent with visual sightings, which allows for a comparison of acoustic and visual detection methods for each cruise.

The post-cruise monitoring reports also include the following information: the total operational effort in daylight (hrs), the total operation effort at night (hrs), the total number of hours of visual observations conducted, the total number of sightings, and the total number of hours of acoustic detections conducted.

LGL Ltd., Environmental Research Associates (LGL), a contractor for USGS, has processed sighting and density data, and their publications can be viewed online at: *http://www.lgl.com/index.php?option=com_content&view=article&id=69&Itemid=162&lang=en.* Post-cruise monitoring reports are currently available on the NMFS's MMPA Incidental Take Program Web site and future reports will also be available on the NSF Web site should there be interest in further analysis of this data by the public.

*Comment 8:* The Commission recommends that NMFS condition the authorization, if issued, to require the USGS to monitor, document, and report observations during all ramp-up procedures; this data will provide a stronger scientific basis for determining the effectiveness of and deciding when to implement this particular mitigation measure.

*Response:* The IHA requires that PSVOs on the *Langseth* make observations for 30 min prior to ramp-up, during all ramp-ups, and during all daytime seismic operations and record the following information when a marine mammal is sighted:

(i) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from seismic vessel, sighting cue, apparent reaction of the airguns or vessel (*e.g.,* none, avoidance, approach, paralleling, *etc.,* and including responses to ramp-up), and behavioral pace; and

(ii) Time, location, heading, speed, activity of the vessel (including number of airguns operating and whether in state of ramp-up or power-down), Beaufort wind force and sea state, visibility, and sun glare.

*Comment 9:* The Commission recommends that NMFS in collaboration with the NSF, analyze these data to determine the effectiveness of ramp-up procedures as a mitigation measure for geophysical surveys.

*Response:* One of the primary purposes of monitoring is to result in "increased knowledge of the species" and the effectiveness of monitoring and mitigation measures; the effectiveness of ramp-up as a mitigation measure and marine mammal reaction to ramp-up would be useful information in this regard. NMFS has asked USGS, NSF, and L–DEO to gather all data that could potentially provide information regarding the effectiveness of ramp-ups as a mitigation measure. However, considering the low numbers of marine mammal sightings and low numbers of ramp-ups, it is unlikely that the information will result in any statistically robust conclusions for this particular seismic survey. Over the long term, these requirements may provide information regarding the effectiveness of ramp-up as a mitigation measure, provided animals are detected during ramp up.

**Description of the Marine Mammals in the Area of the Proposed Specified Activity**

Twenty-five marine mammal species (18 cetacean, 6 pinniped, and the sea otter) are known to or could occur in the GOA. Several of these species are listed as endangered under the U.S. Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*), including the North Pacific right whale (*Eubalaena japonica*), humpback (*Megaptera novaeangliae*), sei (*Balaenoptera borealis*), fin (*Balaenoptera physalus*), blue (*Balaenoptera musculus*), and sperm (*Physeter macrocephalus*) whales, as well as the Cook Inlet distinct population segment (DPS) of beluga whales (*Dephinapterus leucas*) and the western stock of Steller sea lions (*Eumetopias jubatus*). The eastern stock of Steller sea lions is listed as threatened, as is the southwest Alaska DPS of the sea otter (*Enhydra lutris*).

The marine mammals that occur in the survey area belong to four taxonomic groups: odontocetes (toothed cetaceans, such as dolphins), mysticetes (baleen whales), pinnipeds (seals, sea lions, and walrus), and fissipeds (sea otter). Cetaceans and pinnipeds are the subject of the IHA application to NMFS. Walrus sightings are rare in the GOA. Sea otters generally inhabit nearshore areas inside the 40 m (131.2 ft) depth contour (Riedman and Estes, 1990) and likely would not be encountered in the deep, offshore waters of the study area. The sea otter and Pacific walrus are two marine mammal species mentioned in this document that are managed by the U.S. Fish and Wildlife Service (USFWS) and are not considered further in this analysis; all others are managed by NMFS. Coastal cetacean species (gray whales, beluga whales, and harbor porpoises) and pinniped species (California sea lions and harbor seals) likely would not be encountered in the deep, offshore waters of the survey area.

Table 1 presents information on the abundance, distribution, population status, conservation status, and density of the marine mammals that may occur in the survey area during June, 2011.

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Table 1. The habitat, regional abundance, and conservation status of marine mammals that may occur in or near the seismic survey areas in the central GOA. (See text and Tables 2 to 4 in USGS's application and EA for further details.)

| Species | Occurrence in/near Survey Area | Habitat | Abundance (Alaska) | Regional Abundance | ESA[1] | MMPA[2] | Density (#/1,000 km$^2$) Best[3] | Max[4] |
|---|---|---|---|---|---|---|---|---|
| Mysticetes | | | | | | | | |
| North Pacific right whale (*Eubalaena japonica*) | Rare | Coastal, shelf | 28-31[5] | Low hundreds[6] | EN | D | 0 | 0 |
| Gray whale (*Eschrichtius robustus*) | Uncommon | Coastal | N.A. | 19,126[7] | DL | NC D (Western populations) | N.A. | N.A. |
| Humpback whale (*Megaptera novaeangliae*) | Common | Coastal, banks | 3,000 to 5,000[8] | 20,800[9] | EN | D | 2.61 | 6.53 |
| Minke whale (*Balaenoptera acutorostrata*) | Uncommon | Coastal, shelf | 1,233[10] | 25,000[11] | NL | NC | 0 | 0 |
| Sei whale (*Balaenoptera borealis*) | Rare | Pelagic | N.A. | 7,260 to 12,620[12] | EN | D | 0 | 0 |
| Fin whale (*Balaenoptera physalus*) | Common | Pelagic | 1,652[10] | 13,620 to 18,680[13] | EN | D | 2.90 | 10.38 |
| Blue whale (*Balaneoptera musculus*) | Rare | Pelagic, shelf, coastal | N.A. | 3,500[14] | EN | D | 0 | 0 |
| Odontocetes | | | | | | | | |
| Sperm whale (*Physeter macrocephalus*) | Uncommon | Pelagic | 159[15] | 24,000[16] | EN | D | 0.38 | 1.69 |
| Cuvier's beaked whale (*Ziphius cavirostris*) | Common | Pelagic | N.A. | 20,000[17] | NL | NC | 1.42 | 1.81 |
| Baird's beaked whale (*Berardius bairdii*) | Rare | Pelagic | N.A. | 6,000[18] | NL | NC | 0.44 | 0.60 |
| Stejneger's beaked whale (*Mesoplodon stejnegeri*) | Common | Likely pelagic | N.A. | N.A. | NL | NC | 0 | 0 |

| Species | Occurrence in/near Survey Area | Habitat | Abundance (Alaska) | Regional Abundance | ESA[1] | MMPA[2] | Density (#/1,000 km$^2$) Best[3] | Max[4] |
|---|---|---|---|---|---|---|---|---|
| Beluga whale (*Delphinapterus leucas*) | Extralimital | Coastal and ice edges | 340[19] | N.A. | EN[34] NL | D[34] NC | N.A. | N.A. |
| Pacific white-sided dolphin (*Lagenorhynchus obliquidens*) | Common | Pelagic, shelf, coastal | 26,880[20] | 988,000[21] | NL | NC | N.A. | N.A. |
| Risso's dolphin (*Grampus griseus*) | Extralimital | Pelagic, shelf, coastal | N.A. | 838,000[22] | NL | NC | N.A. | N.A. |
| Killer whale (*Orcinus orca*) | Common | Pelagic, shelf, coastal | 2,636[23] | 8,500[24] | NL[35] | NC | 3.79 | 13.53 |
| Short-finned pilot whale (*Globicephala macrorhynchus*) | Extralimital | Pelagic, shelf, coastal | N.A. | 53,000[22] | NL | NC | N.A. | N.A. |
| Harbor porpoise (*Phocoena phocoena*) | Uncommon | Coastal | 11,146[25] 31,046[26] | 168,387[27] | NL | NC | N.A. | N.A. |
| Dall's porpoise (*Phocoenoides dalli*) | Common | Pelagic, shelf | 83,400[20] | 1,186,000[28] | NL | NC | 25.69 | 62.50 |
| Pinnipeds | | | | | | | | |
| Northern fur seal (*Callorhinus ursinus*) | Uncommon | Pelagic, breeds coastally | 653,171[7] | 1.1 million[29] | NL | D | 105.90 | 158.85 |
| Steller sea lion (*Eumetopias jubatus*) | Common | Coastal, offshore | 58,334- 72,223[30] 42,366[31] | N.A. | T[36] EN[36] | D | 9.80 | 14.70 |
| California sea lion (*Zalophus c. californianus*) | Uncommon | Coastal | N.A. | 238,000[33] | NL | NC | N.A. | N.A. |
| Harbor seal (*Phoca vitulina richardsi*) | Uncommon | Coastal | 45,975[26] | 180,017[32] | NL | NC | N.A. | N.A. |
| Northern elephant seal (*Mirounga angustirostris*) | Uncommon | Coastal, offshore | N.A. | 124,000[33] | NL | NC | 0 | 0 |

N.A. Not available or not assessed.
[1] U.S. Endangered Species Act: EN = Endangered, T = Threatened, NL = Not listed.
[2] U.S. Marine Mammal Protection Act: D = Depleted, NC = Not Classified.
[3] Best density estimate as listed in Table 3 of the application.[4] Maximum density estimate as listed in Table 3 of the application.
[5] Bering Sea and Aleutian Islands (Wade *et al.*, 2010).
[6] Western population (Brownell *et al.*, 2001)
[7] Eastern North Pacific (Allen and Angliss, 2010).
[8] GOA (Calambokidis *et al.*, 2008).
[9] North Pacific Ocean (Barlow *et al.*, 2009).
[10] Western GOA and eastern Aleutians (Zerbini *et al.*, 2006).
[11] Northwest Pacific (Buckland *et al.*, 1992; IWC, 2009).
[12] North Pacific (Tillman, 1977).

[9] North Pacific Ocean (Barlow *et al*., 2009).
[10] Western GOA and eastern Aleutians (Zerbini *et al*., 2006).
[11] Northwest Pacific (Buckland *et al*., 1992; IWC, 2009).
[12] North Pacific (Tillman, 1977).
[13] North Pacific (Ohsumi and Wada, 1974).
[14] Eastern North Pacific (NMFS, 1998).
[15] Western GOA and eastern Aleutians (Zerbini *et al*., 2004).
[16] Eastern temperate North Pacific (Whitehead, 2002b).
[17] Eastern Tropical Pacific (Wade and Gerrodette, 1993).
[18] Western North Pacific (Reeves and Leatherwood, 1994; Kasuya, 2002).
[19] Cook Inlet stock (Shelden *et al*., 2010)
[20] Alaska stock (Allen and Angliss, 2010).
[21] North Pacific Ocean (Miyashita, 1993b).
[22] Western North Pacific Ocean (Miyashita, 1993a).
[23] Minimum abundance in Alaska, includes 2,084 resident and 552 GOA, Bering Sea, Aleutian Islands transients (Allen and Angliss, 2010).
[24] Eastern Tropical Pacific (Ford, 2002).
[25] Southeast Alaska stock (Allen and Angliss, 2010).
[26] GOA stock (Allen and Angliss, 2010).
[27] Eastern North Pacific (totals from Carretta *et al*., 2009 and Allen and Angliss, 2010).
[28] North Pacific Ocean and Bering Sea (Houck and Jefferson, 1999).
[29] North Pacific (Gelatt and Lowry, 2008).
[30] Eastern U.S. Stock (Allen and Angliss, 2010).
[31] Western U.S. Stock (Allen and Angliss, 2010).
[32] Alaska statewide (Allen and Angliss, 2010).
[33] Caretta *et al*., 2009.
[34] Cook Inlet DPS is listed as Endangered and Depleted; other stocks are not listed.
[35] Stocks in Alaska are not listed, but the southern resident DPS is listed as endangered. AT1 transient in Alaska is considered depleted and a strategic stock (NOAA, 2004a).
[36] Eastern stock is listed as threatened, and the western stock is listed as endangered.

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Refer to Section III of USGS's application for detailed information regarding the abundance and distribution, population status, and life history and behavior of these species and their occurrence in the project area. The application also presents how USGS calculated the estimated densities for the marine mammals in the survey area. NMFS has reviewed these data and determined them to be the best available scientific information for the purposes of the IHA.

**Potential Effects on Marine Mammals**

Acoustic stimuli generated by the operation of the airguns, which introduce sound into the marine environment, may have the potential to cause Level B harassment of marine mammals in the survey area. The effects of sounds from airgun operations might include one or more of the following: tolerance, masking of natural sounds, behavioral disturbance, temporary or permanent hearing impairment, or non-auditory physical or physiological effects (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007).

Permanent hearing impairment, in the unlikely event that it occurred, would constitute injury, but temporary threshold shift (TTS) is not an injury (Southall *et al.,* 2007). Although the possibility cannot be entirely excluded, it is unlikely that the project would result in any cases of temporary or permanent hearing impairment, or any significant non-auditory physical or physiological effects. Based on the available data and studies described here, some behavioral disturbance is expected, but NMFS expects the disturbance to be localized and short-term.

The notice of the proposed IHA (76 FR 18167, April 1, 2011) included a discussion of the effects of sounds from airguns on mysticetes, odontocetes, and pinnipeds including tolerance, masking, behavioral disturbance, hearing impairment, and other non-auditory physical effects. NMFS refers the reader to USGS's application, and EA for additional information on the behavioral reactions (or lack thereof) by all types of marine mammals to seismic vessels.

**Anticipated Effects on Marine Mammal Habitat, Fish, and Invertebrates**

NMFS included a detailed discussion of the potential effects of this action on marine mammal habitat, including physiological and behavioral effects on marine fish and invertebrates in the notice of the proposed IHA (76 FR 18167, April 1, 2011). While NMFS anticipates that the specified activity may result in marine mammals avoiding certain areas due to temporary ensonification, this impact to habitat is temporary and reversible which NMFS considered in further detail in the notice of the proposed IHA (76 FR 18167, April 1, 2011) as behavioral modification. The main impact associated with the activity would be temporarily elevated noise levels and the associated direct effects on marine mammals.

Recent work by Andre *et al.* (2011) purports to present the first morphological and ultrastructural evidence of massive acoustic trauma (*i.e.,* permanent and substantial alterations of statocyst sensory hair cells) in four cephalopod species subjected to low-frequency sound. The cephalopods, primarily cuttlefish, were exposed to continuous 40 to 400 Hz sinusoidal wave sweeps (100% duty cycle and 1 s sweep period) for two hours while captive in relatively small tanks (one 2,000 liter [L, 2 $m^3$] and one 200 L [0.2 $m^3$] tank). The received SPL was reported as 157±5 dB re 1 μPa, with peak levels at 175 dB re 1 μPa. As in the McCauley *et al.* (2003) paper on sensory hair cell damage in pink snapper as a result of exposure to seismic sound, the cephalopods were subjected to higher sound levels than they would be under natural conditions, and they were

unable to swim away from the sound source.

**Mitigation**

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

USGS has based the mitigation measures described herein, to be implemented for the seismic survey, on the following:

(1) Protocols used during previous USGS and L–DEO seismic research cruises as approved by NMFS;

(2) Previous IHA applications and IHAs approved and authorized by NMFS; and

(3) Recommended best practices in Richardson *et al.* (1995), Pierson *et al.* (1998), and Weir and Dolman, (2007).

To reduce the potential for disturbance from acoustic stimuli associated with the activities, USGS and/or its designees will implement the following mitigation measures for marine mammals:

(1) EZs;

(2) Power-down procedures;

(3) Shut-down procedures;

(4) Ramp-up procedures; and

(5) Special procedures for situations and species of concern.

*Planning Phase*—In designing the seismic survey, USGS has considered potential environmental impacts including seasonal, biological, and weather factors; ship schedules; and equipment availability. Part of the considerations was whether the research objectives could be met with a smaller source; tests will be conducted to determine whether the two-string sub-array (3,300 in $^3$) will be satisfactory to accomplish the geophysical objectives. If so, the smaller array will be used to minimize environmental impact. Also, the array will be powered-down to a single airgun during turns, and the array will be shut down during OBS deployment and retrieval.

*EZs*—Received sound levels have been determined by corrected empirical measurements for the 36 airgun array, and an L–DEO model was used to predict the EZs for the single 1900LL 40 in $^3$ airgun, which will be used during power-downs. Results were recently reported for propagation measurements of pulses from the 36 airgun array in two water depths (approximately 1,600 m and 50 m [5,249 to 164 ft]) in the Gulf of Mexico (GOM) in 2007 to 2008 (Tolstoy *et al.,* 2009). It would be prudent to use the empirical values that resulted to determine EZs for the airgun array. Results of the propagation measurements (Tolstoy *et al.,* 2009) showed that radii around the airguns for various received levels varied with water depth. During the study, all survey effort will take place in deep (greater than 1,000 m) water, so propagation in shallow water is not relevant here. The depth of the array was different in the GOM calibration study (6 m [19.7 ft]) than in the survey (9 m); thus, correction factors have been applied to the distances reported by Tolstoy *et al.* (2009). The correction factors used were the ratios of the 160, 180, and 190 dB distances from the modeled results for the 6,600 in $^3$ airgun array towed at 6 m versus 9 m. Based on the propagation measurements and modeling, the distances from the source where sound levels are predicted to be 190, 180, and 160 dB re 1 μPa (rms) were determined (see Table 1 above). The 180 and 190 dB radii are to 940 m and 400 m, respectively, as specified by NMFS (2000); these levels were used to establish the EZs.

If the PSVO detects marine mammal(s) within or about to enter the appropriate EZ, the airguns will be powered-down (or shut-down, if necessary) immediately.

Table 2 summarizes the predicted distances at which sound levels (160, 180, and 190 dB [rms]) are expected to be received from the 36 airgun array and a single airgun operating in deep water depths.

TABLE 2—MEASURED (ARRAY) OR PREDICTED (SINGLE AIRGUN) DISTANCES TO WHICH SOUND LEVELS ≥ 190, 180, AND 160 dB

[Re: 1 μPa (rms) could be received in water depths >1,000 m during the survey in the central GOA, June 5 to 25, 2011]

| Source and volume | Water depth | Predicted RMS distances (m) | | |
|---|---|---|---|---|
| | | 190 dB | 180 dB | 160 dB |
| Single Bolt airgun (40 in $^3$) | Deep > 1,000 m | 12 | 40 | 385 |
| 4 Strings 36 airguns (6,600 in$^3$) | Deep > 1,000 m | 400 | 940 | 3,850 |

*Power-Down Procedures*—A power-down involves decreasing the number of airguns in use such that the radius of the 180 dB (or 190 dB) zone is decreased to the extent that marine mammals are no longer in or about to enter the EZ. A power-down of the airgun array can also occur when the vessel is moving from one seismic line to another. During a power-down for mitigation, USGS will operate one airgun. The continued operation of one airgun is intended to alert marine mammals to the presence of the seismic vessel in the area. In contrast, a shut-down occurs when the *Langseth* suspends all airgun activity.

If the PSVO detects a marine mammal outside the EZ, but it is likely to enter the EZ, USGS will power-down the airguns before the animal is within the EZ. Likewise, if a mammal is already within the EZ, when first detected USGS will power-down the airguns immediately. During a power-down of the airgun array, USGS will also operate the 40 in$^3$ airgun. If a marine mammal is detected within or near the smaller EZ around that single airgun (Table 1), USGS will shut-down the airgun (see next section).

Following a power-down, USGS will not resume airgun activity until the marine mammal has cleared the EZ. USGS will consider the animal to have cleared the EZ if:

- A PSVO has visually observed the animal leave the EZ, or
- A PSVO has not sighted the animal within the EZ for 15 min for species with shorter dive durations (*i.e.,* small odontocetes or pinnipeds), or 30 min for species with longer dive durations (*i.e.,* mysticetes and large odontocetes, including sperm, pygmy sperm, dwarf sperm, killer, and beaked whales).

During airgun operations following a power-down (or shut-down) whose duration has exceeded the time limits specified previously, USGS will ramp-up the airgun array gradually (see Shut-down and Ramp-up Procedures).

*Shut-Down Procedures*—USGS will shut down the operating airgun(s) if a

marine mammal is seen within or approaching the EZ for the single airgun. USGS will implement a shut-down:

(1) If an animal enters the EZ of the single airgun after USGS has initiated a power-down; or

(2) If an animal is initially seen within the EZ of the single airgun when more than one airgun (typically the full airgun array) is operating.

USGS will not resume airgun activity until the marine mammal has cleared the EZ, or until the PSVO is confident that the animal has left the vicinity of the vessel. Criteria for judging that the animal has cleared the EZ will be as described in the preceding section.

*Ramp-Up Procedures*—USGS will follow a ramp-up procedure when the airgun array begins operating after a specified period without airgun operations or when a power-down has exceeded that period. USGS proposes that, for the present cruise, this period would be approximately eight min. This period is based on the 180 dB radius (940 m) for the 36 airgun array towed at a depth of 9 m in relation to the minimum planned speed of the *Langseth* while shooting (7.4 km/hr). USGS and L–DEO have used similar periods (approximately 8 to 10 min) during previous L–DEO surveys.

Ramp-up will begin with the smallest airgun in the array (40 $in^3$). Airguns will be added in a sequence such that the source level of the array will increase in steps not exceeding six dB per five min period over a total duration of approximately 35 min. During ramp-up, the PSOs will monitor the EZ, and if marine mammals are sighted, USGS will implement a power-down or shut-down as though the full airgun array were operational.

If the complete EZ has not been visible for at least 30 min prior to the start of operations in either daylight or nighttime, USGS will not commence the ramp-up unless at least one airgun (40 $in^3$ or similar) has been operating during the interruption of seismic survey operations. Given these provisions, it is likely that the airgun array will not be ramped-up from a complete shut-down at night or in thick fog, because the outer part of the EZ for that array will not be visible during those conditions. If one airgun has operated during a power-down period, ramp-up to full power will be permissible at night or in poor visibility, on the assumption that marine mammals will be alerted to the approaching seismic vessel by the sounds from the single airgun and could move away. USGS will not initiate a ramp-up of the airguns if a marine mammal is sighted within or near the applicable EZs during the day or close to the vessel at night.

*Special Procedures for Situations and Species of Concern*—USGS will implement special mitigation procedures as follows:

- The airguns will be shut-down immediately if ESA-listed species for which no takes are being requested (*i.e.,* North Pacific right, sei, blue, and beluga whales) are sighted at any distance from the vessel. Ramp-up will only begin if the whale has not been seen for 30 min.
- Concentrations of humpback, fin, and/or killer whales will be avoided if possible, and the array will be powered-down if necessary. For purposes of this survey, a concentration or group of whales will consist of three or more individuals visually sighted that do not appear to be traveling (*e.g.,* feeding, socializing, *etc.*).

NMFS has carefully evaluated the applicant's mitigation measures and has considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. NMFS's evaluation of potential measures included consideration of the following factors in relation to one another:

(1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;

(2) The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and

(3) The practicability of the measure for applicant implementation.

Based on NMFS's evaluation of the applicant's measures, as well as other measures considered by NMFS or recommended by the public, NMFS has determined that the mitigation measures provide the means of effecting the least practicable adverse impacts on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

**Monitoring and Reporting**

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

*Monitoring*

USGS would sponsor marine mammal monitoring during the present project, in order to implement the mitigation measures that require real-time monitoring, and to satisfy the anticipated monitoring requirements of the IHA. USGS's Monitoring Plan is described below this section. The monitoring work described here has been planned as a self-contained project independent of any other related monitoring projects that may be occurring simultaneously in the same regions. USGS is prepared to discuss coordination of its monitoring program with any related work that might be done by other groups insofar as this is practical and desirable.

*Vessel-Based Visual Monitoring*

USGS's PSVOs will be based aboard the seismic source vessel and will watch for marine mammals near the vessel during daytime airgun operations and during any ramp-ups at night. PSVOs will also watch for marine mammals near the seismic vessel for at least 30 min prior to the start of airgun operations after an extended shut-down.

PSVOs will conduct observations during daytime periods when the seismic system is not operating for comparison of sighting rates and behavior with and without airgun operations and between acquisition periods. Based on PSVO observations, the airguns will be powered-down or shut-down when marine mammals are observed within or about to enter a designated EZ.

During seismic operations in the central GOA, at least four PSOs will be based aboard the *Langseth*. USGS will appoint the PSOs with NMFS's concurrence. Observations will take place during ongoing daytime operations and nighttime ramp-ups of the airguns. During the majority of seismic operations, two PSVOs will be on duty from the observation tower to monitor marine mammals near the seismic vessel. Use of two simultaneous PSVOs will increase the effectiveness of detecting animals near the source vessel. However, during meal times and bathroom breaks, it is sometimes difficult to have two PSVOs on effort, but at least one PSVO will be on duty. PSVO(s) will be on duty in shifts of duration no longer than 4 hr.

Two PSVOs will also be on visual watch during all nighttime ramp-ups of the seismic airguns. A third PSO (*i.e.,* Protected Species Acoustic Observer

[PSAO]) will monitor the PAM equipment 24 hours a day to detect vocalizing marine mammals present in the action area. In summary, a typical daytime cruise would have scheduled two PSVOs on duty from the observation tower, and a third PSAO on PAM. Other crew will also be instructed to assist in detecting marine mammals and implementing mitigation requirements (if practical). Before the start of the seismic survey, the crew will be given additional instruction on how to do so.

The *Langseth* is a suitable platform for marine mammal observations. When stationed on the observation platform, the eye level will be approximately 21.5 m (70.5 ft) above sea level, and the PSVO will have a good view around the entire vessel. During daytime, the PSVOs will scan the area around the vessel systematically with reticle binoculars (*e.g.,* 7 x 50 Fujinon), Big-eye binoculars (25 x 150), and with the naked eye. During darkness, NVDs will be available (ITT F500 Series Generation 3 binocular-image intensifier or equivalent), when required. Laser range-finding binoculars (Leica LRF 1200 laser rangefinder or equivalent) will be available to assist with distance estimation. Those are useful in training observers to estimate distances visually, but are generally not useful in measuring distances to animals directly; that is done primarily with the reticles in the binoculars.

When marine mammals are detected within or about to enter the designated EZ, the airguns will immediately be powered-down or shut-down if necessary. The PSVO(s) will continue to maintain watch to determine when the animal(s) are outside the EZ by visual confirmation. Airgun operations will not resume until the animal is confirmed to have left the EZ, or if not observed after 15 min for species with shorter dive durations (small odontocetes and pinnipeds) or 30 min for species with longer dive durations (mysticetes and large odontocetes, including sperm, killer, and beaked whales).

*PAM*

PAM will complement the visual monitoring program, when practicable. Visual monitoring typically is not effective during periods of poor visibility or at night, and even with good visibility, is unable to detect marine mammals when they are below the surface or beyond visual range.

Besides the three PSVOs, an additional PSAO with primary responsibility for PAM will also be aboard the vessel. USGS can use acoustic monitoring in addition to visual observations to improve detection, identification, and localization of cetaceans. The acoustic monitoring will serve to alert visual observers (if on duty) when vocalizing cetaceans are detected. It is only useful when marine mammals call, but it can be effective either by day or by night, and does not depend on good visibility. It will be monitored in real time so that the PSVOs can be advised when cetaceans are detected. When bearings (primary and mirror-image) to calling cetacean(s) are determined, the bearings will be relayed to the visual observer to help him/her sight the calling animal(s).

The PAM system consists of hardware (*i.e.,* hydrophones) and software. The "wet end" of the system consists of a towed hydrophone array that is connected to the vessel by a cable. The array will be deployed from a winch located on the back deck. A deck cable will connect from the winch to the main computer laboratory where the acoustic station and signal conditioning and processing system will be located. The digitized signal and PAM system is monitored by PSAOs at a station in the main laboratory. The lead in from the hydrophone array is approximately 400 m (1,312 ft) long, the active section of the array is approximately 56 m (184 ft) long, and the hydrophone array is typically towed at depths of less than 20 m (66 ft).

Ideally, the PSAO will monitor the towed hydrophones 24 hr per day at the seismic survey area during airgun operations, and during most periods when the *Langseth* is underway while the airguns are not operating. However, PAM may not be possible if damage occurs to both the primary and back-up hydrophone arrays during operations. The primary PAM streamer on the *Langseth* is a digital hydrophone streamer. Should the digital streamer fail, back-up systems should include an analog spare streamer and a hull-mounted hydrophone. Every effort would be made to have a working PAM system during the cruise. In the unlikely event that all three of these systems were to fail, USGS would continue science acquisition with the visual-based observer program. The PAM system is a supplementary enhancement to the visual monitoring program. If weather conditions were to prevent the use of PAM then conditions would also likely prevent the use of the airgun array.

One PSAO will monitor the acoustic detection system at any one time, by listening to the signals from two channels via headphones and/or speakers and watching the real-time spectrographic display for frequency ranges produced by cetaceans. PSAOs monitoring the acoustical data will be on shift for one to six hours at a time. Besides the PSVO, an additional PSAO with primary responsibility for PAM will also be aboard the source vessel. All PSVOs are expected to rotate through the PAM position, although the most experienced with acoustics will be on PAM duty more frequently.

When a vocalization is detected while visual observations are in progress, the PSAO will contact the PSVO immediately, to alert him/her to the presence of cetaceans (if they have not already been seen), and to allow a power-down or shut-down to be initiated, if required. The information regarding the call will be entered into a database. Data entry will include an acoustic encounter identification number, whether it was linked with a visual sighting, date, time when first and last heard and whenever any additional information was recorded, position and water depth when first detected, bearing if determinable, species or species group (*e.g.,* unidentified dolphin, sperm whale), types and nature of sounds heard (*e.g.,* clicks, continuous, sporadic, whistles, creaks, burst pulses, strength of signal, *etc.*), and any other notable information. The acoustic detection can also be recorded for further analysis.

*PSVO Data and Documentation*

PSVOs will record data to estimate the numbers of marine mammals exposed to various received sound levels and to document apparent disturbance reactions or lack thereof. Data will be used to estimate numbers of animals potentially "taken" by harassment (as defined in the MMPA). They will also provide information needed to order a power-down or shut-down of the airguns when a marine mammal is within or near the EZ. Observations will also be made during daytime periods when the *Langseth* is underway without seismic operations. In addition to transits to, from, and through the study area, there will also be opportunities to collect baseline biological data during the deployment and recovery of OBSs.

When a sighting is made, the following information about the sighting will be recorded:

1. Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from seismic vessel, sighting cue, apparent reaction to the airguns or vessel (*e.g.,* none, avoidance,

approach, paralleling, *etc.*), and behavioral pace.

2. Time, location, heading, speed, activity of the vessel, sea state, visibility, and sun glare.

The data listed under (2) will also be recorded at the start and end of each observation watch, and during a watch whenever there is a change in one or more of the variables.

All observations and power-downs or shut-downs will be recorded in a standardized format. Data will be entered into an electronic database. The accuracy of the data entry will be verified by computerized data validity checks as the data are entered and by subsequent manual checking of the database. These procedures will allow initial summaries of data to be prepared during and shortly after the field program, and will facilitate transfer of the data to statistical, graphical, and other programs for further processing and archiving.

Results from the vessel-based observations will provide:

1. The basis for real-time mitigation (airgun power-down or shut-down).

2. Information needed to estimate the number of marine mammals potentially taken by harassment, which must be reported to NMFS.

3. Data on the occurrence, distribution, and activities of marine mammals in the area where the seismic study is conducted.

4. Information to compare the distance and distribution of marine mammals relative to the source vessel at times with and without seismic activity.

5. Data on the behavior and movement patterns of marine mammals seen at times with and without seismic activity.

USGS will submit a report to NMFS and NSF within 90 days after the end of the cruise. The report will describe the operations that were conducted and sightings of marine mammals near the operations. The report will provide full documentation of methods, results, and interpretation pertaining to all monitoring. The 90-day report will summarize the dates and locations of seismic operations, and all marine mammal sightings (dates, times, locations, activities, associated seismic survey activities). The report will also include estimates of the number and nature of exposures that could result in "takes" of marine mammals by harassment or in other ways.

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by this IHA, such as an injury (Level A harassment), serious injury or mortality (*e.g.,* ship-strike, gear interaction, and/or entanglement), USGS will immediately cease the specified activities and immediately report the incident to the Chief of the Permits, Conservation, and Education Division, Office of Protected Resources, NMFS, at 301–713–2289 and/or by e-mail to *Michael.Payne@noaa.gov* and *Howard.Goldstein@noaa.gov,* and the Alaska Regional Stranding Coordinators (*Aleria.Jensen@noaa.gov* and *Barbara.Mahoney@noaa.gov*). The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Name and type of vessel involved;
- Vessel's speed during and leading up to the incident;
- Description of the incident;
- Status of all sound source use in the 24 hours preceding the incident;
- Water depth;
- Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities will not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with USGS to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. USGS may not resume their activities until notified by NMFS via letter or e-mail, or telephone.

In the event that USGS discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (*i.e.,* in less than a moderate state of decomposition as described in the next paragraph), USGS will immediately report the incident to the Chief of the Permits, Conservation, and Education Division, Office of Protected Resources, NMFS, at 301–713–2289, and/or by e-mail to *Michael.Payne@noaa.gov* and *Howard.Goldstein@noaa.gov,* and the NMFS Alaska Stranding Hotline (1–877–925–7773) and/or by e-mail to the Alaska Regional Stranding Coordinators (*Aleria.Jensen@noaa.gov* and *Barbara.Mahoney@noaa.gov*). The report must include the same information identified in the paragraph above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with USGS to determine whether modifications in the activities are appropriate.

In the event that USGS discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), USGS will report the incident to the Chief of the Permits, Conservation, and Education Division, Office of Protected Resources, NMFS, at 301–713–2289, and/or by e-mail to *Michael.Payne@noaa.gov* and *Howard.Goldstein@noaa.gov,* and the NMFS Alaska Stranding Hotline (1–877–925–7773) and/or by e-mail to the Alaska Regional Stranding Coordinators (*Aleria.Jensen@noaa.gov* and *Barbara.Mahoney@noaa.gov*), within 24 hours of the discovery. USGS will provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network.

**Estimated Take by Incidental Harassment**

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Only take by Level B harassment is anticipated and authorized as a result of the marine seismic survey in the central GOA. Acoustic stimuli (*i.e.,* increased underwater sound) generated during the operation of the seismic airgun array may have the potential to cause marine mammals in the survey area to be exposed to sounds at or greater than 160 dB or cause temporary, short-term changes in behavior. There is no evidence that the planned activities could result in injury, serious injury, or mortality within the specified geographic area for which NMFS has issued the IHA. Take by injury, serious injury, or mortality is thus neither anticipated nor authorized. NMFS has determined that the required mitigation and monitoring measures will minimize any potential risk for injury, serious injury, or mortality.

The following sections describe USGS's methods to estimate take by incidental harassment and present the applicant's estimates of the numbers of marine mammals that could be affected during the seismic program. The

estimates are based on a consideration of the number of marine mammals that could be harassed by operations with the 36 airgun array to be used during approximately 3,300 km (1,782 nmi) of survey lines in the central GOA.

USGS assumes that, during simultaneous operations of the airgun array and the other sources, any marine mammals close enough to be affected by the MBES and SBP would already be affected by the airguns. However, whether or not the airguns are operating simultaneously with the other sources, marine mammals are expected to exhibit no more than short-term and inconsequential responses to the MBES and SBP given their characteristics (*e.g.,* narrow, downward-directed beam) and other considerations described previously. Such reactions are not considered to constitute "taking" (NMFS, 2001). Therefore, USGS provides no additional allowance for animals that could be affected by sound sources other than airguns.

There are several sources of systematic data on the numbers and distributions of marine mammals in the coastal and nearshore areas of the GOA, but there are fewer data for offshore areas. Vessel-based surveys in the northern and western GOA from the Kenai Peninsula to the central Aleutian Islands during July to August, 2001 to 2003 (Zerbini *et al.,* 2003, 2006, 2007) and in the northern and western GOA from Prince William Sound to approximately 160° West off the Alaska Peninsula during June 26 to July 15, 2003 (Waite, 2003) were confined to waters less than 1,000 m deep, and most effort was in depths less than 100 m. Similarly, Dahlheim *et al.* (2000) conducted aerial surveys of the nearshore waters from Bristol Bay to Dixon Entrance for harbor porpoises during 1993, and Dahlheim and Towell (1994) conducted vessel-based surveys of Pacific white-sided dolphins in the inland waterways of southeast Alaska during April to May, June or July, and September to early October of 1991 to 1993.

Deeper water was included in several surveys. In a report on a seismic cruise in southeast Alaska from Dixon Entrance to Kodiak Island during August to September, 2004, MacLean and Koski (2005) included density estimates of cetaceans and pinnipeds for each of three depth ranges (less than 100 m, 100 to 1,000 m, and greater than 1,000 m) during non-seismic periods. Hauser and Holst (2009) reported density estimates during non-seismic periods for all marine mammals sighted during a September to early October seismic cruise in southeast Alaska for each of the same three depth ranges as MacLean and Koski (2005). Rone *et al.* (2010) conducted surveys of nearshore and offshore strata in the GOA during April, 2009, with much of their survey effort in water depths greater than 1,000 m. The Department of the Navy (DON, 2009) estimated densities of several species of marine mammals in the offshore GOA based on surveys by other researchers.

Table 2 (Table 3 of the IHA application) gives the estimated average (best) and maximum densities of marine mammals expected to occur in the deep, offshore waters of the survey area. USGS used the densities reported by MacLean and Koski (2005) and Hauser and Holst (2009) for greater than 1,000 m, which were corrected for both trackline detection probability and availability biases. USGS calculated density estimates from effort and sightings in water depths greater than 1,000 m in Rone *et al.* (2010) for humpback, fin, and killer whales and Dall's porpoise, and in 500 to 1,000 m depths of Waite (2003) for Cuvier's and Baird's beaked whales, using values for $f(0)$ and $g(0)$ from Barlow and Forney (2007). Finally, USGS used seasonal densities for pinnipeds from DON (2009), which were based on counts at haul-out sites and biological (mostly breeding) information to estimate in-water densities.

There is some uncertainty about the representativeness of the data and the assumptions used in the calculations below for two main reasons: (1) the surveys from which densities were derived were at different times of year: April (Rone *et al.,* 2010), June to July (Waite, 2003), August to September (MacLean and Koski, 2005), and September to October (Hauser and Holst, 2009); and (2) the MacLean and Koski (2005) and Hauser and Holst (2009) surveys were conducted primarily in southeast Alaska (east of the study area). However, the approach used here is believed to be the best available approach.

Also, to provide some allowance for these uncertainties, "maximum estimates" as well as "best estimates" of the densities present and numbers potentially affected have been derived. Best estimates of cetacean density are effort-weighted mean densities from the various surveys, whereas maximum estimates of density come from the individual survey that provided the highest density. For marine mammals where only one density estimate was available, the maximum is 1.5 times the best estimate.

For one species, the Dall's porpoise, density estimates in the original reports are much higher than densities expected during the survey, because this porpoise is attracted to vessels. USGS estimates for Dall's porpoises are from vessel-based surveys without seismic activity; they are overestimates possibly by a factor of 5 times, given the tendency of this species to approach vessels (Turnock and Quinn, 1991). Noise from the airgun array during the survey is expected to at least reduce and possibly eliminate the tendency of this porpoise to approach the vessel. Dall's porpoises are tolerant of small airgun sources (MacLean and Koski, 2005) and tolerated higher sound levels than other species during a large-array survey (Bain and Williams, 2006); however, they did respond to that and another large airgun array by moving away (Calambokidis and Osmek, 1998; Bain and Williams, 2006). Because of the probable overestimates, the best and maximum estimates for Dall's porpoises shown in Table 2 (Table 3 of the IHA application) are one-quarter of the reported densities. In fact, actual densities are probably slightly lower than that.

USGS's estimates of exposures to various sound levels assume that the surveys will be fully completed including the contingency line; in fact, the ensonified areas calculated using the planned number of line-km have been increased by 25% to accommodate lines that may need to be repeated, equipment testing, *etc.* As is typical during offshore ship surveys, inclement weather and equipment malfunctions are likely to cause delays and may limit the number of useful line-kilometers of seismic operations that can be undertaken. Furthermore, any marine mammal sightings within or near the designated EZs will result in the power-down or shut-down of seismic operations as a mitigation measure. Thus, the following estimates of the numbers of marine mammals potentially exposed to sound levels of 160 dB re 1 μPa (rms) are precautionary and probably overestimate the actual numbers of marine mammals that might be involved. These estimates also assume that there will be no weather, equipment, or mitigation delays, which is highly unlikely.

USGS estimated the number of different individuals that may be exposed to airgun sounds with received levels greater than or equal to 160 dB re 1 μPa (rms) on one or more occasions by considering the total marine area that would be within the 160 dB radius around the operating airgun array on at least one occasion and the expected density of marine mammals. The number of possible exposures (including repeated exposures of the

same individuals) can be estimated by considering the total marine area that would be within the 160 dB radius around the operating airguns, including areas of overlap. In the survey, the seismic lines are widely spaced in the survey area, so few individual marine mammals would be exposed more than once during the survey. The area including overlap is only 1.13 times the area excluding overlap. Moreover, it is unlikely that a particular animal would stay in the area during the entire survey. The number of different individuals potentially exposed to received levels greater than or equal to 160 re 1 μPa was calculated by multiplying:

(1) The expected species density, either "mean" (*i.e.,* best estimate) or "maximum", times

(2) The anticipated area to be ensonified to that level during airgun operations excluding overlap.

The area expected to be ensonified was determined by entering the planned survey lines into a MapInfo GIS, using the GIS to identify the relevant areas by "drawing" the applicable 160 dB buffer (see Table 1 of the IHA application) around each seismic line, and then calculating the total area within the buffers. Areas of overlap (because of lines being closer together than the 160 dB radius) were limited and included only once when estimating the number of individuals exposed. Before calculating numbers of individuals exposed, the areas were increased by 25% as a precautionary measure.

Table 2 (Table 4 of the IHA application) shows the best and maximum estimates of the number of different individual marine mammals that potentially could be exposed to greater than or equal to 160 dB re 1 μPa (rms) during the seismic survey if no animals moved away from the survey vessel. The requested take authorization, given in Table 3 (the far right column of Table 4 of the IHA application), is based on the maximum estimates rather than the best estimates of the numbers of individuals exposed, because of uncertainties about the representativeness of the density data discussed previously. For cetacean species not listed under the ESA that could occur in the study area but were not sighted in the surveys from which density estimates were calculated—Pacific white-sided dolphins, Risso's dolphins, short-finned pilot whales, and Stejneger's beaked whales—the average group size has been used to request take authorization. For ESA-listed cetacean species unlikely to be encountered during the study (*i.e.,* North Pacific right, sei, and blue whales), the requested takes are zero.

Applying the approach described above, approximately 20,933 $km^2$ (6,103.1 $nmi^2$) (approximately 26,166 $km^2$ [7,628.8 $nmi^2$] including the 25% contingency) would be within the 160 dB isopleths on one or more occasions during the survey, assuming that the contingency line is completed. Because this approach does not allow for turnover in the marine mammal populations in the study area during the course of the survey, the actual number of individuals exposed could be underestimated in some cases. However, the approach assumes that no cetaceans will move away from or toward the trackline as the *Langseth* approaches in response to increasing sound levels prior to the time the levels reach 160 dB, which will result in overestimates for those species known to avoid seismic vessels.

The "best estimate" of the number of individual cetaceans that could be exposed to seismic sounds with greater than or equal to 160 dB re 1 μPa (rms) during the survey is 973 (see Table 4 of the IHA application). That total includes 68 humpback, 76 fin, 10 sperm, 37 Cuvier's beaked, 11 Baird's beaked, and 99 killer whales, which would represent 0.3%, 0.5%, less than 0.1%, 0.2%, 0.2%, and 1.2% of the regional populations, respectively. Dall's porpoises are expected to be the most common species in the study area; the best estimate of the number of Dall's porpoises that could be exposed is 672 or less than 0.1% of the regional population. This may be a slight overestimate because the estimated densities are slight overestimates. Estimates for other species are lower. The "maximum estimates" total 2,539 cetaceans. "Best estimates" of 256 Steller sea lions and 2,771 northern fur seals could be exposed to airgun sounds with received levels greater than or equal to 160 dB re 1 μPa (rms). These estimates represent 0.6% of the Steller sea lion regional population and less than 0.1% of the northern fur seal regional population. The estimated numbers of pinnipeds that could be exposed to received levels greater than or equal to 160 dB re 1 μPa (rms) are probably overestimates of the actual numbers that will be affected. During the June survey period, the Steller sea lion is in its breeding season, with males staying on land and females with pups generally staying close to the rookeries in shallow water. Male northern fur seals are at their rookeries in June, and adult females are either there or migrating there, possibly through the survey area. No take has been requested for North Pacific right, minke, sei, and blue whales, beluga whales, harbor porpoises, Northern elephant and harbor seals, and California sea lions.

TABLE 3—ESTIMATES OF THE POSSIBLE NUMBERS OF MARINE MAMMALS EXPOSED TO DIFFERENT SOUND LEVELS ≥160 dB DURING USGS'S SEISMIC SURVEY IN THE CENTRAL GOA DURING JUNE, 2011

| Species | Estimated No. of individuals exposed to sound levels | | Take authorized | Approximate percent of regional population [2] (Best) |
|---|---|---|---|---|
| | ≥160 dB re 1 μPa (Best [1]) | ≥160 dB re 1 μPa (Maximum [1]) | | |
| Mysticetes: | | | | |
| North Pacific right whale | 0 | 0 | 0 | 0 |
| Gray whale | NA | NA | NA | NA |
| Humpback whale | 68 | 171 | 68 | 0.3 |
| Minke whale | 0 | 0 | 0 | 0 |
| Sei whale | 0 | 0 | 0 | 0 |
| Fin whale | 76 | 272 | 76 | 0.47 |
| Blue whale | 0 | 0 | 0 | 0 |
| Physeteridae: | | | | |
| Sperm whale | 10 | 44 | 10 | <0.1 |
| Ziphidae: | | | | |
| Cuvier's beaked whale | 37 | 47 | 37 | 0.2 |
| Baird's beaked whale | 11 | 16 | 11 | 0.2 |
| Stejneger's beaked whale | 0 | 0 | 15 | 0 |

TABLE 3—ESTIMATES OF THE POSSIBLE NUMBERS OF MARINE MAMMALS EXPOSED TO DIFFERENT SOUND LEVELS ≥160 dB DURING USGS'S SEISMIC SURVEY IN THE CENTRAL GOA DURING JUNE, 2011—Continued

| Species | Estimated No. of individuals exposed to sound levels | | Take authorized | Approximate percent of regional population [2] (Best) |
|---|---|---|---|---|
| | ≥160 dB re 1 μPa (Best [1]) | ≥160 dB re 1 μPa (Maximum [1]) | | |
| Delphinidae: | | | | |
| Beluga whale | NA | NA | NA | NA |
| Pacific white-sided dolphin | 0 | 0 | 90 | NA |
| Risso's dolphin | 0 | 0 | 33 | NA |
| Killer whale | 99 | 354 | 99 | 1.17 |
| Short-finned pilot whale | 0 | 0 | 50 | NA |
| Phocoenidae: | | | | |
| Harbor porpoise | NA | NA | NA | NA |
| Dall's porpoise | 672 | 1,635 | 672 | <0.1 |
| Pinnipeds: | | | | |
| Northern fur seal | 2,771 | 4,157 | 2,771 | <0.1 |
| Steller sea lion | 256 | 385 | 256 | 0.6 |
| California sea lion | NA | NA | NA | NA |
| Harbor seal | NA | NA | NA | NA |
| Northern elephant seal | 0 | 0 | 0 | 0 |

[1] Best and maximum estimates are based on densities from Table 3 and ensonified areas (including 25% contingency) of 26,166.25 km[2] for 160 dB.

[2] Regional population size estimates are from Table 2 (see Table 2 of the IHA application); NA means not available.

**Encouraging and Coordinating Research**

USGS will coordinate the planned marine mammal monitoring program associated with the seismic survey in the central GOA with other parties that may have an interest in the area and/or be conducting marine mammal studies in the same region during the seismic survey. USGS will coordinate with applicable U.S. agencies (*e.g.,* NMFS), and will comply with their requirements.

**Negligible Impact and Small Numbers Analysis and Determination**

NMFS has defined "negligible impact" in 50 CFR 216.103 as "* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival." In making a negligible impact determination, NMFS evaluated factors such as:

(1) The number of anticipated injuries, serious injuries, or mortalities;

(2) The number, nature, intensity, and duration of Level B harassment (all relatively limited); and

(3) The context in which the takes occur (*i.e.,* impacts to areas of significance, impacts to local populations, and cumulative impacts when taking into account successive/contemporaneous actions when added to baseline data);

(4) The status of stock or species of marine mammals (*i.e.,* depleted, not depleted, decreasing, increasing, stable, and impact relative to the size of the population);

(5) Impacts on habitat affecting rates of recruitment or survival; and

(6) The effectiveness of monitoring and mitigation measures (*i.e.,* the manner and degree in which the measure is likely to reduce adverse impacts to marine mammals, the likely effectiveness of measures, and the practicability of implementation).

For reasons stated previously in this document, and in the proposed notice of an IHA (76 FR 18167, April 1, 2011), the specified activities associated with the marine seismic survey are not likely to cause PTS, or other non-auditory injury, serious injury, or death because:

(1) The likelihood that, given sufficient notice through relatively slow ship speed, marine mammals are expected to move away from a noise source that is annoying prior to its becoming potentially injurious;

(2) The potential for temporary or permanent hearing impairment is very low and would likely be avoided through the incorporation of the monitoring and mitigation measures;

(3) The fact that pinnipeds and cetaceans would have to be closer than 400 m (1,312.3 ft) and 940 m (3,084 ft) in deep water when the 36 airgun array and 12 m (39.4 ft) and 40 m (131.2 ft) when the single airgun is in use at 9 m (29.5 ft) tow depth from the vessel to be exposed to levels of sound believed to have even a minimal chance of causing permanent threshold shift; and

(4) The likelihood that marine mammal detection ability by trained PSOs is high at close proximity to the vessel.

No injuries, serious injuries, or mortalities are anticipated to occur as a result of the USGS's planned marine seismic survey, and none are authorized. Only short-term behavioral disturbance is anticipated to occur due to the brief and sporadic duration of the survey activities. Due to the nature, degree, and context of behavioral harassment anticipated, the activity is not expected to impact rates of recruitment or survival for any affected species or stock.

As mentioned previously, NMFS estimates that nine species of marine mammals under its jurisdiction could be potentially affected by Level B harassment over the course of the IHA. For each species, these numbers are small (each, one percent or less) relative to the population size. NMFS has determined, provided that the aforementioned mitigation and monitoring measures are implemented, that the impact of conducting a marine seismic survey in the central GOA, June 2011, may result, at worst, in a temporary modification in behavior and/or low-level physiological effects (Level B harassment) of small numbers of certain species of marine mammals.

While behavioral modifications, including temporarily vacating the area during the operation of the airgun(s), may be made by these species to avoid the resultant acoustic disturbance, the availability of alternate areas within these areas and the short and sporadic duration of the research activities, have led NMFS to determine that this action

will have a negligible impact on the species in the specified geographic region.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS finds that USGS's planned research activities will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from the marine seismic survey will have a negligible impact on the affected species or stocks of marine mammals; and that impacts to affected species or stocks of marine mammals have been mitigated to the lowest level practicable.

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

Section 101(a)(5)(D) also requires NMFS to determine that the authorization will not have an unmitigable adverse effect on the availability of marine mammal species or stocks for subsistence use. There are no relevant subsistence uses of marine mammals in the study area (deep, offshore waters of the central GOA) that implicate MMPA section 101(a)(5)(D).

**Endangered Species Act**

Of the species of marine mammals that may occur in the survey area, several are listed as endangered under the ESA, including the North Pacific right, humpback, sei, fin, blue, and sperm whales, as well as the Cook Inlet DPS of beluga whales and the western stock of Steller sea lions. The eastern stock of Steller sea lions is listed as threatened, as is the southwest Alaska DPS of the sea otter. Under section 7 of the ESA, USGS initiated formal consultation with the NMFS, Office of Protected Resources, Endangered Species Division, on this seismic survey. NMFS's Office of Protected Resources, Permits, Conservation and Education Division, also initiated formal consultation under section 7 of the ESA with NMFS's Office of Protected Resources, Endangered Species Division, to obtain a Biological Opinion (BiOp) evaluating the effects of issuing the IHA on threatened and endangered marine mammals and, if appropriate, authorizing incidental take. In June 2011, NMFS issued a BiOp and concluded that the action and issuance of the IHA are not likely to jeopardize the continued existence of the North Pacific right, humpback, sei, fin, blue, and sperm whales, Cook Inlet DPS of beluga whales, and Steller sea lions. The BiOp also concluded that designated critical habitat for these species does not occur in the action area and would not be affected by the survey. USGS must comply with the Relevant Terms and Conditions of the Incidental Take Statement (ITS) corresponding to NMFS's BiOp issued to both USGS and NMFS's Office of Protected Resources. USGS must also comply with the mitigation and monitoring requirements included in the IHA in order to be exempt under the ITS in the BiOp from the prohibition on take of listed endangered marine mammal species otherwise prohibited by section 9 of the ESA.

**NEPA**

With its complete application, USGS provided NMFS an EA analyzing the direct, indirect, and cumulative environmental impacts of the specified activities on marine mammals including those listed as threatened or endangered under the ESA. The EA, prepared by LGL on behalf of USGS, is entitled "Environmental Assessment of a Marine Geophysical Survey by the R/V *Marcus G. Langseth* in the central Gulf of Alaska, June 2011." After NMFS reviewed and evaluated the USGS EA for consistency with the regulations published by the Council of Environmental Quality (CEQ) and NOAA Administrative Order 216–6, Environmental Review Procedures for Implementing the National Environmental Policy Act, NMFS adopted the USGS EA and issued a Finding of No Significant Impact (FONSI).

**Authorization**

NMFS has issued an IHA to USGS for the take, by Level B harassment, of small numbers of marine mammals incidental to conducting a marine geophysical survey in the central GOA, June 2011, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: June 3, 2011.

**Helen M. Golde,**

*Deputy Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2011–14331 Filed 6–8–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA449**

### Takes of Marine Mammals Incidental to Specified Activities; Harbor Activities Related to the Delta IV/Evolved Expendable Launch Vehicle at Vandenberg Air Force Base, CA

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

**ACTION:** Notice; issuance of an incidental harassment authorization.

**SUMMARY:** In accordance with the Marine Mammal Protection Act (MMPA) regulations, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to United Launch Alliance (ULA), to take marine mammals, by Level B harassment, incidental to conducting *Delta Mariner* operations, cargo unloading activities, and harbor maintenance activities related to the Delta IV/Evolved Expendable Launch Vehicle (Delta IV/EELV) at south Vandenberg Air Force Base, CA (VAFB).

**DATES:** Effective June 7, 2011, through June 6, 2012.

**ADDRESSES:** A copy of the authorization, application, and associated Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) may be obtained by writing to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East West Highway, Silver Spring, MD 20910, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

**FOR FURTHER INFORMATION CONTACT:** Jeannine Cody, NMFS, Office of Protected Resources, NMFS (301) 713–2289.

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 101(a)(5)(D) of the MMPA (16 U.S.C. 1371 (a)(5)(D)) directs the Secretary of Commerce to authorize, upon request, the incidental, but not intentional, taking of small numbers of marine mammals of a species or population stock, by U.S. citizens who

engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental taking of small numbers of marine mammals shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant). The authorization must set forth the permissible methods of taking, other means of effecting the least practicable adverse impact on the species or stock and its habitat, and monitoring and reporting of such takings. NMFS has defined "negligible impact" in 50 CFR 216.103 as "* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) of the MMPA establishes a 45-day time limit for NMFS' review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the public comment period, NMFS must either issue or deny the authorization. NMFS must publish a notice in the **Federal Register** within 30 days of its determination to issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

**Summary of Request**

NMFS received an application on August 4, 2010, from ULA requesting the taking by harassment, of small numbers of marine mammals, incidental to conducting *Delta Mariner* harbor operations for one year. NMFS reviewed the ULA application and identified a number of issues requiring further clarification. After addressing comments from NMFS, ULA modified its application and submitted a revised application on February 11, 2011. NMFS determined that application complete and adequate on March 29, 2011.

These activities (*i.e.,* transport vessel operations, cargo movement activities, and harbor maintenance dredging) will support Delta IV/EELV launch activities from the Space Launch Complex at VAFB Harbor and would occur in the vicinity of a known pinniped haul out site (Small Haul-out Site #1) located at 34°33.192′ N, 120° 36.580′ W.

Acoustic and visual stimuli generated by the use of heavy equipment during the *Delta Mariner* off-loading operations and the cargo movement activities, the increased presence of personnel, and harbor maintenance dredging may have the potential to cause California sea lions (*Zalophus californianus*), Pacific harbor seals (*Phoca vitulina*), and Northern elephant seals (*Mirounga angustirostris*) hauled out on Small Haul-out Site #1 to flush into VAFB Harbor or to cause a short-term behavioral disturbance for marine mammals in the area. These types of disturbances are the principal means of marine mammal taking associated with these activities, and ULA has requested an authorization to take 1,075 Pacific harbor seals; 86 California sea lions; and 43 Northern elephant seals by Level B harassment only.

**Description of the Specified Geographic Region**

The activities will take place in or near the VAFB harbor located on the central coast of California at 34° 33′ N, 120° 36′ W in the northeast Pacific Ocean. The harbor is approximately 2.5 miles (mi) (4.02 kilometers (km)) south of Point Arguello, CA, and approximately 1 mi (1.61 km) south of the nearest marine mammal rookery.

**Description of the Specified Activity**

ULA proposes to conduct Delta IV/EELV activities (transport vessel operations, harbor maintenance dredging, and cargo movement activities) between June 8, 2011, and June 7, 2012.

To date, NMFS has issued eight, 1-year IHAs to ULA for the conduct of the same activities from 2002 to 2010, with the last IHA expiring on September 3, 2010 (74 FR 46742, September 11, 2009).

The Delta IV/EELV launch vehicle is comprised of a common booster core (CBC), an upper stage, and a payload fairing. The size of the CBC requires it to be transported to the VAFB launch site by a specially designed vessel, the *Delta Mariner.* To allow safe operation of the *Delta Mariner,* maintenance dredging within a harbor located in Zone 6 of the Western Space and Missile Center (WSMC) in the Pacific Ocean (33 CFR 334.1130(a)(2)(vi)), ULA requires that the harbor undergo maintenance on a periodic basis.

*Delta Mariner Operations*

The *Delta Mariner* is a 312-foot (ft) (95.1-meter (m)) long, 84-ft (25.6-m) wide, steel-hulled, ocean-going vessel capable of operating at an 8-ft (2.4-m) draft. It is a roll-on, roll-off, self-propelled ship with an enclosed watertight cargo area, a superstructure forward, and a ramp at the vessel's stern.

*Delta Mariner* off-loading operations and associated cargo movements within the harbor would occur at a maximum frequency of four times per year. The 8,000-horsepower vessel would enter the harbor stern first at 1.5 to 2 knots (1.72 mi per hour (mph)) during daylight hours at high tide, approaching the wharf at less than 0.75 knot (less than one mph). At least one tugboat will always accompany the *Delta Mariner* during visits to the VAFB harbor. Departure will occur under the previously-stated conditions.

*Harbor Maintenance Activities*

ULA must perform maintenance dredging annually or twice per year, depending on the hardware delivery schedule. To accommodate the *Delta Mariner's* draft, ULA would need to remove up to 5,000 cubic yards of sediment per dredging cycle. Dredging would involve the use of heavy equipment, including a clamshell dredge, dredging crane, a small tug, dredging barge, dump trucks, and a skip loader. Dredge operations, from set-up to tear-down, would continue 24-hours a day for approximately 35 days.

ULA provides a more detailed description of the work proposed for 2011–2012 in the application and the Final U.S. Air Force EA for Harbor Activities Associated with the Delta IV Program at Vandenberg Air Force Base (ENSR International, 2001) which are available upon request (see **ADDRESSES**).

*Cargo Movement Activities*

Removal of the CBC from the vessel requires the use of an elevating platform transporter (EPT). The EPT is powered by a diesel engine manufactured by Daimler-Chrysler AG (Mercedes), model OM442A, 340HP. ULA would limit cargo unloading activities to periods of

high tide. It takes approximately two hours to remove the first CBC from the cargo bay and six hours to remove a complement of three CBCs. It would take up to two additional hours to remove remaining cargo which may consist of two upper stages, one set of fairings, and one payload attach fitting. The total of 10 hours includes time required to move the flight hardware to the staging area. Flight hardware items, other than the CBCs, are packaged in containers equipped with retractable casters and tow bars. ULA would tow these containers off the vessel by a standard diesel truck tractor. Noise from the ground support equipment will be muted while inside the cargo bay and will be audible to marine mammals only during the time the equipment is in the harbor area. Cargo movement operations would occur for approximately 43 days (concurrent with the harbor maintenance activities).

NMFS outlined the purpose of the program in the Notice of Proposed IHA (76 FR 21862, April 19, 2011). The activities to be conducted have not changed between the Notice of Proposed IHA (76 FR 21862, April 19, 2011) and this final notice announcing the issuance of the IHA. For a more detailed description of the authorized action, including a discussion of associated noise sources from the harbor operations, NMFS refers the reader to the Notice of Proposed IHA (76 FR 21862, April 19, 2011), the application, and associated documents referenced earlier in this document.

**Comments and Responses**

NMFS published a notice of receipt of the ULA application and proposed IHA in the **Federal Register** on April 19, 2011 (76 FR 21862). During the 30-day public comment period, NMFS received two comments from the public and a letter from the Marine Mammal Commission (Commission). Following are the comments from the public commenter and the Commission with NMFS' responses.

*Comment 1:* One commenter opposed the project on the grounds that it would cause injury or mortality to marine mammals.

*Response:* As described in detail in the **Federal Register** notice of the proposed IHA (76 FR 21862, April 19, 2011), no marine mammal would be killed or injured as a result of the operations by ULA. The project would only result in Level B behavioral harassment only of a small number of marine mammals.

*Comment 2:* The commenter believed that NMFS inflated the population estimate for the California sea lion stock in the Notice of Proposed IHA (76 FR 21862, April 19, 2011).

*Response:* The Notice of Proposed IHA (76 FR 21862, April 19, 2011) states that the estimated population of the U.S. stock of California sea lion ranged from 141,842 to 238,000 animals in 2009. The peer-reviewed source for the estimate is the most recent NMFS Stock Assessment Report (SAR) for California sea lions (Carretta *et al.,* 2010). The SAR is available on the Internet at: *http://www.nmfs.noaa.gov/pr/pdfs/sars/po2009.pdf.*

*Comment 3:* The Commission recommended that NMFS issue the IHA, subject to inclusion of the proposed mitigation and monitoring measures and also recommended that in the case of injury or mortality that may have resulted from the proposed activities, NMFS require that ULA suspend its activities until the agency is able to review the circumstances of the take.

*Response:* NMFS has included all of the mitigation and monitoring measures proposed in the Notice of Proposed IHA (76 FR 21862, April 19, 2011). The IHA's reporting requirements direct ULA to report all injured or dead marine mammals (regardless of cause) to NMFS. In the unanticipated event that any taking of a marine mammal in a manner prohibited by the IHA occurs, such as an injury, serious injury, or mortality, and are judged to result from the activities, ULA shall report the incident to NMFS immediately. ULA will postpone the activities until NMFS is able to review the circumstances of the take. NMFS will work with ULA to determine whether modifications to the harbor activities are warranted.

**Description of Marine Mammals in the Area of the Specified Activity**

The marine mammal species most likely to be harassed incidental to conducting *Delta Mariner* operations, cargo unloading activities, and harbor maintenance activities at VAFB are the California sea lion, the Pacific harbor seal, and the northern elephant seal. California sea lions, Pacific harbor seals, and northern elephant seals are not listed as threatened or endangered under the U.S. Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*), nor are they categorized as depleted under the MMPA.

Other cetaceans that have the potential to transit in the vicinity of the VAFB harbor include the short-beaked common dolphin (*Delphinus delphis*), the Pacific white-sided dolphin (*Lagenorhynchus obliquidens*), and the gray whale (*Eschrichtius robustus*). However, these species are rare in the immediate harbor area. NMFS included a more detailed discussion of the status of these stocks and their occurrence at VAFB in the Notice of Proposed IHA (76 FR 21862, April 19, 2011).

**Potential Effects on Marine Mammals**

Acoustic and visual stimuli generated by: The use of heavy equipment during the *Delta Mariner* off-loading operations and harbor dredging and the increased presence of personnel may have the potential to cause Level B harassment of any pinnipeds hauled out in the VAFB harbor. This disturbance from acoustic and visual stimuli is the principal means of marine mammal taking associated with these activities.

The effects of the harbor activities would be limited to short-term startle responses and localized behavioral changes and have the potential to temporarily displace the animals from a haul out site. NMFS would expect the pinnipeds to return to a haulout site within 60 minutes of the disturbance (Allen *et al.,* 1985) and does not expect that the pinnipeds would permanently abandon a haul-out site during the conduct of harbor maintenance and *Delta Mariner* operations.

Finally, no operations would occur on pinniped rookeries; therefore, NMFS does not expect mother and pup separation or crushing of pups to occur. For a more detailed discussion of the sound levels produced by the equipment, behavioral reactions of marine mammals to loud noises or looming visual stimuli, and some specific observations of the response of marine mammals to this activity gathered during previous monitoring, NMFS refers the reader to the Notice of Proposed IHA (76 FR 21862, April 19, 2011), the application, and associated documents.

**Anticipated Effects on Habitat**

NMFS does not anticipate that the operations would result in any temporary or permanent effects on the habitats used by the marine mammals in the VAFB harbor, including the food sources they use (*i.e.* fish and invertebrates). NMFS does not anticipate that there would be any physical damage to any habitat. While NMFS anticipates that the specified activity may result in marine mammals avoiding certain areas due to temporary ensonification and human presence, this impact to habitat is temporary and reversible which NMFS considered in further detail earlier in this document and the Notice of Proposed IHA (76 FR 21862, April 19, 2011), as behavioral modification.

**Mitigation**

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

ULA has based the mitigation measures described herein, to be implemented for the habor operations, on the following:

(1) Protocols used during previous operations as approved by NMFS; and

(2) Previous IHA applications and IHAs approved and authorized by NMFS.

To reduce the potential for disturbance from visual and acoustic stimuli associated with the activities, ULA/and or its designees shall implement the following mitigating measures for marine mammals: (1) If activities occur during nighttime hours, ULA will turn on lighting equipment before dusk and the lights shall remain on for the entire night to avoid startling pinnipeds; (2) initiate operations before dusk; (3) keep construction noises at a constant level (i.e., not interrupted by periods of quiet in excess of 30 minutes) while pinnipeds are present; (4) if activities cease for longer than 30 minutes and pinnipeds are in the area, ULA shall initiate a gradual start-up of activities to ensure a gradual increase in noise levels; (5) a NMFS-qualified marine mammal observer shall visually monitor the harbor seals on the beach adjacent to the harbor and on rocks for any flushing or other behaviors as a result of ULA's activities (see Monitoring); (6) the *Delta Mariner* and accompanying vessels shall enter the harbor only when the tide is too high for harbor seals to haul-out on the rocks; reducing speed to 1.5 to 2 knots (1.5–2.0 nm/hr; 2.8–3.7 km/hr) once the vessel is within 3 mi (4.83 km) of the harbor. The vessel shall enter the harbor stern first, approaching the wharf and moorings at less than 0.75 knot (1.4 km/hr); (7) as alternate dredge methods are explored, the dredge contractor may introduce quieter techniques and equipment.

NMFS has carefully evaluated the applicant's proposed mitigation measures and has considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: (1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals; (2) the proven or likely efficacy of the specific measure to minimize impacts as planned; and (3) the practicability of the measure for applicant implementation.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS or recommended by the public, NMFS has determined that the mitigation measures provide the means of effecting the least practicable adverse impacts on marine mammals species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

**Monitoring**

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

ULA will sponsor a marine mammal monitor during the present project, in order to implement the mitigation measures thus satisfying the monitoring requirements of the IHA. ULA's monitoring activities will consist of:

(1) A NMFS-qualified and VAFB-designated biologically trained observer monitoring the area for pinnipeds during all harbor activities. During nighttime activities, the monitor would use a night vision scope.

(2) Conducting baseline observations of pinnipeds in the project area prior to initiating project activities.

(3) Conducting and recording observations on pinnipeds in the vicinity of the harbor for the duration of the activity occurring when tides are low enough (less than or equal to 2 ft (0.61 m) for pinnipeds to haul out.

(4) Conducting post-construction observations of pinniped haul-outs in the project area to determine whether animals disturbed by the project activities return to the haul-out.

**Reporting**

ULA will notify NMFS two weeks prior to initiation of each activity. After the completion of each activity, ULA will submit a draft final monitoring report to NMFS within 120 days to the Director of Office of Protected Resources at NMFS Headquarters. If ULA receives no comments from NMFS on the draft Final Monitoring Report, NMFS would consider the draft Final Monitoring Report to be the Final Monitoring Report.

The final report shall provide dates, times, durations, and locations of specific activities, details of pinniped behavioral observations, and estimates of numbers of affected pinnipeds and impacts (behavioral or other). In addition, the report would include information on the weather, tidal state, horizontal visibility, and composition (species, gender, and age class) and locations of haul-out group(s).

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by this Authorization, such as an injury (Level A Harassment), serious injury or mortality (*e.g.,* ship-strike, gear interaction, and/or entanglement), ULA shall immediately cease the specified activities and immediately report the incident to the Chief of the Permits, Conservation, and Education Division, Office of Protected Resources, NMFS, at 301–713–2289 and/or by e-mail to *Michael.Payne@noaa.gov* and *Jeannine.Cody@noaa.gov*, and the Southwest Regional Stranding Coordinators (*Joe.Cordaro@noaa.gov* and *Sarah.Wilkin@noaa.gov*). The report must include the following information: (a) Time, date, and location (latitude/longitude) of the incident; the name and type of vessel involved; the vessel's speed during and leading up to the incident; description of the incident; status of all sound source use in the 24 hours preceding the incident; water depth; environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility); description of marine mammal observations in the 24 hours preceding the incident; species identification or description of the animal(s) involved; the fate of the animal(s); and photographs or video footage of the animal (if equipment is available).

ULA shall not resume its activities until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with ULA to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA

compliance. ULA may not resume their activities until notified by NMFS via letter or e-mail, or telephone.

In the event that ULA discovers an injured or dead marine mammal, and the NMFS-qualified marine mammal observer determines that the cause of the injury or death is unknown and the death is relatively recent (i.e., in less than a moderate state of decomposition as described in the next paragraph), ULA will immediately report the incident to the Chief of the Permits Conservation, and Education Division, Office of Protected Resources, NMFS, and to the NMFS Southwest Stranding Coordinators. The report must include the same information identified in Condition (a). ULA may continue its activities while NMFS reviews the circumstances of the incident. NMFS will work with ULA to determine whether modifications in the activities are appropriate.

In the event that ULA discovers an injured or dead marine mammal, and the NMFS-qualified marine mammal observer determines that the injury or death is not associated with or related to the activities authorized in Condition 2 of this Authorization (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), ULA shall report the incident to the Chief of the Permits Conservation, and Education Division, Office of Protected Resources, NMFS, and to the NMFS Southwest Stranding Coordinators within 24 hours of the discovery. ULA shall provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network.

**Estimated Take by Incidental Harassment**

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

NMFS anticipates take by Level B harassment only as a result of the harbor maintenance and *Delta Mariner* operations in the VAFB harbor. Based on ULA's previous monitoring reports, with the same activities conducted in the operations area NMFS estimates that small numbers of Pacific harbor seals, California sea lions, and northern elephant seals could be potentially affected by Level B behavioral harassment over the course of the IHA.

For this IHA, NMFS has authorized the take of 1,075 Pacific harbor seals, 86 California sea lions, and 43 northern elephant seals. Because of the required mitigation measures and the likelihood that some pinnipeds will avoid the area due to wave inundation of the haulout area, NMFS expects no injury, serious injury, or mortality to occur, and no takes by injury or mortality are authorized.

**Negligible Impact and Small Numbers Analysis and Determination**

NMFS has defined "negligible impact" in 50 CFR 216.103 as " * * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival." In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to:

(1) The number of anticipated mortalities;

(2) The number and nature of anticipated injuries;

(3) The number, nature, and intensity, and duration of Level B harassment; and

(4) The context in which the takes occur.

As mentioned previously, NMFS estimates that three species of marine mammals could be potentially affected by Level B harassment over the course of the IHA. For each species, these numbers are small (each, less than two percent) relative to the population size.

NMFS does not anticipate takes by Level A harassment, serious injury, or mortality to occur as a result of ULA's activities, and none are authorized. These species may exhibit behavioral modifications, including temporarily vacating the area during the proposed harbor maintenance and *Delta Mariner* operations to avoid the resultant acoustic and visual disturbances. However, NMFS anticipates only short-term behavioral disturbance due to the brief duration of the proposed activities; the availability of alternate areas near the VAFB harbor for pinnipeds to avoid the resultant noise from the maintenance and vessel operations; and that no operations would occur on pinniped rookeries. Due to the nature, degree, and context of the behavioral harassment anticipated, the activities are not expected to impact rates of recruitment or survival.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS finds that the impact of conducting harbor maintenance and vessel operations from June, 2011, through June, 2012, will result in the incidental take of small numbers of marine mammals, by Level B behavioral harassment only, and that the total taking from the ULA's activities will have a negligible impact on the affected species or stocks; and that impacts to affected species or stocks of marine mammals would be mitigated to the lowest level practicable.

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

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

**Endangered Species Act (ESA)**

This action will not affect species listed under the ESA that are under NMFS' jurisdiction. VAFB formally consulted with the U.S. Fish and Wildlife Service in 1998 on the possible take of southern sea otters during ULA's harbor activities at south VAFB. A Biological Opinion was issued in August 2001, which concluded that the EELV Program is not likely to jeopardize the continued existence of the southern sea otter, and no injury or mortality is expected. The activities covered by this IHA are analyzed in that Biological Opinion, and this IHA does not modify the action in a manner that was not previously analyzed.

**National Environmental Policy Act (NEPA)**

In 2001, the USAF prepared an Environmental Assessment (EA) for Harbor Activities Associated with the Delta IV Program at VAFB. In 2005, NMFS prepared an EA augmenting the information contained in the USAF EA and issued a Finding of No Significant Impact (FONSI) on the issuance of an IHA for ULA's harbor activities in accordance with section 6.01 of the NOAA Administrative Order 216–6 (Environmental Review Procedures for Implementing the National Environmental Policy Act, May 20, 1999). ULA's activities and impacts for 2011–2012 are within the scope of NMFS' 2005 EA and FONSI. NMFS has again reviewed the 2005 EA and determined that there are no new direct,

indirect or cumulative impacts to the human and natural environment associated with the IHA requiring evaluation in a supplemental EA and NMFS, therefore, reaffirms the 2005 FONSI. A copy of the EA and the FONSI for this activity is available upon request (see **ADDRESSES**).

**Authorization**

As a result of these determinations, NMFS has issued an IHA to ULA to take marine mammals, by Level B harassment only, incidental to conducting *Delta Mariner* operations, cargo unloading activities, and harbor maintenance activities at south VAFB, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: June 6, 2011.

**Helen M. Golde,**

*Deputy Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2011–14335 Filed 6–8–11; 8:45 am]

**BILLING CODE 3510–22–P**

## CONSUMER PRODUCT SAFETY COMMISSION

### Sunshine Act Meeting Notice

**TIME AND DATE:** Wednesday, June 15, 2011; 10 a.m.–11 a.m.

**PLACE:** Hearing Room 420, Bethesda Towers, 4330 East-West Highway, Bethesda, Maryland.

**STATUS:** Closed to the Public.

**Matter To Be Considered**

*Compliance Status Report*

The Commission staff will brief the Commission on the status of compliance matters.

For a recorded message containing the latest agenda information, call (301) 504–7948.

**CONTACT PERSON FOR MORE INFORMATION:** Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: June 7, 2011.

**Todd A Stevenson,**

*Secretary.*

[FR Doc. 2011–14485 Filed 6–7–11; 4:15 pm]

**BILLING CODE 6355–01–P**

## COUNCIL ON ENVIRONMENTAL QUALITY

### National Ocean Council; Strategic Action Plan Content Outlines

**AGENCY:** Council on Environmental Quality.

**ACTION:** Notice of Availability, Strategic Action Plan Content Outlines; Request for Comments.

**SUMMARY:** On July 19, 2010, President Obama signed Executive Order 13547 establishing a National Policy for the Stewardship of the Ocean, our Coasts, and the Great Lakes ("National Ocean Policy"). The National Ocean Policy provides an implementation strategy, which describes nine priority objectives that seek to address some of the most pressing challenges facing the ocean, our coasts, and the Great Lakes. The National Ocean Council is responsible for developing strategic action plans for each of the nine priority objectives. As a first step, Federal interagency writing teams have developed content outlines for each draft strategic action plan. The NOC is seeking public review and comment of these content outlines.

The purpose of the draft content outlines (outlines) is to provide the public with an initial view of potential actions that could be taken to further the national priority objectives. As such, they are an interim step toward development of the first full draft of each strategic action plan. In developing the outlines, the writing teams were informed by the comments received during an initial public scoping period that closed on April 29.

Each outline presents in bulleted form potential actions to further the particular priority objective. It describes the reasons for taking the action, expected outcomes and milestones, gaps and needs in science and technology, and the timeframe for completing the action. The outlines also provide an overview of the priority objective, greater context for the strategic action plan in implementing the National Ocean Policy, and an overview of the preparation of the plan .

Public comments received on the outlines will be collated and posted on the NOC Web site. The comments on the outlines will inform the preparation of full draft strategic action plans, which will be released for public review in the fall of 2011, allowing additional opportunity for the public to provide comments. Final strategic action plans are expected to be completed by early 2012.

**DATES:** Comments should be submitted on or before July 2, 2011.

**ADDRESSES:** Content outlines can be downloaded here: *http://www.whitehouse.gov/administration/eop/oceans.* Comments should be submitted electronically at *http://www.WhiteHouse.gov/administration/eop/oceans/comment* or can be sent by mail to: National Ocean Council, 722 Jackson Place, NW., Washington, DC 20503. Comments and input may also be provided in person by participating in regional listening sessions that will be convened throughout the U.S. in the month of June. You can learn more about these regional listening sessions by visiting *http://www.WhiteHouse.gov/oceans.*

**FOR FURTHER INFORMATION CONTACT:** Michael Weiss, Deputy Associate Director for Ocean and Coastal Policy, at (202) 456–3892.

**SUPPLEMENTARY INFORMATION:** On July 19, 2010, President Obama signed Executive Order 13547 establishing a National Policy for the Stewardship of the Ocean, our Coasts, and the Great Lakes ("National Ocean Policy"). That Executive Order adopts the Final Recommendations of the Interagency Ocean Policy Task Force and directs Federal agencies to take the appropriate steps to implement them. The Executive Order creates an interagency National Ocean Council (NOC) to strengthen ocean governance and coordination, identifies nine priority actions for the NOC to pursue, and adopts a flexible framework for effective coastal and marine spatial planning to address conservation, economic activity, user conflict, and sustainable use of the ocean, our coasts, and the Great Lakes.

The National Ocean Policy provides a comprehensive approach, based on science and technology, to uphold our stewardship responsibilities and ensure accountability for our actions to present and future generations. The Obama Administration intends, through the National Ocean Policy, to provide a model of balanced, productive, efficient, sustainable, and informed ocean, coastal, and Great Lakes use, management, and conservation. The Final Recommendations provide an implementation strategy that describes a clear set of priority objectives that our Nation should pursue to further the National Policy.

The nine priority objectives seek to address some of the most pressing challenges facing the ocean, our coasts, and the Great Lakes. The nine priority objectives are identified below. Additional information about each priority may be found at *http://www.WhiteHouse.gov/oceans.*

*Objective 1:* Ecosystem-Based Management: Adopt ecosystem-based management as a foundational principle for the comprehensive management of the ocean, our coasts, and the Great Lakes;

*Objective 2:* Coastal and Marine Spatial Planning: Implement comprehensive, integrated, ecosystem-based coastal and marine spatial planning and management in the United States;

*Objective 3:* Inform Decisions and Improve Understanding: Increase knowledge to continually inform and improve management and policy decisions and the capacity to respond to change and challenges. Better educate the public through formal and informal programs about the ocean, our coasts, and the Great Lakes;

*Objective 4:* Coordinate and Support: Better coordinate and support Federal, State, Tribal, local, and regional management of the ocean, our coasts, and the Great Lakes. Improve coordination and integration across the Federal Government and, as appropriate, engage with the international community;

*Objective 5:* Resiliency and Adaptation to Climate Change and Ocean Acidification: Strengthen resiliency of coastal communities and marine and Great Lakes environments and their abilities to adapt to climate change impacts and ocean acidification;

*Objective 6:* Regional Ecosystem Protection and Restoration: Establish and implement an integrated ecosystem protection and restoration strategy that is science-based and aligns conservation and restoration goals at the Federal, State, Tribal, local, and regional levels;

*Objective 7:* Water Quality and Sustainable Practices on Land: Enhance water quality in the ocean, along our coasts, and in the Great Lakes by promoting and implementing sustainable practices on land;

*Objective 8:* Changing Conditions in the Arctic: Address environmental stewardship needs in the Arctic Ocean and adjacent coastal areas in the face of climate-induced and other environmental changes; and

*Objective 9:* Ocean, Coastal, and Great Lakes Observations, Mapping, and Infrastructure: Strengthen and integrate Federal and non-Federal ocean observing systems, sensors, data collection platforms, data management, and mapping capabilities into a national system and integrate that system into international observation efforts.

These priority objectives are meant to provide a bridge between the National Ocean Policy and action on the ground and in the water, but they do not prescribe specific actions or responsibilities. The NOC is responsible for developing strategic action plans to achieve the priority objectives. As envisioned, the plans will:

- Identify specific and measurable near-term, mid-term, and long-term actions, with appropriate milestones, performance measures, and outcomes to fulfill each objective;
- Consider smaller-scale, incremental, and opportunistic efforts that could build upon existing activities, as well as more complex, larger-scale actions that have the potential to be truly transformative;
- Identify key lead and participating agencies;
- Identify gaps and needs in science and technology; and
- Identify potential resource requirements and efficiencies; and steps for integrating or coordinating current and out-year budgets.

The plans will be adaptive to allow for modification and addition of new actions based on new information or changing conditions. Their effective implementation will also require clear and easily understood requirements and regulations, where appropriate, that include enforcement as a critical component. Implementation of the National Ocean Policy for the stewardship of the ocean, our coasts, and the Great Lakes will recognize that different legal regimes, with their associated freedoms, rights, and duties, apply in different maritime zones. The plans will be implemented in a manner consistent with applicable international conventions and agreements and with customary international law as reflected in the Law of the Sea Convention. The plans and their implementation will be assessed and reviewed annually by the NOC and modified as needed based on the success or failure of the agreed upon actions.

The NOC is committed to transparency in developing strategic action plans and implementing the National Ocean Policy. As the NOC develops and revises the plans, it will ensure substantial opportunity for public participation. The NOC will also actively engage interested parties, including, as appropriate, State, Tribal, and local authorities, regional governance structures, academic institutions, nongovernmental organizations, recreational interests, and private enterprise.

Public comments are requested on or before July 1, 2011.

Dated: June 2, 2011.

**Nancy H. Sutley,**

*Chair.*

[FR Doc. 2011–14056 Filed 6–8–11; 8:45 am]

**BILLING CODE 3125–W0–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Docket ID: DOD–2011–OS–0062]**

### Proposed Collection; Comment Request

**AGENCY:** National Security Agency/Central Security Service, DoD.

**ACTION:** Notice.

**SUMMARY:** In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995,* the National Security Agency/Central Security Service announces a new proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Consideration will be given to all comments received by August 8, 2011.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

*Instructions:* All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** To request more information on this proposed information collection or to

obtain a copy of the proposal and associated collection instruments, please write to Division of Toxicology, Brody School of Medicine at East Carolina University, ATTN: Allison Mainhart, Clinical Research Coordinator. 600 Moye Boulevard, Greenville, NC 27834. Telephone 252–744–5568.

*Title; Associated Form; and OMB Number:* A Trial of Dextromethorphan and Naltrexone for Gulf War illness. Associated Form: Telephone Screening Form, CDMRP GW080064; OMB Control Number 0704–TBD.

*Needs and Uses:* The information collection requirement is necessary in order to contact veterans of the Gulf War to see if they are interested and qualified to participate in a research study.

*Affected Public:* Gulf War Veterans.

*Annual Burden Hours:* 15.

*Number of Respondents:* 60.

*Responses per Respondent:* 1.

*Average Burden per Response:* 15 minutes.

*Frequency:* On occasion.

**SUPPLEMENTARY INFORMATION:**

**Summary of Information Collection**

Respondents are Gulf War veterans who served in the 1991 Gulf War. Information collected is dates of service in the Gulf, and answers to questions about health after obtaining informed consent approved by both the DoD institutional review board (IRB) and the East Carolina University IRB.

Dated: June 6, 2011.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2011–14326 Filed 6–8–11; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Department of the Army

**[Docket ID: USA–2011–0011]**

### Privacy Act of 1974; System of Records

**AGENCY:** Department of the Army, DoD.

**ACTION:** Notice to add a system of records.

**SUMMARY:** The Department of the Army 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:** This proposed action would be effective without further notice on July 11, 2011 unless comments are received which result in a contrary determination.

**ADDRESSES:** You may submit comments, identified by docket number and/Regulatory Information Number (RIN) and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, OSD Mailroom 3C843, Washington, DC 20301–1160.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Mr. Leroy Jones, Department of the Army, Privacy Office, U.S. Army Records Management and Declassification Agency, 7701 Telegraph Road, Casey Building, Suite 144, Alexandria, VA 22325–3905, or by phone at (703) 428–6185.

**SUPPLEMENTARY INFORMATION:** The Department of the Army notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on June 2, 2011 to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: June 2, 2011.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**A0600–8a PEO EIS**

**SYSTEM NAME:**

Integrated Personnel and Pay System—Army (IPPS–A) Records.

**SYSTEM LOCATION:**

Primary Location: Radford Army Ammunitions Plant, Radford, VA 24143–0004.

Decentralized segments are located at Army Processing Centers (APCs) worldwide.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Members of the United States Army to include Active Duty, National Guard, Reserve, select Army retired and former Army military personnel.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

*Personal Information:* Individual's name, rank/grade, address, date of birth, eye color, height, weight, place of birth, Social Security Number (SSN), and similar personal identifiers for beneficiary/dependant purposes; driver's license number, security clearance level, office location, assigned user name and security questions, local and home of record addresses, phone numbers and emergency contact information.

*Personnel Information:* Evaluation and review history, enrollment, participation, status and outcome information for personnel programs, service qualification and performance measures, types of orders, accomplishments, skills and competencies, career preferences, contract information related to accession and Oath of Office, enlistment and re-enlistment, retirement and separation information, retirement points including information necessary to determine retirement pay, benefits eligibility, enrollment, designations and status information, Uniform Code of Military Justice (UCMJ) actions summarizing court martial, non-judicial punishments, and similar or related documents. Circumstances of an incident the member was involved in and whether he or she is in an injured, wounded, seriously wounded, or ill duty status from the incident. Duty related information: Duty station, employment and job related information and history, deployment information, work title, work address and related work contact information (e.g., phone and fax numbers, E-mail address), supervisor's name and related contact information.

*Education and training:* Graduation dates and locations, highest level of education, other education, training and school information including courses and training completion dates.

*Pay Entitlement and Allowances:* Pay information including earnings and allowances, additional pay (bonuses, special, and incentive pays), payroll

computation, balances and history with associated accounting elements, leave balances and leave history.

*Deductions from Pay:* Tax information (Federal, state and local) based on withholding options, payroll deductions, garnishments, savings bond information including designated owner, deductions, and purchase dates, thrift savings plan participation.

*Other pay-related information:* Direct deposit information including financial institution name, routing number, and account information.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

10 U.S.C. 113, Secretary of Defense; 10 U.S.C. 3013, Secretary of the Army; 37 U.S.C., Pay and Allowances of the Uniformed Services; 10 U.S.C., Armed Forces: Under Secretary of Defense for Personnel and Readiness; and E.O. 9397 (SSN), as amended.

**PURPOSE(S):**

A Web-based, integrated personnel and pay system to support all components of the United States Army to include Active Duty, National Guard, Reserve, select Army retired and former Army military personnel. This system is intended to support peacetime and wartime readiness requirements across a range of personnel, financial and related matters.

**ROUTINE 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 of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To officials and employees of the Department of Health and Human Services, and Selective Service Administration in the performance of their official duties related to eligibility, notification, and assistance in obtaining benefits for which members, former members or retiree may be eligible.

To officials and employees of the Department of Veterans Affairs in the performance of their official duties related to approved research projects, and for processing and adjudicating claims, determining eligibility, notification, and assistance in obtaining benefits and medical care for which members, former members, retiree and family members/annuitants may be eligible.

To the Department of Veterans Affairs to provide information regarding a service-member's record or family member for the purposes of supporting eligibility processing for the Service-member's Group Life Insurance program.

To state and local agencies in the performance of their official duties related to verification of status for determination of eligibility for Veterans bonuses and other benefits and entitlements.

To officials and employees of the American Red Cross in the performance of their duties relating to the assistance of the members and their dependents and relatives, or related to assistance previously furnished such individuals, without regard to whether the individual assisted or his/her sponsor continues to be a member of the Military Service. Access will be limited to those portions of the member's record required to effectively assist the member.

To the U.S. Citizenship and Immigration Services for use in making alien admission and naturalization inquiries.

To the Social Security Administration to obtain or verify Social Security Numbers or to substantiate applicant's credit for social security compensation.

To officials and employees of the Office of the Sergeant at Arms of the United States House of Representatives in the performance of their official duties related to the verification of the active duty military service of Members of Congress. Access is limited to those portions of the member's record required to verify time in service.

To the widow or widower, dependent, or next-of-kin of deceased members to settle the affairs of the deceased member. The individuals will have to verify relationship by providing a birth certificate, marriage license, death certificate, or court document as requested/required to prove identity.

To governmental agencies for the conduct of computer matching agreements for the purpose(s) of determining eligibility for Federal benefit programs, to determine compliance with benefit program requirements and to recover improper payments or delinquent debts under a Federal benefit program.

To Federal and state licensing authorities and civilian certification boards, committees and/or ecclesiastical endorsing organizations for the purposes of professional credentialing (licensing and certification) of lawyers, chaplains and health professionals.

To Federal agencies such as the National Academy of Sciences, for the purposes of conducting personnel and/or health-related research in the interest of the Federal government and the public. When not considered mandatory, the names and other identifying data will be eliminated from records used for such research studies.

To the officials and employees of the Department of Labor in the performance of their official duties related to employment and compensation.

**Note:** Disclosure to consumer reporting agencies.

Disclosures pursuant to 5 U.S.C. 552a(b)(12) may be made from this system to 'consumer reporting agencies' as defined in the Fair Credit Reporting Act (14 U.S.C. 1681a(f)) or the Federal Claims Collection Act of 1966 (31 U.S.C. 3701(a)(3)). The purpose of this disclosure is to aid in the collection of outstanding debts owed to the Federal government, typically to provide an incentive for debtors to repay delinquent Federal government debts by making these debts part of their credit records.

The disclosure is limited to information necessary to establish the identity of the individual, including name, address, and taxpayer identification number (Social Security Number (SSN)); the amount, status and history of the claim, and the agency or program under which the claim arose for the sole purpose of allowing the consumer reporting agency to prepare a commercial credit report.

The DoD 'Blanket Routine Uses' set forth at the beginning of the Army's compilation of System of Records Notices apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Electronic storage media.

**RETRIEVABILITY:**

Individual's name, Social Security Number (SSN), and date of birth.

**SAFEGUARDS:**

Physical entry will be restricted by the use of locks, guards, and will be accessible only to authorized personnel with a need-to-know. Access to personal data will be limited to person(s) responsible for maintaining and servicing IPPS–A data in performance of their official duties and who are properly trained, screened and cleared for a need-to-know. Access to personal data will be further restricted by encryption and the use of Common Access Card (CAC) and/or strong password, which are changed periodically according to DoD and Army security policies.

**RETENTION AND DISPOSAL:**

Personnel and education records: Keep in current files area until transfer or separation of individual and then until no longer needed for conducting business, but not longer than 6 years after the event, then destroy.

*UCMJ records:* Records at the Office of the Judge Advocate General, the Office of the Chief Counsel, and the Office, Chief of Engineers are permanent; at all other locations, records are destroyed upon obsolescence.

*Military pay records:* Records may be temporary in nature and destroyed when actions are completed, superseded, obsolete, or no longer needed. Other records may be cut off at the end of the payroll year or fiscal year, and destroyed 6 years and 3 months after cutoff. Active duty pay records created prior to automation were cut off on conversion to the Defense Joint Military Payroll System (DJMS), and will be destroyed October 1, 2033, or 56 years after implementation of DJMS. The records are destroyed by tearing, shredding, pulping, macerating, burnings or degaussing the electronic storage media.

**SYSTEM MANAGER(S) AND ADDRESS:**

IPPS–A System Manager, PEO EIS, Project Directorate IPPS–A, Hoffman II, 200 Stovall St., Alexandria, VA 22332–0010.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to Army Records, U.S. Army Human Resources Command, Attn: AHRC–PAV–V, 1 Reserve Way, St. Louis, MO 63132–5200.

For verification purposes, individuals should provide their full name, Social Security Number (SSN), any details which may assist in locating records, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

**RECORD ACCESS PROCEDURES:**

Individuals seeking written access to information about themselves contained in this system of records should address written inquiries to Army Records, U.S. Army Human Resources Command, Attn: AHRC–PAV–V, 1 Reserve Way, St. Louis, MO 63132–5200.

For verification purposes, individuals should provide their full name, Social Security Number (SSN), any details which may assist in locating records, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

**CONTESTING RECORD PROCEDURES:**

The Army's rules for accessing records and for contesting contents and appealing initial agency determinations are contained in Army Regulation 340–21, The Army Privacy Program; Title 32 CFR National Defense, part 505, Army Privacy Act Program; or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

Data contained in this system is collected from the individuals and current Army Human Resource Offices and integrated pay systems.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. 2011–14309 Filed 6–8–11; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF EDUCATION

### Applications for New Awards; National Institute on Disability and Rehabilitation Research (NIDRR)—Disability Rehabilitation Research Project (DRRP)—Disability in the Family

**AGENCY:** Office of Special Education and Rehabilitative Services, Department of Education.

**ACTION:** Notice.

**Overview Information**

*National Institute on Disability and Rehabilitation Research (NIDRR)—Disability and Rehabilitation Research Projects and Centers Program—Disability Rehabilitation Research Project (DRRP)—Disability in the Family; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2011*

Catalog of Federal Domestic Assistance (CFDA) Number: 84.133A–9.

Dates:

*Applications Available:* June 9, 2011.

*Date of Pre-Application Meeting:* June 30, 2011.

*Deadline for Transmittal of Applications:* August 8, 2011.

**Full Text of Announcement**

**I. Funding Opportunity Description**

*Purpose of Program:* The purpose of the DRRP program is to improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended, by developing methods, procedures, and rehabilitation technologies that advance a wide range of independent living and employment outcomes for individuals with disabilities, especially individuals with the most severe disabilities. DRRPs carry out one or more of the following types of activities, as specified and defined in 34 CFR 350.13 through 350.19: research, training, demonstration, development, dissemination, utilization, and technical assistance.

An applicant for assistance under this program must demonstrate in its application how it will address, in whole or in part, the needs of individuals with disabilities from minority backgrounds (34 CFR 350.40(a)). The approaches an applicant may take to meet this requirement are found in 34 CFR 350.40(b).

Additional information on the DRRP program can be found at: *http://www.ed.gov/rschstat/research/pubs/res-program.html#DRRP.*

*Priorities:* NIDRR has established two absolute priorities for this competition.

*Absolute Priorities:* The *General DRRP Requirements* priority, which applies to all DRRP competitions, is from the notice of final priorities for the Disability and Rehabilitation Research Projects and Centers Program, published in the **Federal Register** on April 28, 2006 (71 FR 25472). The *DRRP on Disability and Family* priority is from the notice of final priority for this program, published elsewhere in this issue of the **Federal Register.**

For FY 2011 and any subsequent year in which we make awards from the list

of unfunded applicants from this competition, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider only applications that meet these priorities.

These priorities are:

*General Disability Rehabilitation Research Projects (DRRP) Requirements* and *DRRP on Disability in the Family.*

**Note:** The full text of these priorities is included in the pertinent notices of final priority or priorities published in the **Federal Register** and in the application package for this program.

**Program Authority:** 29 U.S.C. 762(g) and 764(a).

*Applicable Regulations:* (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 80, 81, 82, 84, 85, 86, and 97. (b) The regulations for this program in 34 CFR part 350. (c) The notice of final priorities for the Disability and Rehabilitation Research Projects and Centers program, published in the **Federal Register** on April 28, 2006 (71 FR 25472). (d) The notice of final priority for this program, published elsewhere in this issue of the **Federal Register**.

**Note:** The regulations in 34 CFR part 86 apply to institutions of higher education only.

## II. Award Information

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* $500,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2012 from the list of approved but unfunded applicants from this competition.

*Maximum Award:* We will reject any application that proposes a budget exceeding $500,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

*Estimated Number of Awards:* 1.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* Up to 60 months.

## III. Eligibility Information

1. *Eligible Applicants:* States; public or private agencies, including for-profit agencies; public or private organizations, including for-profit organizations; institutions of higher education; and Indian Tribes and Tribal organizations.

2. *Cost Sharing or Matching:* Cost sharing is required by 34 CFR 350.62(a) and will be negotiated at the time of award.

## IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *http://www.ed.gov/fund/grant/apply/grantapps/index.html.* To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. Fax: (703) 605–6794. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.edpubs.gov* or at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application package from ED Pubs, be sure to identify this program as follows: CFDA number 84.133A–9.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

*Page Limit:* The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you limit Part III to the equivalent of no more than 100 pages, using the following standards:

- A "page" is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the page limit does apply to all of the application narrative section (Part III).

The application package will provide instructions for completing all components to be included in the application. Each application must include a cover sheet (Standard Form 424); budget requirements (ED Form 524) and narrative budget justification; other required forms; an abstract, Human Subjects narrative, Part III project narrative; resumes of staff; and other related materials, if applicable.

3. *Submission Dates and Times:*

*Applications Available:* June 9, 2011.

*Pre-Application Meeting:* Interested parties are invited to participate in a pre-application meeting and to receive information and technical assistance through individual consultation with NIDRR staff. The pre-application meeting will be held June 30, 2011. Interested parties may participate in this meeting by conference call with NIDRR staff from the Office of Special Education and Rehabilitative Services between 1:00 p.m. and 3:00 p.m., Washington, DC time. NIDRR staff also will be available from 3:30 p.m. to 4:30 p.m., Washington, DC time, on the same day, by telephone, to provide information and technical assistance through individual consultation. For further information or to make arrangements to participate in the meeting via conference call or for an individual consultation, contact either Lynn Medley or Marlene Spencer as follows: Lynn Medley, U.S. Department of Education, 400 Maryland Avenue, SW., room 5140, PCP, Washington, DC 20202–2700. Telephone: (202) 245–7338 or by e-mail: *Lynn.Medley@ed.gov.* Marlene Spencer, U.S. Department of Education, 400 Maryland Avenue, SW., room 5133, PCP, Washington, DC 20202–2700. Telephone: (202) 245–7532 or by e-mail: *Marlene.Spencer@ed.gov.*

*Deadline for Transmittal of Applications:* August 8, 2011.

Applications for grants under this program must be submitted electronically using the Grants.gov Apply site (*http://Grants.gov*). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) Be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined in the Grants.gov 3–Step Registration Guide (see *http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf*).

7. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

*a. Electronic Submission of Applications*

Applications for grants under the DRRP on Disability in the Family, CFDA number 84.133A–9, must be submitted electronically using the Governmentwide Grants.gov Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the DRRP on Disability in the Family at *http://www.Grants.gov.* You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.133, not 84.133A).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this program to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *http://www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a .PDF (Portable Document) format only. If you upload a file type other than a .PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that

the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

*Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System:* If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

**Note:** The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

*Exception to Electronic Submission Requirement:* You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system; *and*

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Marlene Spencer, U.S. Department of Education, 400 Maryland Avenue, SW., room 5133, PCP, Washington, DC 20202–2700. Fax: (202) 245–7323.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

*b. Submission of Paper Applications by Mail*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.133A–9), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

**Note:** The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

*c. Submission of Paper Applications by Hand Delivery*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.133A–9), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

**Note for Mail or Hand Delivery of Paper Applications:** If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the program under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

## V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 75.210 of EDGAR and 34 CFR 350.54 and are listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant program, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

**VI. Award Administration Information**

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this program, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* To evaluate the overall success of its research program, NIDRR assesses the quality of its funded projects through a review of grantee performance and products. Each year, NIDRR examines a portion of its grantees to determine:

- The number of accomplishments (*e.g.,* new or improved tools, methods, discoveries, standards, interventions, programs, or devices) developed or tested with NIDRR funding that have been judged by expert panels to be of high quality and to advance the field.
- The average number of publications per award based on NIDRR-funded research and development activities in refereed journals.
- The percentage of new NIDRR grants that assess the effectiveness of interventions, programs, and devices using rigorous methods.

NIDRR uses information submitted by grantees as part of their Annual Performance Reports (APRs) for these reviews.

Department of Education program performance reports, which include information on NIDRR programs, are available on the Department's Web site: *http://www.ed.gov/about/offices/list/opepd/sas/index.html.*

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made "substantial progress toward meeting the objectives in its approved application." This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

**VII. Agency Contacts**

**FOR FURTHER INFORMATION CONTACT:** Lynn Medley or Marlene Spencer as follows:

Lynn Medley, U.S. Department of Education, 400 Maryland Avenue, SW., room 5140, PCP, Washington, DC 20202–2700. Telephone: (202) 245–7338 or by e-mail: *Lynn.Medley@ed.gov.*

Marlene Spencer, U.S. Department of Education, 400 Maryland Avenue, SW., room 5133, PCP, Washington, DC 20202–2700. Telephone: (202) 245–7532 or by e-mail: *Marlene.Spencer@ed.gov.*

If you use a TDD call the FRS, toll free, at 1–800–877–8339.

**VIII. Other Information**

*Accessible Format:* Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD call the FRS, toll-free, at 1–800–877–8339.

*Electronic Access to This Document:* The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *http://www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *http://www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: June 6, 2011.

**Alexa Posny,**

*Assistant Secretary for Special Education and Rehabilitative Services.*

[FR Doc. 2011–14342 Filed 6–8–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Applications for New Awards; Spinal Cord Injury Model Systems (SCIMS) Centers and SCIMS Multi-Site Collaborative Research Projects

**AGENCY:** Office of Special Education and Rehabilitative Services, Department of Education.

**ACTION:** Notice.

**Overview Information**

*National Institute on Disability and Rehabilitation Research (NIDRR)—Disability and Rehabilitation Research Projects and Centers Program—Disability and Rehabilitation Research Projects (DRRPs) and Special Projects and Demonstrations for Spinal Cord Injury Program—Spinal Cord Injury Model Systems (SCIMS) Centers and SCIMS Multi-Site Collaborative Research Projects; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2011*

Catalog of Federal Domestic Assistance (CFDA) Numbers: 84.133N–1 and 84.133A–15.

**Note:** This notice invites applications for the first of two related competitions and announces key information for both competitions. For key dates and funding information regarding each competition, see the chart in the *Award Information* section of this notice (chart).

**DATES:** *Applications Available:* See chart.

*Date of Pre-Application Meeting:* June 30, 2011.

*Deadline for Transmittal of Applications:* See chart.

**Full Text of Announcement**

**I. Funding Opportunity Description**

*Purpose of Programs:* The competitions announced in this notice are conducted under two separate programs: The Special Projects and Demonstrations for Spinal Cord Injury Program (the SCIMS Centers program—84.133N–1 competition) and the Disability and Rehabilitation Research Projects (DRRPs) program (the SCIMS Multi-Site Collaborative Research Projects—84.133A–15 competition).

*Special Projects and Demonstrations for Spinal Cord Injuries Program*

The SCIMS centers program is funded through the Special Projects and Demonstrations for Spinal Cord Injuries Program. This program provides assistance for projects that provide comprehensive rehabilitation services to individuals with spinal cord injuries and conducts spinal cord research, as specified in 34 CFR 359.10 and 359.11.

*DRRP Program*

The SCIMS Multi-Site Collaborative Research Projects are funded under the DRRP program. DRRPs are designed to improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended (Rehabilitation Act) by developing methods, procedures, and rehabilitation technologies that advance a wide range of independent living and employment outcomes for individuals with disabilities, especially individuals with the most severe disabilities. DRRPs carry out one or more of the following types of activities, as specified and defined in 34 CFR 350.13 through 350.19: Research, training, demonstration, development, dissemination, utilization, and technical assistance. An applicant for assistance under this program must demonstrate in its application how it will address, in whole or in part, the needs of individuals with disabilities from minority backgrounds (34 CFR 350.40(a)). The approaches an applicant may take to meet this requirement are found in 34 CFR 350.40(b). Additional information on the DRRP program can be found at: *http://www.ed.gov/rschstat research/pubs/res-program.html#DRRP.*

*Priorities:* This notice includes three priorities, which correspond to the two competitions announced in this notice as follows:

| Competition | Priority or priorities |
|---|---|
| CFDA No. 84.133N–1 | Spinal Cord Injury Model Systems (SCIMS) Centers. |
| CFDA No. 84.133A–15 | *Spinal Cord Injury Model Systems (SCIMS) Multi-Site Collaborative Research Projects.*<br>*General Disability and Rehabilitation Research Projects (DRRP) Requirements priority.* |

The SCIMS Centers and SCIMS Multi-Site Collaborative Research Projects priorities are from the notice of final priorities and selection criterion published elsewhere in this issue of the **Federal Register**. The General DRRP Requirements priority is from the notice of final priorities published in the **Federal Register** on April 28, 2006 (71 FR 25472).

*Absolute Priority:* For FY 2011 and any subsequent year in which we make awards from the list of unfunded applicants, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3), for each competition, we consider only applications that meet the applicable priority or priorities for that competition.

These priorities are:

1. *Spinal Cord Injury Model Systems (SCIMS) Centers.*

2. *Spinal Cord Injury Model Systems (SCIMS) Multi-Site Collaborative Research Projects.*

3. *General Disability and Rehabilitation Research Projects (DRRP) Requirements priority.*

**Note:** The full text of these priorities are included in the pertinent notices of final priority or priorities published in the **Federal Register** and in the application package for this program.

**Program Authority:** 29 U.S.C. 760 and 764(a) and 764(b)(4).

*Applicable Regulations:* (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 80, 81, 82, 84, 85, 86, and 97. (b) The regulations for this program in 34 CFR parts 350 and 359. (c) The notice of final priorities published in the **Federal Register** on April 28, 2006 (71 FR 25472). (d) The notice of final priorities and selection criterion for the SCIMS program and the DRRP program, published elsewhere in this issue of the **Federal Register**.

**Note:** The regulations in 34 CFR part 86 apply to institutions of higher education only.

**II. Award Information**

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* See chart.

*Estimated Range of Awards:* See chart.

*Estimated Average Size of Awards:* See chart.

*Maximum Award:* See chart.

*Estimated Number of Awards:* See chart.

*Project Period:* See chart.

| CFDA number and name | Applications available | Deadline for transmittal of application | Estimated available funds | Estimated range of awards | Estimated average size of awards | Maximum award (budget period of 12 months) [1] [2] | Estimated number of awards | Project period |
|---|---|---|---|---|---|---|---|---|
| SCIMS Centers (84.133N–1). | June 9, 2011 ..... | August 8, 2011 ..... | $6,500,000 | [3] $439,000–$489,000 | $464,000 | [4] $489,000 | 14 | Up to 60 months. |
| SCIMS Multi-Site Collaborative Research Projects (84.133A–15). | Letters inviting applications will be mailed to each successful applicant of the SCIMS competition. Applications will be available online at the time of the mailing. | The Department will establish the deadline date for the competition in the letter it provides to each eligible applicant under this notice. | $1,800,000 | $850,00–900,000 | $900,000 | $900,000 | 2 | Up to 60 months. |

[1] We will reject any application that proposes a budget exceeding the Maximum Amount. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published the **Federal Register**.

[2] The maximum amount includes direct and indirect costs.

[3] SCIMS Centers will be funded at varying amounts up to the maximum award based on the numbers of SCIMS database participants from whom Centers must collect follow-up data. Centers that have previously been SCIMS grantees with significantly larger numbers of database participants will receive higher funding within the specified range, as determined by NIDRR after the applicant is selected for funding. Applicants should include in their budgets specific estimates of their costs for follow-up data collection. Funding will be determined individually for each successful applicant, up to the maximum allowed, based upon the documented workload associated with the follow-up data collection, the other costs of the grant, and the overall budgetary limits of the program.

[4] SCIMS Centers must spend at least 15 percent of their annual budget on participating in at least one module project. Module projects are described in the notice of final priorities and selection criterion, published elsewhere in the **Federal Register**.

**Note:** The Department is not bound by any estimates in this notice.

## III. Eligibility Information

1. *Eligible Applicants:*

(a) *For the SCIMS Centers Competition (84.133N–1):* States; public or private agencies, including for-profit agencies; public or private organizations, including for-profit organizations; institutions of higher education; and Indian Tribes and Tribal organizations.

(b) *For the SCIMS Multi-Site Collaborative Research Projects Competition (84.133A–15):* Grantees under the FY 2011 SCIMS Centers competition. Successful grantees under the SCIMS competition will be invited by letter to apply for funding as a lead center under the SCIMS Multi-Site Collaborative Research Projects Competition.

2. *Cost Sharing or Matching:* The SCIMS Centers Competition announced in this notice does not involve cost sharing or matching. The SCIMS Multi-Site Collaborative Research Projects Competition announced in this notice does require cost sharing (4 CFR 350.62(a)), which will be negotiated at the time of the grant award.

## IV. Application and Submission Information

1. *Address To Request Application Package:* You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *http://www.ed.gov/fund/grant/apply/grantapps/index.html.* To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. Fax: (703) 605–6794. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.EDPubs.gov* or at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA numbers 84.133N–1 and 84.133A–15.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

*Page Limit:* The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. For both competitions announced in this notice, we recommend that you limit Part III to the equivalent of no more than 100 pages, using the following standards:

- A "page" is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the page limit does apply to all of the application narrative section (Part III).

The application package for each of the competitions announced in this notice will provide instructions for completing all components to be included in the application. Each application must include a cover sheet (Standard Form 424); budget requirements (ED Form 524) and narrative budget justification; other required forms; an abstract, Human Subjects narrative, Part III project narrative; resumes of staff; and other related materials, if applicable.

3. *Submission Dates and Times:*

*Applications Available:* See chart.

*Date of Pre-Application Meeting:* Interested parties are invited to participate in a pre-application meeting to discuss the funding priorities and to receive information and technical assistance through individual consultation. The pre-application meeting will be held on June 30, 2011. Interested parties may participate in this meeting by conference call between 10 a.m. and 12 noon. After the meeting,

NIDRR staff also will be available from 1:30 p.m. to 4 p.m. on that same day to provide information and technical assistance through individual consultation.

For further information or to make arrangements to attend by conference call, or for an individual consultation, contact Lynn Medley, U.S. Department of Education, Potomac Center Plaza, room 5040, 550 12th Street, SW., Washington, DC 20202. Telephone (202) 245–7338 or by e-mail: *Lynn.Medley@ed.gov.*

*Deadline for Transmittal of Applications:* See chart.

Applications for grants under each of the competitions announced in this notice must be submitted electronically using the Grants.gov Apply site (*http://www.grants.gov*). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* These programs are not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section in this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) Be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined in the Grants.gov 3–Step Registration Guide (see *http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf*).

7. *Other Submission Requirements.* Applications for grants under these competitions must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Spinal Cord Injury Model Systems (SCIMS) Centers and SCIMS Multi-Site Collaborative Research Projects, CFDA number 84.133N–1 and 84.133A–15, must be submitted electronically using the Governmentwide Grants.gov Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for Spinal Cord Injury Model Systems (SCIMS) Centers and SCIMS Multi-Site Collaborative Research Projects at *http://www.Grants.gov.* You must search for the downloadable application package for these competitions by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.133, not 84.133N).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *http://www.G5.gov.*
- You will not receive additional point value because you submit your

application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

- You must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a .PDF (Portable Document) format only. If you upload a file type other than a .PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

*Application Deadline Date Extension in Case of Technical Issues With the Grants.gov System:* If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with *Grants.gov,* along with the *Grants.gov* Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the *Grants.gov* system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

**Note:** The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

*Exception to Electronic Submission Requirement:* You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system; *and*
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Lynn Medley, U.S. Department of Education, 400 Maryland Avenue, SW., room 5140, PCP, Washington, DC 20202–2700. Fax: (202) 245–7323.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.133N–1 or 84.133A–15), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

**Note:** The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.133N–1 or 83.133A–15), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

**Note for Mail or Hand Delivery of Paper Applications:** If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number,

including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

## V. Application Review Information

1. *Selection Criteria:* The selection criteria for the SCIMS Centers competition are from 34 CFR 359.31, and are listed in the application package. The selection criteria for the SCIMS Multi-Site Collaborative Research Projects are from 34 CFR 75.210 of EDGAR, 34 CFR 350.54, and the criterion established in the NFP; these selection criteria will be listed in the application package for the SCIMS Multi-Site Collaborative Research Projects competition.

The Secretary is interested in hypothesis-driven research and development projects. To address this interest it is expected that applicants will articulate goals, objectives, and expected outcomes for the proposed research and development activities. It is critical that proposals describe expected public benefits, especially benefits for individuals with disabilities, and propose projects that are optimally designed to demonstrate outcomes that are consistent with the proposed goals. Applicants are encouraged to include information describing how they will measure outcomes, including the indicators that will represent the end-result, the mechanisms that will be used to evaluate outcomes associated with specific problems or issues, and how the proposed activities will support new intervention approaches and strategies, including a discussion of measures of effectiveness.

Submission of this information is voluntary except where required by the selection criteria listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

## VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* To evaluate the overall success of its research program, NIDRR assesses the quality of its funded projects through a review of grantee performance and products. Each year, NIDRR examines a portion of its grantees to determine:

- The number of accomplishments (*e.g.,* new or improved tools, methods, discoveries, standards, interventions, programs, or devices) developed or tested with NIDRR funding that have been judged by expert panels to be of high quality and to advance the field.
- The average number of publications per award based on NIDRR-funded research and development activities in refereed journals.
- The percentage of new NIDRR grants that assess the effectiveness of interventions, programs, and devices using rigorous methods.

NIDRR uses information submitted by grantees as part of their Annual Performance Reports (APRs) for these reviews.

Department of Education program performance reports, which include information on NIDRR programs, are available on the Department's Web site: *http://www.ed.gov/about/offices/list/opepd/sas/index.html.*

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made "substantial progress toward meeting the objectives in its approved application." This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

## VII. Agency Contacts

**FOR FURTHER INFORMATION CONTACT:** Either Lynn Medley or Marlene Spencer as follows:

Lynn Medley, U.S. Department of Education, 400 Maryland Avenue, SW., Room 5140, PCP, Washington, DC 20202–2700. Telephone: (202) 245–7338 or by e-mail: *Lynn.Medley@ed.gov.*

Marlene Spencer, U.S. Department of Education, 400 Maryland Avenue, SW.,

Room 5133, PCP, Washington, DC 20202–2700. Telephone: (202) 245–7532 or by e-mail: *Marlene.Spencer@ed.gov.*

If you use a TDD call the FRS, toll free, at 1–800–877–8339.

**VIII. Other Information**

*Accessible Format:* Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., Room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD call the (Federal Relay Service) FRS, toll-free, at 1–800–877–8339.

*Electronic Access to This Document:* The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *http://www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *http://www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: June 6, 2011.

**Alexa Posny,**

*Assistant Secretary for Special Education and Rehabilitative Services.*

[FR Doc. 2011–14349 Filed 6–8–11; 8:45 am]

**BILLING CODE 4000–01–**

## DEPARTMENT OF EDUCATION

**[CFDA Numbers: 84.133N–1 and 84.133A–15]**

## Final Priorities and Selection Criterion; National Institute on Disability and Rehabilitation Research (NIDRR)—Spinal Cord Injury Model Systems (SCIMS) Centers and SCIMS Multi-Site Collaborative Research Projects

**AGENCY:** Office of Special Education and Rehabilitative Services, Department of Education.

**ACTION:** Notice of final priorities and selection criterion.

**SUMMARY:** The Assistant Secretary for Special Education and Rehabilitative Services announces (1) a priority under the Special Projects and Demonstrations for Spinal Cord Injuries Program for SCIMS Centers (priority 1), and (2) a priority and selection criterion for Disability and Rehabilitation Research Projects (DRRPs) that will serve as the SCIMS Multi-Site Collaborative Research Projects (priority 2). The Assistant Secretary may use one or more of these priorities and selection criterion for competitions in fiscal year (FY) 2011 and later years. We take this action to focus attention on areas of national need.

**DATES:** *Effective Date:* These priorities and selection criterion are effective July 11, 2011.

**FOR FURTHER INFORMATION CONTACT:** Lynn Medley, U.S. Department of Education, 400 Maryland Avenue, SW., room 5140, Potomac Center Plaza (PCP), Washington, DC 20202–2700. Telephone: (202) 245–7338 or by e-mail: *lynn.medley@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service, toll free, at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:** This notice of final priorities and selection criterion (NFP) is in concert with NIDRR's currently approved Long-Range Plan (Plan). The Plan, which was published in the **Federal Register** on February 15, 2006 (71 FR 8165), can be accessed on the Internet at the following site: *http://www.ed.gov/about/offices/list/osers/nidrr/policy.html.*

Through the implementation of the Plan, NIDRR seeks to: (1) Improve the quality and utility of disability and rehabilitation research; (2) foster an exchange of expertise, information, and training to facilitate the advancement of knowledge and understanding of the unique needs of traditionally underserved populations; (3) determine the best strategies and programs to improve rehabilitation outcomes for underserved populations; (4) identify research gaps; (5) identify mechanisms of integrating research and practice; and (6) disseminate findings.

This notice proposes priorities and a selection criterion that NIDRR intends to use for competitions in FY 2011 and possibly later years. However, nothing precludes NIDRR from publishing additional priorities if needed. Furthermore, NIDRR is under no obligation to make an award using either of the priorities or the selection criterion. The decision to make an award will be based on the quality of applications received and available funding.

*Purpose of Programs:* The SCIMS centers are funded through the Special Projects and Demonstrations for SCI Program and the SCIMS Multi-Site Collaborative Research Projects are funded as DRRPs.

**Special Projects and Demonstrations for Spinal Cord Injuries Program**

The SCIMS centers program is funded through the Special Projects and Demonstrations for Spinal Cord Injuries Program. This program provides assistance for projects that provide comprehensive rehabilitation services to individuals with spinal cord injuries, and conducts spinal cord research, as specified in 34 CFR 359.10 and 359.11.

**Disability and Rehabilitation Research Projects (DRRPs) Program**

The SCIMS Multi-Site Collaborative Research Projects are funded as DRRPs. DRRPs are designed to improve the effectiveness of services authorized under the Rehabilitation Act by developing methods, procedures, and rehabilitation technologies that advance a wide range of independent living and employment outcomes for individuals with disabilities, especially individuals with the most severe disabilities. DRRPs carry out one or more of the following types of activities, as specified and defined in 34 CFR 350.13 through 350.19: research, training, demonstration, development, dissemination, utilization, and technical assistance.

**Program Authority:** 29 U.S.C. 760 and 764(a) and 764(b)(4).

*Applicable Program Regulations:* 34 CFR parts 350 and 359.

We published a notice of proposed priorities and selection criterion (NPP) for NIDRR's Disability and Rehabilitation Research Projects and Centers Program in the **Federal Register** on March 22, 2011 (76 FR 15961). That notice contained background information and our reasons for proposing the SCIMS Center priority and the SCIMS Multi-Site Collaborative Research Projects priority and selection criterion.

*Public Comment:* In response to our invitation in the NPP, nine parties submitted comments on the proposed priorities and selection criterion.

Generally, we do not address technical and other minor changes. In addition, we do not address general comments that raised concerns not

directly related to the proposed priorities and selection criterion.

*Analysis of Comments and Changes:* An analysis of the comments and of any changes in the priorities and selection criterion since publication of the notice NPP follows. We discuss substantive issues under the priorities or selection criterion to which they pertain.

**General**

*Comment:* One commenter noted that the proposed priorities focus on acquired spinal cord injuries, and not on developmental disabilities or other conditions that affect the spinal cord. This commenter recommended that the priorities be expanded to include any conditions that affect the spinal cord and subsequent human physical activity and movement.

*Discussion:* We are establishing the SCIMS Centers priority under section 204(b)(4) of the Rehabilitation Act, the statutory authority for the Special Projects and Demonstrations for Spinal Cord Injuries program. Section 204(b)(4) of the Rehabilitation Act and 34 CFR part 359, the implementing regulations for this program, clearly specify a focus on spinal cord injury, and on services provided to individuals following a spinal cord injury. We are funding the SCIMS Centers priority under this statutory authority to build upon the specialized research capacity that NIDRR has established under the SCIMS program. NIDRR developed the SCIMS Collaborative Research Projects priority to capitalize on this specialized research capacity. Therefore, both of the priorities announced in this notice focus on spinal cord injuries, and not other conditions that affect the spinal cord and subsequent physical activity and movement, as suggested by the commenter.

*Changes:* None.

**Spinal Cord Injury Model Systems (SCIMS) Centers Funded Under the Special Projects and Demonstrations for Spinal Cord Injuries**

*Comment:* Six commenters asked whether applicants under the SCIMS Centers priority would be required to propose a module project in their proposals. Four of these commenters asked for clarification on the mechanism that will be used to develop and decide upon module projects.

*Discussion:* Applicants are *not* required to propose a specific collaborative module project that they will implement in their proposals. Collaborative research projects cannot be developed in a thoughtful manner without knowledge of the capacity, interests, and expertise of the participating collaborators. For this reason, the priority does not require the SCIMS Centers to develop a collaborative module project. Rather, each SCIMS Center is required to participate in at least one collaborative module. Accordingly, applicants must demonstrate their capacity to successfully engage in multi-site collaborative research. This capacity includes access to research participants, the ability to maintain data quality, and the ability to adhere to research protocols.

Following the announcement of new awards under this priority, SCIMS Centers that are interested in developing module projects may identify module topics, identify potential collaborators from among the other new SCIMS Centers, and develop research protocols for the potential modules. At the first SCIMS Project Directors' meeting, Project Directors will review, discuss, and decide upon specific module projects to implement. NIDRR staff will facilitate this post-award discussion and selection of module topics for implementation among new SCIMS Center grantees. Once these module projects are agreed upon by the Project Directors, each SCIMS Center will be required to participate in at least one of the module projects.

*Changes:* NIDRR has modified the note under paragraph (d) of this priority to clearly indicate that applicants should not propose a specific module project in their application, and to clarify the mechanism that will be used to develop and decide upon the module projects in which the SCIMS Center grantees will participate.

*Comment:* Two commenters asked how NIDRR would assess applicants' capacity to participate in multi-site collaborative research.

*Discussion:* Because the SCIMS Centers will be funded under the Special Projects and Demonstrations for Spinal Cord Injuries program, the regulations in 34 CFR 359 apply. Under those regulations, peer reviewers will use selection criteria in 34 CFR 359.31 to evaluate the quality of applications under this program, including applicants' descriptions of their capacity to engage in collaborative research. Specifically, the peer review criteria under CFR 359.31(c) and (e) are directly applicable to the evaluation of applicants' capacity to engage in multi-site collaborative research.

*Changes:* None.

*Comment:* One commenter asked how NIDRR would assess applicants' capacity to enroll at least 30 participants per year in the database.

*Discussion:* Under the applicable program regulations for the Special Projects and Demonstrations for Spinal Cord Injuries program in 34 CFR part 359, peer reviewers will use selection criteria under 34 CFR 359.31 to evaluate the quality of applications under this program, including proposed plans to recruit at least 30 participants per year into the SCIMS database. We expect applicants to describe their capacity to meet this minimum requirement in their applications so that peer reviews can assess this capacity under 34 CFR 359.31. In addition, we note NIDRR will continue to closely monitor the capacity of its funded SCIMS Centers to enroll the minimum number of participants into the SCIMS database each year of the project period.

*Changes:* None.

*Comment:* One commenter asked whether NIDRR intended to require applicants to budget "at least 15 percent" of its budget to participate in module projects, or if NIDRR intended to require applicants to budget "no more than 15 percent" for this activity.

*Discussion:* NIDRR intends paragraph (d)(2) of this priority to require that SCIMS Centers propose to spend at least 15 percent of their annual budget on module participation.

*Changes:* None.

*Comment:* One commenter asked how applicants should describe their module participation in their proposed budgets.

*Discussion:* In order to meet paragraph (d) of the priority, a grantee must participate as a research collaborator in at least one module project. As discussed earlier in this *Analysis of Comments and Changes* section, we do not expect applicants to propose or describe a module project. Rather, we require applicants to propose to spend at least 15 percent of their annual budget on participating in a module project. Accordingly, the only information regarding participation in the module project that is needed in the application is a single line item for module participation that is at least 15 percent of the overall budget. No additional information is required.

*Changes:* None.

*Comment:* One commenter noted that the requirements under paragraph (c) of the priority are overly restrictive, in that they require projects to test both innovative approaches to treating SCI *and* innovative approaches to assessing outcomes. This commenter stated that it would be more reasonable to require projects to test either innovative approaches to treating SCI *or* innovative approaches to assessing outcomes. This commenter also suggested that NIDRR broaden the types of possible research

that can be proposed under this priority to include research that uses advanced methods to collect other information of clinical and/or scientific value that is of relevance to SCI.

*Discussion:* NIDRR agrees that the language in proposed paragraph (c) of the priority is overly restrictive and is changing the priority to require that applicants propose research to test innovative SCI treatments, or research to test innovative approaches to assessing outcomes of spinal cord injury.

In response to the second point raised by the commenter, NIDRR would like to maintain focus on the testing of interventions or the development of new outcomes measures and assessments. Through sustained funding of its SCIMS program, NIDRR has created a mature research infrastructure that will support the testing of interventions. NIDRR's emphasis on the testing of interventions and the development of measures to support that testing is intended to build upon this infrastructure to improve the outcomes of individuals with spinal cord injury. For this reason, we decline to revise this requirement to broaden the types of research that can be supported under this priority.

*Changes:* NIDRR has made minor modifications to paragraph (c) of the priority to clarify that applicants can propose research to test innovative SCI treatments, or research to test innovative approaches to assessing outcomes of spinal cord injury.

*Comment:* None.

*Discussion:* Paragraph (c) of this priority states that each SCIMS Center must propose and conduct at least one, but no more than two, site-specific research projects. We intend this language to prohibit applicants from proposing and conducting more than two site-specific research projects. To avoid any confusion on this point, we believe it would be helpful to applicants to add language clearly stating that applicants who propose more than two site-specific research projects will be disqualified.

*Changes:* NIDRR has revised paragraph (c) of this priority by adding a sentence stating that applicants who propose more than two site-specific research projects will be disqualified.

**SCIMS Multi-Site Collaborative Research Projects**

*Comment:* One commenter asked NIDRR to expand the eligibility criteria for serving as the lead applicant for one of the SCIMS Multi-Site Collaborative Research Projects, so that the two NIDRR-funded Rehabilitation Research and Training Centers on Secondary Conditions in Rehabilitation of Individuals with Spinal Cord Injury would be eligible to apply.

*Discussion:* NIDRR's SCIMS Centers program has evolved into a multi-site platform that can serve as a resource for testing promising interventions and building the evidence base for spinal cord injury rehabilitation. NIDRR has designed this priority to directly utilize this platform for collaborative research on interventions. Therefore, only SCIMS Centers are eligible to apply. These SCIMS Centers have direct access to individuals with SCI who will participate in the collaborative research. They also maintain comprehensive systems of clinical services for individuals with SCI. Applicants that are not SCIMS Centers will not have direct access to these resources, which are necessary for leading collaborative research within the SCIMS program. While only SCIMS Centers can apply as lead applicants for the SCIMS Multi-Site Collaborative Research grants, applicants may include as part of their multi-site collaborative research project other SCI research sites that are not participating as a SCIMS Center.

*Changes:* None.

**Final Priorities**

*Priority 1—Spinal Cord Injury Model Systems Centers*

The Assistant Secretary for Special Education and Rehabilitative Services establishes a priority for the funding of Spinal Cord Injury Model Systems (SCIMS) centers of care (SCIMS Centers). The SCIMS Centers must provide comprehensive, multidisciplinary services to individuals with spinal cord injury (SCI) as a basis for conducting research that contributes to evidence-based rehabilitation interventions and clinical and practice guidelines. The SCIMS program is designed to generate new knowledge that can be used to improve outcomes of individuals with SCI in one or more domains identified in NIDRR's currently approved Long Range Plan, published in the **Federal Register** on February 15, 2006 (71 FR 8165): health and function, participation and community living, technology, and employment. Each SCIMS Center must contribute to this outcome by—

(a) Providing a multidisciplinary system of rehabilitation care specifically designed to meet the needs of individuals with SCI. The system must encompass a continuum of care, including emergency medical services, acute care services, acute medical rehabilitation services, and post-acute services;

(b) Continuing the assessment of long-term outcomes of individuals with SCI by enrolling at least 30 subjects per year into the SCIMS database, following established protocols for the collection of enrollment and follow-up data on subjects;

(c) Proposing and conducting at least one, but no more than two, site-specific research projects to test innovative approaches to treating SCI or to assessing outcomes of individuals with SCI in one or more domains identified in the Plan: health and function, participation and community living, technology, and employment.

**Note:** Applicants who propose more than two site-specific research projects will be disqualified.

(d) Participating as research collaborators in at least one module project. Module projects are research collaborations with one or more other SCIMS Centers on topics of mutual interest and expertise. These module projects are carried out as part of the SCIMS Centers' activities. They are not part of the SCIMS Multi-Site Collaborative Projects, which are funded under a separate priority.

**Note:** Applicants should not propose a specific module project in their application. While all SCIMS Center grantees are required to participate as research collaborators in at least one module project, they are not required to develop any module project on their own. Immediately following the announcement of new awards under this priority, those SCIMS Centers that are interested in developing module projects may identify module topics, identify potential collaborators from among the other new SCIMS Centers, and develop research protocols for the potential modules. At the first SCIMS Project Directors' meeting, Project Directors will review, discuss, and decide upon specific module projects to implement. NIDRR staff will facilitate this post-award discussion and negotiation among new SCIMS grantees. Once these module projects are agreed upon by the Project Directors, each SCIMS Center will be required to participate in at least one of them.

Each applicant under this priority must—

(1) Demonstrate, in its application, its capacity to successfully engage in multi-site collaborative research. This capacity includes access to research participants, the ability to maintain data quality, and the ability to adhere to research protocols; and

(2) Propose to spend at least 15 percent of its annual budget on participating in a module project, as described in paragraph (d) of this priority;

(e) Addressing the needs of persons with disabilities including individuals

from traditionally underserved populations;

(f) Coordinating with the NIDRR-funded Model Systems Knowledge Translation Center (MSKTC) to provide scientific results and information for dissemination to clinical and consumer audiences; and

(g) Ensuring participation of persons with disabilities in conducting SCIMS research.

*Priority 2—Spinal Cord Injury Model Systems (SCIMS) Multi-Site Collaborative Research Projects*

The Assistant Secretary for Special Education and Rehabilitative Services establishes a priority for the funding of Disability and Rehabilitation Research Projects (DRRPs) to serve as Spinal Cord Injury Model Systems (SCIMS) multi-site collaborative research projects. To be eligible under this priority, an applicant must have received a grant under the SCIMS Centers priority (Proposed Priority 1 in this notice). Following completion of a competition using the SCIMS Centers priority, the Department will invite successful applicants under that competition to apply for funding under this SCIMS Multi-Site Collaborative Research Projects priority.

Each SCIMS multi-site collaborative research project must be designed to contribute to evidence-based rehabilitation interventions and clinical practice guidelines that improve the lives of individuals with spinal cord injury (SCI) through research, including the testing of approaches to treating SCI or the assessment of the outcomes of individuals with SCI. Each SCIMS multi-site collaborative research project must contribute to this outcome by—

(a) Collaborating with three or more of the NIDRR-funded SCIMS centers (for a minimum of four SCIMS sites). Applicants may also propose to include as part of their multi-site collaborative research project other SCI research sites that are not participating in a NIDRR-funded program;

(b) Conducting multi-site research on questions of significance to SCI rehabilitation, using clearly identified research designs. The research must focus on outcomes in one or more domains identified in NIDRR's currently approved Long Range Plan, published in the **Federal Register** on February 15, 2006 (71 FR 8165): Health and function, participation and community living, technology, and employment;

(c) Demonstrating the capacity to carry out multi-site collaborative research projects, including administrative capabilities, experience with management of multi-site research protocols, and demonstrated ability to maintain standards for quality and confidentiality of data gathered from multiple sites;

(d) Addressing the needs of people with disabilities, including individuals from traditionally underserved populations;

(e) Coordinating with the NIDRR-funded Model Systems Knowledge Translation Center (MSKTC) to provide scientific results and information for dissemination to clinical and consumer audiences; and

(f) Ensuring participation of individuals with disabilities in conducting SCIMS research.

**Types of Priorities**

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

*Absolute priority:* Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

*Competitive preference priority:* Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

*Invitational priority:* Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

**Selection Criterion**

In accordance with the provisions of 34 CFR 350.53 and 350.54 and in addition to the selection criteria specified in those sections, the Secretary will consider the following factor in evaluating applications submitted under the SCIMS Multi-Site Collaborative Research Projects priority:

The extent to which the applicant clearly documents its capacity to carry out a multi-site research project, including demonstrated administrative capabilities, experience with managing and following multi-site research protocols, and ability to maintain and meet standards for quality and confidentiality of data gathered from multiple sites.

This notice does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

**Note:** This notice does *not* solicit applications. In any year in which we choose to use these priorities, we invite applications through a notice in the **Federal Register.**

*Executive Order 12866:* This notice has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this final regulatory action.

The potential costs associated with this final regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this final regulatory action, we have determined that the benefits of the final priorities justify the costs.

**Summary of Potential Costs and Benefits**

The benefits of the Disability and Rehabilitation Research Projects and Centers and the Special Projects and Demonstrations for Spinal Cord Injuries Programs have been well established over the years in that similar projects have been completed successfully. These final priorities and selection criterion will generate new knowledge through research and development. Another benefit of these final priorities and selection criterion is that the establishment of new SCIMS Centers and the DRRPs conducting SCIMS multi-site research projects will generate new knowledge to improve the lives of individuals with disabilities. The new SCIMS Centers and the SCIMS multi-site research projects will generate, disseminate, and promote the use of new information that will improve the options for individuals with spinal cord injury to perform activities of their choice in the community.

*Accessible Format:* Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

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**Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *http://www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *http://www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: June 6, 2011.

**Alexa Posny,**

*Assistant Secretary for Special Education and Rehabilitative Services.*

[FR Doc. 2011–14350 Filed 6–8–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

**[CFDA Number: 84.133A–09]**

### Final Priority; National Institute on Disability and Rehabilitation Research (NIDRR)—Disability Rehabilitation Research Project (DRRP)—Disability in the Family

**AGENCY:** Office of Special Education and Rehabilitative Services, Department of Education.

**ACTION:** Notice of final priority.

**SUMMARY:** The Assistant Secretary for Special Education and Rehabilitative Services announces a funding priority for the Disability and Rehabilitation Research Projects and Centers Program administered by NIDRR. Specifically, this notice announces a priority for a center on disability in the family. The Assistant Secretary may use this priority for competitions in fiscal year (FY) 2011 and later years. We take this action to focus research attention on areas of national need. We intend this priority to contribute to increased participation and community living within the context of family life for individuals with disabilities and their families.

**DATES:** *Effective Date:* This priority is effective July 11, 2011.

**FOR FURTHER INFORMATION CONTACT:** Marlene Spencer, U.S. Department of Education, 400 Maryland Avenue, SW., room 5133, Potomac Center Plaza (PCP), Washington, DC 20202–2700. Telephone: (202) 245–7532 or by e-mail: *marlene.spencer@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service, toll free, at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:**

This notice of final priority (NFP) is in concert with NIDRR's currently approved Long-Range Plan (Plan). The Plan, which was published in the **Federal Register** on February 15, 2006 (71 FR 8165), can be accessed on the Internet at the following site: *http://www.ed.gov/about/offices/list/osers/nidrr/policy.html.*

Through the implementation of the Plan, NIDRR seeks to: (1) Improve the quality and utility of disability and rehabilitation research; (2) foster an exchange of expertise, information, and training to facilitate the advancement of knowledge and understanding of the unique needs of traditionally underserved populations; (3) determine the best strategies and programs to improve rehabilitation outcomes for underserved populations; (4) identify research gaps; (5) identify mechanisms of integrating research and practice; and (6) disseminate findings.

This notice announces a priority that NIDRR intends to use for DRRP competitions in FY 2011 and possibly later years. However, nothing precludes NIDRR from publishing additional priorities if needed. Furthermore, NIDRR is under no obligation to make an award for this priority. The decision to make an award will be based on the quality of applications received and available funding.

*Purpose of Program:* The purpose of the Disability and Rehabilitation Research Projects and Centers Program is (1) to plan and conduct research, demonstration projects, training, and related activities, including international activities, to develop methods, procedures, and rehabilitation technology, that maximize the full inclusion and integration into society, employment, independent living, family support, and economic and social self-sufficiency of individuals with disabilities, especially individuals with the most severe disabilities, and (2) to improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended (Rehabilitation Act).

**Program Authority:** 29 U.S.C. 762(g) and 764(a).

*Applicable Program Regulations:* 34 CFR part 350.

We published a notice of proposed priority (NPP) for this program in the **Federal Register** on March 29, 2011 (76 FR 17403). That notice contained background information and our reasons for proposing the particular priority.

There are no differences between the proposed priority and this final priority.

*Public Comment:* In response to our invitation in the notice of proposed priority, one party submitted comments on the proposed priority.

Generally, we do not address technical and other minor changes. In addition, we do not address general comments that raised concerns not directly related to the proposed priority.

*Analysis of Comments and Changes:* An analysis of the comment and of any changes in the priority since publication of the notice of proposed priority follows.

*Comment:* One commenter recommended that NIDRR require the DRRP on Disability in the Family to partner with the network of Parent Training and Information Centers that are funded by the Department's Office of Special Education Programs (OSEP), as well as with the Parent Training and Information Projects funded by the Department's Rehabilitation Services Administration (RSA). The commenter stated that these partnerships would ensure widespread dissemination of DRRP resources and information.

*Discussion:* NIDRR agrees that these partnerships may help provide a targeted means of dissemination to families that include at least one member with a disability. Nothing in the priority precludes applicants from proposing partnerships with OSEP's Parent Training and Information Centers, or RSA's Parent Training and Information Projects. However, NIDRR does not have a sufficient basis for requiring all applicants to do so. Applicants under this priority have a large number of stakeholder groups and organizations with whom they can collaborate. NIDRR does not want to limit applicants' choices by requiring partnerships with a particular type of entity.

*Changes:* None.

**Final Priority**

*Priority—DRRP on Disability in the Family*

The Assistant Secretary for Special Education and Rehabilitative Services establishes a priority for a Disability and Rehabilitation Research Project (DRRP) on Disability in the Family. The DRRP must contribute to the outcome of increased participation and community living for individuals with disabilities and their families.

To contribute to this outcome, the DRRP must—

1. Conduct research activities, development activities, or both;

2. Identify or develop, and test or evaluate interventions, programs, technologies, or products;

3. Conduct knowledge translation activities (*i.e.,* training, technical assistance, utilization, dissemination) in order to facilitate stakeholder (*e.g.,* people with disabilities, families that have at least one member with a disability) use of the interventions, programs, technologies, or products that resulted from the research activities, development activities, or both;

4. Involve key stakeholder groups in the activities described in paragraphs 1 through 3 in order to maximize the relevance and usability of the interventions, programs, technologies, or products to be developed or studied; and

5. Include families who are from traditionally underserved populations and who have at least one member with a disability as participants when conducting the activities described in paragraphs 1 through 3.

To contribute to this outcome, the DRRP may—

1. Focus its activities at the individual level, the family level, the systems level, or any combination of the three levels;

2. Include in its activities families with a person with a disability of any age and any disability;

3. Interpret the term "family" broadly; and

4. Choose from a wide range of research and development topics and approaches within any of the domains in NIDRR's currently approved Long Range Plan (*i.e.,* participation and community living, technology for access and function, health and function, employment) in order to contribute to the outcome goal of increased participation and community living for individuals with disabilities and their families.

**Types of Priorities**

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

*Absolute priority:* Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

*Competitive preference priority:* Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

*Invitational priority:* Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

This notice does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

**Note:** This notice does *not* solicit applications. In any year in which we choose to use this priority, we invite applications through a notice in the **Federal Register.**

*Executive Order 12866:* This notice has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this final regulatory action.

The potential costs associated with this final regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this final regulatory action, we have determined that the benefits of the final priority justify the costs.

**Summary of Potential Costs and Benefits**

The benefits of the Disability and Rehabilitation Research Projects and Centers Programs have been well established over the years in that similar projects have been completed successfully. This final priority will generate new knowledge through research, development, and knowledge translation activities. Another benefit of this final priority is that the establishment of a new DRRP will improve the lives of individuals with disabilities and their family members. The new DRRP will generate and promote the use of new information that will improve the community living and community participation options for individuals with disabilities and their families.

*Accessible Format:* Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, Potomac Center Plaza, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

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You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *http://www.federal register.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: June 6, 2011.

**Alexa Posny,**

*Assistant Secretary for Special Education and Rehabilitative Services.*

[FR Doc. 2011–14345 Filed 6–8–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### National Advisory Council on Indian Education (NACIE)

**AGENCY:** U.S. Department of Education.

**ACTION:** Notice of a Closed Meeting.

**SUMMARY:** This notice sets forth the schedule and proposed agenda of an upcoming closed meeting of the National Advisory Council on Indian Education (the Council) and is intended to notify the general public of the meeting. This notice also describes the functions of the Council. Notice of the Council's meetings is required under Section 10(a)(2) of the Federal Advisory Committee Act.

*Dates and Times:* June 23, 2011; June 24, 2011. June 23, 2011—2 p.m. to 5 p.m. Eastern Daylight Savings Time. June 24, 2011—12 p.m. to 5 p.m. Eastern Daylight Savings Time.

*Location:* The closed meeting will be conducted via conference call with NACIE members.

**SUPPLEMENTARY INFORMATION:**

The National Advisory Council on Indian Education is authorized by Section 7141 of the Elementary and Secondary Education Act. The Council is established within the Department of

Education to advise the Secretary of Education on the funding and administration (including the development of regulations, and administrative policies and practices) of any program over which the Secretary has jurisdiction and includes Indian children or adults as participants or programs that may benefit Indian children or adults, including any program established under Title VII, Part A of the Elementary and Secondary Education Act. The Council submits to the Congress, not later than June 30 of each year, a report on the activities of the Council that includes recommendations the Council considers appropriate for the improvement of Federal education programs that include Indian children or adults as participants or that may benefit Indian children or adults, and recommendations concerning the funding of any such program.

One of the Council's responsibilities is to develop and provide recommendations to the Secretary of Education on the funding and administration (including the development of regulations, and administrative policies and practices) of any program over which the Secretary has jurisdiction that can benefit Indian children or adults participating in any program which could benefit Indian children. Additionally, the Council makes recommendations to the Secretary for filling the position of the Director of Indian Education whenever a vacancy occurs.

The purpose of these closed meetings is to convene the Council via conference calls to interview candidates and deliberate on recommendations to the Secretary of Education for a Director of the Office of Indian Education. These closed discussions will take place June 23, 2011, 2 p.m. to 5 p.m. Eastern Daylight Savings Time and June 24, 2011, 12 p.m. to 5 p.m. Eastern Daylight Savings Time. These discussions pertain solely to internal personnel rules and practices of an agency and will disclose information of a personal nature where disclosure would constitute an unwarranted invasion of personal privacy. As such, this discussion is protected by exemptions 2 and 6 of section 552b(c) of Title 5 U.S.C.

**FOR FURTHER INFORMATION CONTACT:** Jenelle Leonard, Acting Director/Designated Federal Official, Office of Indian Education, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202. Telephone: 202–205–2161. Fax: 202–205–5870.

A report of the activities of the closed session and related matters that are informative to the public and consistent with the policy of section 5 U.S.C. 552b(c) will be available to the public within 21 days of the meeting. Records are kept of all Council proceedings and are available for public inspection at the at the Office of Indian Education, United States Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202. Monday–Friday, 8:30 a.m.–5:00 p.m. Eastern Daylight Time.

*Electronic Access to This Document:* The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: www.gpo.gov/fdsys. At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *http://www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

**Thelma Meléndez de Santa Ana,**

*Assistant Secretary for Elementary and Secondary Education.*

[FR Doc. 2011–14316 Filed 6–8–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

**[FE Docket No. 11–51–LNG]**

### Freeport LNG Development, L.P.; Application for Blanket Authorization To Export Liquefied Natural Gas

**AGENCY:** Office of Fossil Energy, DOE.

**ACTION:** Notice of application.

**SUMMARY:** The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt of an application filed on April 21, 2011, by Freeport LNG Development, L.P. (Freeport LNG), requesting blanket authorization to export liquefied natural gas (LNG) that previously had been imported into the United States from foreign sources on a short-term or spot market basis. The LNG would be exported from the existing Freeport LNG terminal facilities on Quintana Island, Texas, in an amount up to the equivalent of 24 billion cubic feet (Bcf) of natural gas to any country that has the capacity to import LNG via ocean-going carrier, and with which trade is not prohibited by U.S. law or policy. Freeport LNG seeks to export the LNG over a two year period commencing on the date of the authorization on its own behalf or as agent for others. The application is filed under section 3 of the Natural Gas Act (NGA). Protests, motions to intervene, notices of intervention, and written comments are invited.

**DATES:** Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed using procedures detailed in the Public Comment Procedures section of this notice, no later than 4:30 p.m., eastern time, July 11, 2011

**ADDRESSES:**

**Electronic Filing**

*e-mail: fergas@hq.doe.gov.*

**Regular Mail**

U.S. Department of Energy (FE–34), Office of Natural Gas Regulatory Activities, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026–4375.

**Hand Delivery or Private Delivery Services (*e.g.,* FedEx, UPS, *etc.*)**

U.S. Department of Energy (FE–34), Office of Natural Gas Regulatory Activities, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue, SW., Washington, DC 20585.

**FOR FURTHER INFORMATION CONTACT:**

Larine Moore or Beverly Howard, U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–9478; (202) 586–9387.

Edward Myers, U.S. Department of Energy, Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, Room 6B–159, 1000 Independence Ave. SW., Washington, DC 20585, (202) 586–3397.

**SUPPLEMENTARY INFORMATION:**

**Background**

Freeport LNG is a Delaware limited partnership with one general partner, Freeport LNG–GP, Inc., a Delaware corporation, which is owned 50% by an individual, Michael S. Smith, and 50% by ConocoPhillips Company. Freeport LNG's limited partners are: (1) Freeport LNG Investments, LLLP, a Delaware limited liability limited partnership,

which owns a 20% limited partnership interest in Freeport LNG; (2) ZHA FLNG Purchaser LLC, a Delaware limited liability company and wholly owned subsidiary of Zachary American Infrastructure, LLC, which owns a 55% limited partnership interest in Freeport LNG; (3) Texas LNG Holdings, LLC, a Delaware limited liability company and wholly-owned subsidiary of The Dow Chemical Company, which owns a 15% limited partnership interest in Freeport LNG; and (4) Turbo LNG, LLC, a Delaware limited liability company and wholly-owned subsidiary of Osaka Gas Co., Ltd., which owns a 10% limited partnership interest in Freeport LNG.

On June 18, 2004, the Federal Energy Regulatory Commission (FERC) authorized Freeport LNG to site, construct and operate the Freeport LNG terminal on Quintana Island, southeast of the City of Freeport in Brazoria County, Texas. The facilities, completed in June 2008, include an LNG ship marine terminal and unloading dock, LNG transfer lines and storage tanks, high-pressure vaporizers, and a 9.6-mile long send-out pipeline extending to the Stratton Ridge meter station.[1] On July 1, 2008, FERC issued a letter Order granting Freeport LNG's request to commence service at its Quintana Island import terminal.

On January 15, 2008, DOE/FE granted Freeport LNG blanket authorization to import up to 30 Bcf of LNG from various international sources for a two-year term beginning March 1, 2008.[2] On December 15, 2009, DOE/FE granted Freeport LNG blanket authorization to import LNG for a second two-year term beginning March 1, 2010.[3]

On May 6, 2009, FERC authorized certain equipment modifications at the Freeport LNG terminal as required to enable the loading and export of foreign-source LNG.[4]

On May 28, 2009, in DOE/FE Order No. 2644 (Order 2644), DOE/FE granted Freeport LNG blanket authorization to export, on its own behalf or as agent for others, up to a total of the equivalent of 24 Bcf of foreign-source LNG from the Freeport LNG terminal over a two-year period to customers in the United Kingdom, Belgium, Spain, France, Italy, Japan, South Korea, India, China and/or Taiwan.[5] This blanket authorization was later amended to permit exports to Canada, Mexico and any other country with the capacity to import LNG via ocean-going carrier and with which trade is not prohibited by U.S. law or policy.[6]

**Current Application**

In the instant application, Freeport LNG is seeking blanket authorization to export LNG that previously had been imported from foreign sources, to which it holds title, as well as previously imported LNG that it may export as agent on behalf of other entities who themselves hold title, on a short-term or spot market basis from the existing Freeport LNG terminal on Quintana Island, Texas. Freeport LNG states that the current application is filed in anticipation of the expiration of the blanket export authorization granted in Order No. 2644. Freeport LNG is requesting to export an amount up to the equivalent of 24 Bcf of natural gas to any country which has the capacity to import LNG via ocean-going carrier, and with which trade is not prohibited by U.S. law or policy. Freeport LNG seeks to export the LNG over a two year period commencing on the date of the authorization

**Public Interest Considerations**

In support of its application, Freeport LNG asserts the proposed authorization is in the public interest. Under section 3 of the Natural Gas Act, as amended, an LNG export from the United States to a foreign country must be authorized unless "the proposed exportation will not be consistent with the public interest." Section 3 thus creates a statutory presumption in favor of approval of this application, and parties opposing the authorization bear the burden of overcoming this presumption.

Freeport LNG states that there is no domestic reliance on the LNG that it seeks to export. Freeport LNG states that DOE/FE, in Order 2644, authorized the export of previously imported foreign-sourced LNG. DOE/FE determined that there was no domestic reliance on the volumes of imported LNG that Freeport sought to export. Freeport LNG states that DOE/FE has recently issued LNG blanket export authorizations to other applicants, in each case finding that existing domestic supplies are sufficient to serve U.S. markets without reliance on imported LNG supplies. Freeport LNG states that DOE/FE made the same finding in Order No. 2859, which granted the Dow Chemical Company blanket authorization to export up to an amount equivalent to 390 Bcf of previously imported LNG from the Freeport LNG terminal. In that Order, DOE/FE found that "the LNG which Dow seeks to export in this case is not needed in order to meet domestic market demand for natural gas on a competitively priced basis and that the exports of LNG authorized by this amendment will have no significant impact on the market's ability to meet the demand for natural gas domestically."[7]

Additionally, Freeport LNG states that traditional domestic natural gas production has been supplemented by unconventional sources, such as shale gas formations, which new technologies have made economically recoverable. Freeport LNG asserts that as a result of this increased domestic supply, domestic gas prices have remained low compared to other global markets, such as in Europe and Asia, discouraging imports to the U.S. Freeport LNG states that the imported LNG that Freeport LNG seeks to export will be surplus to the demands of U.S. markets during the period of requested authorization, and is needed primarily to enable Freeport LNG to economically maintain and operate its Freeport LNG terminal on Quintana Island. In the event that market conditions would support delivery of Freeport LNG's imported supplies to U.S. markets, the requested authorization would also serve to increase LNG supplies available for delivery to U.S. markets if those markets support it.

Freeport LNG also states in its application that local natural gas supplies will not be reduced. The applicant states that it intends to export only foreign sourced LNG, and does not intend to export domestically produced natural gas. Further, the applicant states that U.S. natural gas supplies would actually increase if the requested authorization were granted, since the boil-off gas from any LNG cargoes delivered to the Freeport LNG terminal would be sold into U.S. markets. Freeport LNG asserts that granting the requested authorization would encourage it to obtain and store spot-market LNG cargoes, making it available to supply local markets when conditions support it, thereby serving to moderate U.S. natural gas price volatility. Freeport LNG asserts that in light of these conditions, its request to export previously imported foreign-

[1] *See Freeport LNG Development, L.P.,* 107 FERC ¶ 61,278, (2004), *order granting rehearing and clarification, 108 FERC ¶ 61,253 (2004), order amending Section 3 authorization,* 112 FERC ¶ 61,194 (2005), *order issuing authorization,* 116 FERC ¶ 61,290 (2006).

[2] *Freeport LNG Development, L.P.,* DOE/FE Order No. 2457, issued January 15, 2008.

[3] *Freeport LNG Development, L.P.,* DOE/FE Order No. 2737, issued December 15, 2009.

[4] *Freeport LNG Development, L.P.,* 127 FERC ¶ 61,105 (2009).

[5] *Freeport LNG Development, L.P.,* DOE/FE Order No. 2644, issued May 28, 2009.

[6] *Freeport LNG Development, L.P.,* DOE/FE Order Nos. 2644–A and 2644–B, issued September 22, 2009 and May 11, 2010, respectively.

[7] *The Dow Chemical Company,* DOE/FE Order No. 2859, issued October 5, 2010.

sourced LNG is consistent with the public interest.

**Environmental Impact**

Freeport LNG states that no change to the Freeport LNG terminal on Quintana Island would be required for the proposed export of foreign-source LNG. Thus, according to Freeport, approval of this application would not constitute a Federal action significantly affecting the human environment within the meaning of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* NEPA requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its NEPA responsibilities.

**DOE/FE Evaluation**

This export application will be reviewed pursuant to section 3 of the Natural Gas Act, as amended, and the authority contained in DOE Delegation Order No. 00–002.00L (Apr. 29, 2011) and DOE Redelegation Order No. 00–002.04E (Apr. 29, 2011). In reviewing this LNG export application, DOE will consider domestic need for the gas, as well as any other issues determined to be appropriate, including whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Parties that may oppose this application should comment in their responses on these issues.

**Public Comment Procedures**

In response to this notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable. Any person wishing to become a party to the proceeding must file a motion to intervene or notice of intervention, as applicable. The filing of comments or a protest with respect to the application will not serve to make the commenter or protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the application. All protests, comments, motions to intervene or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590.

Filings may be submitted using one of the following methods: (1) E-mailing the filing to *fergas@hq.doe.gov*, with FE Docket No. 11–51–LNG in the title line; (2) mailing an original and three paper copies of the filing to the Office of Natural Gas Regulatory Activities at the address listed in **ADDRESSES**; (3) hand delivering an original and three paper copies of the filing to the Office of Natural Gas Regulatory Activities at the address listed in **ADDRESSES**; or (4) submitting comments in electronic form on the Federal eRulemaking Portal at *http://www.regulations.gov*, by following the on-line instructions and submitting such comments under FE Docket No. 11–51LNG. DOE/FE suggests that electronic filers carefully review information provided in their submissions and include only information that is intended to be publicly disclosed.

A decisional record on the application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.

If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The application filed by Freeport LNG is available for inspection and copying in the Office of Natural Gas Regulatory Activities docket room, Room 3E–042, 1000 Independence Avenue, SW., Washington, DC 20585. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The application and any filed comments, protests, motions to intervene or notice of interventions, will also be available electronically by going to the following DOE/FE Web address: *http://www.fe.doe.gov/programs/gasregulation/index.html*. In addition, any electronic comments filed in electronic form on the Federal eRulemaking Portal will also be available at: *http://www.regulations.gov*.

Issued in Washington, DC on June 2, 2011.

**John A. Anderson,**

*Manager, Natural Gas Regulatory Activities, Office of Oil and Gas Global Security and Supply, Office of Fossil Energy.*

[FR Doc. 2011–14280 Filed 6–8–11; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

*Docket Numbers:* RP11–2124–000.

*Applicants:* CenterPoint Energy Gas Transmission Company, LLC.

*Description:* CenterPoint Energy Gas Transmission Company, LLC submits tariff filing per 154.204: CEGT LLC EFT Enhancements to be effective 7/1/2011.

*Filed Date:* 05/24/2011.

*Accession Number:* 20110524–5121.

*Comment Date:* 5 p.m. Eastern Time on Monday, June 06, 2011.

*Docket Numbers:* RP11–2125–000.

*Applicants:* Big Sandy Pipeline, LLC.

*Description:* Big Sandy Pipeline, LLC submits tariff filing per 154.204: Big Sandy Contract Assignment Filing to be effective 6/1/2011.

*Filed Date:* 05/25/2011.

*Accession Number:* 20110525–5079.

*Comment Date:* 5 p.m. Eastern Time on Monday, June 06, 2011.

*Docket Numbers:* RP11–2126–000.

*Applicants:* Gulf South Pipeline Company, LP.

*Description:* Gulf South Pipeline Company, LP submits tariff filing per 154.204: Enbridge 34685 to BP 38842 Capacity Release Negotiated Rate Agreement Filing to be effective 6/1/2011.

*Filed Date:* 05/26/2011.

*Accession Number:* 20110526–5020.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, June 07, 2011.

*Docket Numbers:* RP11–2127–000.

*Applicants:* Sabine Pass Liquefaction, LLC.

*Description:* Sabine Pass Liquefaction, LLC submits Petition for Declaratory Order, or in the Alternative, Request for Waivers and Expedited Consideration.

*Filed Date:* 05/25/2011.

*Accession Number:* 20110525–5113.

*Comment Date:* 5 p.m. Eastern Time on Monday, June 06, 2011.

*Docket Numbers:* RP11–2128–000.

*Applicants:* Equitrans, L.P.

*Description:* Equitrans, L.P. submits tariff filing per 154.203: Equitrans' Tariff Compliance Filing Docket No. CP11–43–000 to be effective 6/25/2011.

*Filed Date:* 05/26/2011.

*Accession Number:* 20110526–5116.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, June 07, 2011.

*Docket Numbers:* RP11–2129–000.

*Applicants:* ETC Tiger Pipeline, LLC.

*Description:* ETC Tiger Pipeline, LLC submits tariff filing per 154.403(d)(2): ETC Tiger 2011_05_26 Out of Cycle Fuel Filing to be effective 7/1/2011.

*Filed Date:* 05/26/2011.

*Accession Number:* 20110526–5120.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, June 07, 2011.

*Docket Numbers:* RP11–2130–000.

*Applicants:* Gulf Crossing Pipeline Company LLC.

*Description:* Gulf Crossing Pipeline Company LLC submits tariff filing per 154.204: Antero2 to Tenaska203 Capacity Release Negotiated Rate Agreement Filing to be effective 6/1/2011.

*Filed Date:* 05/26/2011.

*Accession Number:* 20110526–5132.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, June 07, 2011.

*Docket Numbers:* RP11–2131–000.

*Applicants:* Tennessee Gas Pipeline Company.

*Description:* Tennessee Gas Pipeline Company submits tariff filing per 154.203: Compliance Motion Rate Case Sheets to be effective 6/1/2011.

*Filed Date:* 05/26/2011.

*Accession Number:* 20110526–5172.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, June 07, 2011.

*Docket Numbers:* RP11–2132–000.

*Applicants:* Gas Transmission Northwest Corporation.

*Description:* Gas Transmission Northwest Corporation submits tariff filing per 154.204: GTN Housekeeping to be effective 6/27/2011.

*Filed Date:* 05/26/2011.

*Accession Number:* 20110526–5192.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, June 07, 2011.

*Docket Numbers:* RP11–2133–000.

*Applicants:* Big Sandy Pipeline, LLC.

*Description:* Big Sandy Pipeline, LLC submits tariff filing per 154.204: Negotiated Rate Service Agreement Filing to be effective 6/1/2011.

*Filed Date:* 05/27/2011.

*Accession Number:* 20110527–5006.

*Comment Date:* 5 p.m. Eastern Time on Wednesday, June 08, 2011.

*Docket Numbers:* RP11–2134–000.

*Applicants:* Columbia Gulf Transmission Company.

*Description:* Columbia Gulf Transmission Company submits a Request for Limited Waiver of Tariff Provisions.

*Filed Date:* 05/26/2011.

*Accession Number:* 20110526–5199.

*Comment Date:* 5 p.m. Eastern Time on Thursday, June 02, 2011.

*Docket Numbers:* RP11–2135–000.

*Applicants:* Southern Star Central Gas Pipeline, Inc.

*Description:* Southern Star Central Gas Pipeline, Inc. submits tariff filing per 154.204: Scheduling Priorities Filing—2011 to be effective 10/1/2011.

*Filed Date:* 05/27/2011.

*Accession Number:* 20110527–5036.

*Comment Date:* 5 p.m. Eastern Time on Wednesday, June 08, 2011.

*Docket Numbers:* RP11–2136–000.

*Applicants:* Dominion Cove Point LNG, LP.

*Description:* Dominion Cove Point LNG, LP submits tariff filing per 154.204: DCP–LNG Import Modifications to be effective 6/26/2011.

*Filed Date:* 05/27/2011.

*Accession Number:* 20110527–5046.

*Comment Date:* 5 p.m. Eastern Time on Wednesday, June 08, 2011.

*Docket Numbers:* RP11–2137–000.

*Applicants:* Dominion Cove Point LNG, LP.

*Description:* Dominion Cove Point LNG, LP submits tariff filing per 154.312: DCP–2011 Section 4 General Rate Case to be effective 7/1/2011.

*Filed Date:* 05/27/2011.

*Accession Number:* 20110527–5086.

*Comment Date:* 5 p.m. Eastern Time on Wednesday, June 08, 2011.

*Docket Numbers:* RP11–2138–000.

*Applicants:* ETC Tiger Pipeline, LLC.

*Description:* ETC Tiger Pipeline, LLC submits tariff filing per 154.203: ETC Tiger Phase I Expansion—Compliance Filing to be effective 8/1/2011.

*Filed Date:* 05/27/2011.

*Accession Number:* 20110527–5114.

*Comment Date:* 5 p.m. Eastern Time on Wednesday, June 08, 2011.

*Docket Numbers:* RP11–2139–000.

*Applicants:* Transcontinental Gas Pipe Line Company.

*Description:* Transcontinental Gas Pipe Line Company, LLC submits tariff filing per 154.204: Clean Up of Tariff References to be effective 7/1/2011.

*Filed Date:* 05/27/2011.

*Accession Number:* 20110527–5142.

*Comment Date:* 5 p.m. Eastern Time on Wednesday, June 08, 2011.

*Docket Numbers:* RP11–2140–000.

*Applicants:* Gulf South Pipeline Company, LP.

*Description:* Gulf South Pipeline Company, LP submits tariff filing per 154.204: QEP 36601–6 Amendment to Negotiated Rate Agreement Filing to be effective 6/1/2011.

*Filed Date:* 05/27/2011.

*Accession Number:* 20110527–5147.

*Comment Date:* 5 p.m. Eastern Time on Wednesday, June 08, 2011.

*Docket Numbers:* RP11–2141–000.

*Applicants:* Kinder Morgan Louisiana Pipeline LLC.

*Description:* Kinder Morgan Louisiana Pipeline LLC submits tariff filing per 154.403: Periodic Rate Adjustment Filing to be effective 7/1/2011.

*Filed Date:* 05/27/2011.

*Accession Number:* 20110527–5193.

*Comment Date:* 5 p.m. Eastern Time on Wednesday, June 08, 2011.

*Docket Numbers:* RP11–2142–000.

*Applicants:* Rockies Express Pipeline LLC.

*Description:* Form of Rockies Express Pipeline LLC Penalty Charge Reconciliation Filing.

*Filed Date:* 05/27/2011.

*Accession Number:* 20110527–5203.

*Comment Date:* 5 p.m. Eastern Time on Wednesday, June 08, 2011.

*Docket Numbers:* RP11–2143–000.

*Applicants:* Rockies Express Pipeline LLC.

*Description:* Rockies Express Pipeline LLC submits tariff filing per 154.204: Negotiated Rate 2011–05–27 BP and Johnstown Regional to be effective 6/1/2011.

*Filed Date:* 05/27/2011.

*Accession Number:* 20110527–5206.

*Comment Date:* 5 p.m. Eastern Time on Wednesday, June 08, 2011.

*Docket Numbers:* RP11–2144–000.

*Applicants:* Freebird Gas Storage, L.L.C.

*Description:* Freebird Gas Storage, L.L.C. submits tariff filing per 154.204: Freebird Gas Storage, LLC, Change to FERC Gas Tariff to be effective 5/25/2011.

*Filed Date:* 05/27/2011.

*Accession Number:* 20110527–5236.

*Comment Date:* 5 p.m. Eastern Time on Wednesday, June 08, 2011.

Any person desiring to intervene or to protest in any of the above proceedings 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) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also 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 dockets(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.

Dated: May 31, 2011.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2011–14229 Filed 6–8–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

### Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER91–569–048.

*Applicants:* Entergy Services, Inc.

*Description:* Notice of Non-Material Change in Status of Entergy Services, Inc.

*Filed Date:* 05/27/2011.

*Accession Number:* 20110527–5279.

*Comment Date:* 5 p.m. Eastern Time on Friday, June 17, 2011.

*Docket Numbers:* ER11–3664–000.

*Applicants:* U.S. Gas & Electric, Inc.

*Description:* U.S. Gas & Electric, Inc. submits tariff filing per 35.15: Cancel All Tariffs to be effective 5/31/2011.

*Filed Date:* 05/27/2011.

*Accession Number:* 20110527–5237.

*Comment Date:* 5 p.m. Eastern Time on Friday, June 17, 2011.

*Docket Numbers:* ER11–3665–000.

*Applicants:* Southwestern Public Service Company.

*Description:* Southwestern Public Service Company submits tariff filing per 35.13(a)(2)(iii: 2011_05_27_SPS GBEC–GSEC–Howard_641–SPS to be effective 5/28/2011.

*Filed Date:* 05/27/2011.

*Accession Number:* 20110527–5241.

*Comment Date:* 5 p.m. Eastern Time on Friday, June 17, 2011.

*Docket Numbers:* ER11–3666–000.

*Applicants:* Southwest Power Pool, Inc.

*Description:* Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: 1313R4 Oklahoma Gas and Electric Company NITSA NOA to be effective 5/1/2011.

*Filed Date:* 05/27/2011.

*Accession Number:* 20110527–5251.

*Comment Date:* 5 p.m. Eastern Time on Friday, June 17, 2011.

*Docket Numbers:* ER11–3667–000.

*Applicants:* Arizona Public Service Company.

*Description:* Arizona Public Service Company submits tariff filing per 35.13(a)(2)(iii: Amendment 1 to APS Service Agreement No. 193 to be effective 4/29/2011.

*Filed Date:* 05/27/2011.

*Accession Number:* 20110527–5263.

*Comment Date:* 5 p.m. Eastern Time on Friday, June 17, 2011.

Take notice that the Commission received the following electric securities filings:

*Docket Numbers:* ES11–24–000.

*Applicants:* Upper Peninsula Power Company.

*Description:* Additional Supplement to Upper Peninsula Power Company's Application for Renewed Authorization to Issue Short-term Debt.

*Filed Date:* 05/26/2011.

*Accession Number:* 20110526–5124.

*Comment Date:* 5 p.m. Eastern Time on Monday, June 6, 2011.

Any person desiring to intervene or to protest in any of the above proceedings 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) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also 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 dockets(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.

Dated: May 31, 2011.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2011–14230 Filed 6–8–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 1417–246]**

### Central Nebraska Public Power and Irrigation District; Notice of Availability of Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's regulations, 18 CFR part 380 (Order No. 486, 52 FR 47879), the Office of Energy Projects has reviewed Central Nebraska Public Power and Irrigation District's proposed revised land and shoreline management plan (LSMP) for the Kingsley Dam Project, located on the North Platte and Platte Rivers in Garden, Keith, Lincoln, Gosper, and Dawson Counties, Nebraska, and has prepared an environmental assessment (EA) on the LSMP.

A copy of the EA is on file with the Commission and is available for public inspection. The EA also may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number (P–1417) in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

Any comments on the EA should be filed by June 13, 2011, and should be addressed to the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1–A, Washington, DC 20426. Please reference the project name and project number (P–1417–246) on all comments. Comments may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "eFiling" link. For further information, contact Rebecca Martin at (202) 502–6012 or by e-mail at *Rebecca.martin@ferc.gov.*

Dated: May 11, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–13834 Filed 6–8–11; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2010–1085; FRL–9317–7]**

### Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Use of Surveys in Developing Improved Labeling for Insect Repellent Products

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request for a new collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

**DATES:** Additional comments may be submitted on or before July 11, 2011.

**ADDRESSES:** Submit your comments, referencing Docket ID No. EPA–HQ–OPP–2010–1085, to (1) EPA online using *http://www.regulations.gov* (our preferred method), by e-mail to *opp.ncic@epa.gov,* or by *mail to:* EPA Docket Center, Environmental Protection Agency, Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB by *mail to:* Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Attention:* Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Kathryn Boyle, (7506P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–305–6304; fax number: 703–305–5884; e-mail address: *boyle.kathryn@epa.gov.*

**SUPPLEMENTARY INFORMATION:** EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On February 18, 2011 (76 FR 9574), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received one comment. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OPP–2010–1085, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the OPP Regulatory Public Docket, located at One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the OPP Regulatory Public Docket is (703) 305–5805.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

*Title:* Use of Surveys in Developing Improved Labeling for Insect Repellent Products.

*ICR numbers:* EPA ICR No. 2425.01, OMB Control No. 2070-new.

*ICR Status:* This is a new ICR.

*Abstract:* This ICR is for new information collection, a one-time Internet survey, for consumer research. The goals of the Internet survey are to (1) Identify the types of information that users of insect repellents want on the label of an insect repellent and (2) test four versions of efficacy marks, a graphic that could be placed on the front label of an insect repellent, that would standardize the presentation of information on how long the insect repellent repels ticks and mosquitoes. For the first efficacy mark viewed, participants would provide information on their understanding of the efficacy mark, just as if they came across the mark on a product label with no prior explanation of what the mark could mean. Participants would rate all of the efficacy marks for understandability and usefulness, and then indicate a preferred choice. EPA would use this information to formulate decisions and

policies affecting future labeling of insect repellents. The ultimate goal of this activity is to help the consumer to effectively use the information on the label to select the insect repellent product most likely to meet their needs and readily understand label instructions regarding safe product use.

Responses to this collection of information are voluntary. One survey would be conducted over the life of this ICR. The collected information could be used to revise insect repellent product labels and to create other user friendly consumer information materials. By enabling consumers to make better choices in regard to purchasing and using products intended to protect their health, EPA will more effectively carry out its mandate to protect the public from unreasonable risks to human health.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 15 minutes per response. Burden is defined in 5 CFR 1320.3(b).

*Respondents/Affected Entities:* members of the general public would participate in the survey.

*Estimated Number of Potential Respondents:* 3000.

*Frequency of Response:* One time.

*Estimated Total Annual Hour Burden:* 750 hours.

*Estimated Total Annual Cost:* $15,675.

*Changes in the Estimates:* This is a new collection.

Dated: June 3, 2011.

**John Moses,**

*Director, Collection Strategies Division.*

[FR Doc. 2011–14300 Filed 6–8–11; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–ORD–2009–0694; FRL–9316–6]**

## Notice of Availability of the External Review Draft of the Guidance for Applying Quantitative Data To Develop Data-Derived Extrapolation Factors for Interspecies and Intraspecies Extrapolation

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of document availability for public comment.

**SUMMARY:** The Environmental Protection Agency (EPA) is announcing a 45-day public comment period for the External Review Draft of "*Guidance for Applying Quantitative Data to Develop Data-Derived Extrapolation Factors for Interspecies and Intraspecies Extrapolation.*" EPA is releasing this draft document solely for the purpose of seeking public comment prior to external peer review. The document will undergo independent peer review during an expert peer review meeting, which will be convened, organized, and conducted by an EPA contractor in 2011. The date of the external peer review meeting will be announced in a subsequent **Federal Register** notice. All comments received by the docket closing date July 25, 2011 will be shared with the external peer review panel for their consideration. Comments received after the close of the comment period may be considered by EPA when it finalizes the document. This document has not been formally disseminated by EPA. This draft guidance does not represent and should not be construed to represent EPA policy, viewpoint, or determination. Members of the public may obtain the draft interim guidance from *http://www.regulations.gov;* or *http://www.epa.gov/raf/DDEF/index.htm* or from Dr. Michael Broder via the contact information below.

This draft Guidance for Data Derived Extrapolation Factors document outlines approaches for developing factors for inter- and intra-species extrapolation based on data describing toxicokinetic and/or toxicodynamic properties of particular agent(s). The draft document was developed to provide guidance for EPA staff in evaluating such data and/or information and to provide information to the regulated community and other interested parties about deriving and implementing extrapolation factors derived from data instead of defaults.

**DATES:** All comments received by the docket closing date July 25, 2011 will be shared with the external peer review panel for their consideration. Comments received beyond that time may be considered by EPA when it finalizes the document.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2009–0694, by one of the following methods:

- *http;//www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: ord.docket@epa.gov.*
- *Mail:* ORD Docket, Environmental Protection Agency, *Mailcode:* 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460
- *Hand Delivery:* EPA Docket Center (EPA/DC), Room 3334, EPA West Building, 1301 Constitution Avenue, NW., Washington, D.C. 20460, Attention Docket ID No EPA–HQ–ORD–2009–0694. Deliveries are only accepted from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. Special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–ORD–2009–0694. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected by statute through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the ORD Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone

number for the ORD Docket is (202) 566–1752.

**FOR FURTHER INFORMATION CONTACT:** Dr. Michael W. Broder, Office of the Science Advisor, Mail Code 8105–R, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–3393; fax number: (202) 564–2070, E-mail: *broder.michael@epa.gov*.

**SUPPLEMENTARY INFORMATION:** Key goals for the U.S. EPA include improving the transparency, objectivity and scientific basis for health risk assessment. In 2005, a WHO-sponsored effort produced guidance on the development of Chemical-Specific Adjustment Factors (CSAFs). CSAFs are intended to replace default uncertainty factor values for inter- and intraspecies extrapolation in health risk assessment. The U.S. EPA recognizes differences between the WHO guidance and typical Agency risk assessment practices, policies and guidance. EPA's Risk Assessment Forum convened a technical panel that initiated work on developing draft guidance for use in replacing default values for inter- and intraspecies uncertainty factors with science-based extrapolation factors. The draft document has been reviewed by EPA's Risk Assessment Forum and Science and Technology Policy Council and approved for external review. In 2010, the document was sent to the National Science and Technology Council (NSTC) Committee on Environment and Natural Resources, Toxics and Risk Subcommittee for informal review and comment. The draft document is now available for public comment.

The draft document has been structured and developed in accordance with existing Agency policies on health risk assessment. The draft document provides guidance for the evaluation of data describing interspecies differences in chemical disposition (toxicokinetics); interspecies differences in toxicant-induced response (toxicodynamics); intraspecies differences in chemical disposition (toxicokinetics); and intraspecies differences in toxicant-induced response (toxicodynamics). The document maintains the subdivision of the interspecies and intraspecies uncertainty factors into toxicokinetic and toxicodynamic components specified in the U.S. EPA Inhalation Reference Concentration methodology (U.S. EPA, 1994). EPA will consider all peer review and public comments in finalizing *Guidance for Applying Quantitative Data to Develop Data-Derived Extrapolation Factors for Interspecies and Intraspecies Extrapo*lation.

Dated: May 26, 2011.

**Paul T. Anastas,**

*EPA Science Advisor.*

[FR Doc. 2011–14294 Filed 6–8–11; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9316–1]**

### Modification of the Expiration Date for the National Pollutant Discharge Elimination System General Permit for Stormwater Discharges From Construction Activities on Tribal Lands Within the Southeastern United States

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA Region 4 proposes to modify the expiration date of the National Pollutant Discharge Elimination System (NPDES) general permit authorizing the discharge of stormwater from construction activities on Tribal Lands within the states of Alabama, Florida, Mississippi and North Carolina. This NPDES construction general permit (CGP), hereinafter referred to as "the Region 4 CGP," was issued on September 1, 2009, with an expiration date of August 31, 2011. EPA Region 4 is proposing to extend the expiration date from August 31, 2011, to September 1, 2012. No other revisions are being proposed to the Region 4 CGP. The purpose of extending the expiration date is to ensure that there is no lapse in permit coverage prior to the effective date of the issuance of a new permit, which has been proposed for public review and comment in a separate action. Information about the proposed new permit, hereinafter referred to as "the new National CGP," can be found at *http://cfpub.epa.gov/npdes/stormwater/cgp.cfm.*

**DATES:** EPA is proposing a modification to the Region 4 CGP that would extend the expiration date from August 31, 2011, to September 1, 2012. If the proposed modification is finalized, the Region 4 CGP would expire at midnight, on September 1, 2012, or on the effective date of the new National CGP, whichever is earlier. Comments on the proposal to modify the expiration date of the Region 4 CGP must be postmarked by July 11, 2011.

**FOR FURTHER INFORMATION CONTACT:** Alanna Conley or Michael Mitchell of the Stormwater and Nonpoint Source Section, Water Protection Division, Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, GA 30303; telephone number: (404) 562–9443 or (404) 562–9303; fax number: (404) 562–8692; e-mail address: *conley.alanna@epa.gov* or *mitchell.michael@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. General Information

*A. Does this action apply to me?*

If a discharger chooses to apply for coverage under the Region 4 CGP, the permit provides specific requirements for preventing contamination of waterbodies from stormwater discharges from the following construction activities:

| Category | Examples of affected entities | North American Industry Classification System (NAICS) Code |
|---|---|---|
| Industry ..... | Construction site operators disturbing 1 or more acres of land, or less than 1 acre but part of a larger common plan of development or sale if the larger common plan will ultimately disturb 1 acre or more, and performing the following activities: | |
| | Building, Developing and General Contracting ..... | 233 |
| | Heavy Construction ..... | 234 |

EPA does not intend the preceding table to be exhaustive, but provides it as a guide for readers regarding entities likely to be regulated by this action. This table lists the types of activities that EPA is now aware of that could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility is affected by this action, you should carefully examine the definition of

"construction activity" and "small construction activity" in existing EPA regulations at 40 CFR 122.26(b)(14)(x) and 122.26(b)(15), respectively. If you have questions regarding the applicability of this action to a particular entity, consult the person listed for technical information in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Eligibility for coverage under the Region 4 CGP would be limited to operators of "new projects" or "unpermitted ongoing projects." A "new project" is one that commences after the effective date of the Region 4 CGP (*i.e.,* September 1, 2009). An "unpermitted ongoing project" is one that commenced prior to the effective date of the Region 4 CGP, yet never received authorization to discharge under the previous CGP or any other NPDES permit covering its construction-related stormwater discharges. The Region 4 CGP is effective only in those areas where EPA Region 4 is the permitting authority, which includes all Indian Country Lands within the states of Alabama, Florida, Mississippi, and North Carolina. A list of eligible areas is included in Appendix B of the Region 4 CGP.

*B. How can I get copies of this document and other related information?*

You may access this **Federal Register** document electronically through the EPA Internet under the "Federal Register" listings at *http://www.epa.gov/fedrgstr/.* Electronic versions of the Region 4 CGP and fact sheet are available at EPA Region 4's stormwater Web site at: *http://www.epa.gov/region4/water/permits/stormwater.html.*

*C. How and to whom do I submit comments?*

You may submit comments electronically (e-mail or cdrom), or by postal mail. Comments should be sent to the person listed for technical information in the **FOR FURTHER INFORMATION CONTACT** section of this notice. To ensure proper receipt by EPA, identify the appropriate **Federal Register** title in the subject line on the first page of your comment. To ensure that EPA can read, understand, and therefore properly respond to comments, the Agency would prefer that commenters cite, where possible, the paragraph(s) or section in the fact sheet or permit to which each comment refers. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

*D. Finalizing this action*

This action will not be finalized until after all significant public comments have been considered and addressed. Once the final permit becomes effective, operators of new and unpermitted ongoing construction projects may seek authorization under the Region 4 CGP prior to midnight, September 1, 2012, or the effective date of the new National CGP, whichever is earlier.

## II. Background of Permit

*A. Statutory and Regulatory History*

The Clean Water Act (CWA) establishes a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." See 33 U.S.C. 1251(a). The CWA also includes the objective of attaining "water quality which provides for the protection and propagation of fish, shellfish and wildlife and * * * recreation in and on the water." See 33 U.S.C. 1251(a)(2). To achieve these goals, the CWA requires EPA to control point source discharges of pollutants through the issuance of NPDES permits.

The Water Quality Act of 1987 (WQA) added section 402(p) of the CWA, which directed EPA to develop a phased approach to regulate stormwater discharges under the NPDES program, 33 U.S.C. 1342(p). EPA published a final regulation in the **Federal Register**, often called the "Phase I Rule" on November 16, 1990, establishing permit application requirements for, among other things, "storm water discharges associated with industrial activity." See 55 FR 47990. EPA defined the term "storm water discharge associated with industrial activity" in a comprehensive manner to cover a wide variety of facilities. Construction activities, including activities that are part of a larger common plan of development or sale, that ultimately disturb at least five acres of land and have point source discharges to waters of the United States were included in the definition of "industrial activity" pursuant to 40 CFR 122.26(b)(14)(x). The second rule implementing section 402(p), often called the Phase II Rule, was published in the **Federal Register** on December 8, 1999, requires NPDES permits for discharges from construction sites disturbing at least one acre but less than five acres, including sites that are less than one acre but are part of a larger common plan of development or sale that will ultimately disturb at least one acre but less than five acres, pursuant to 40 CFR 122.26(b)(15)(i). See 64 FR 68722. EPA issued the Region 4 CGP under the statutory and regulatory authority cited above.

NPDES permits issued for construction stormwater discharges are required under Section 402(a)(1) of the CWA to include conditions for meeting technology-based effluent limits established under Section 301 and, where applicable, Section 306. Once an effluent limitations guideline or new source performance standard is promulgated in accordance with these sections, NPDES permits are required to incorporate limits based on such limitations and standards. See 40 CFR 122.44(a)(1). Prior to the promulgation of national effluent limitations guidelines and new source performance standards, permitting authorities incorporate technology-based effluent limitations on a best professional judgment basis. See CWA section 402(a)(1)(B); 40 CFR 125.3(a)(2)(ii)(B).

*B. Summary of the Region 4 CGP Issued in 2009*

EPA announced the issuance of the 2009 Region 4 CGP on August 26, 2009. See 74 FR 43120. Construction operators choosing to be covered by the Region 4 CGP must certify in their notice of intent (NOI) that they meet the requisite eligibility requirements, described in Subpart 1.3 of the permit. If eligible, operators are authorized to discharge under this permit in accordance with Part 2. Permittees must install and implement control measures to meet the effluent limits applicable to all dischargers in Part 3, and must inspect such stormwater controls and repair or modify them in accordance with Part 4. The permit in Part 5 requires all construction operators to prepare a stormwater pollution prevention plan (SWPPP) that identifies all sources of pollution and describes control measures used to minimize pollutants discharged from the construction site. Part 6 details the requirements for terminating coverage under the permit.

EPA Region 4 issued the Region 4 CGP in 2009 to replace the expired CGP, issued in 2004, for operators of new and unpermitted ongoing construction projects. The geographic coverage and scope of eligible construction activities are listed in Appendix B of the Region 4 CGP.

*C. What is EPA's rationale for the modification of the expiration date for the Region 4 CGP?*

EPA proposes to modify the Region 4 CGP by extending the expiration date of the permit to September 1, 2012. EPA Region 4 finds it necessary to propose this extension in order to provide

sufficient time for finalization of the new National CGP which is being issued by EPA Region 4 and the other EPA regional offices and would also provide coverage to eligible existing and new construction projects in all areas of the country where EPA is the NPDES permitting authority (*i.e.,* other Indian Lands, Idaho, Massachusetts, New Hampshire, New Mexico, Puerto Rico, Washington, DC, and U.S. territories and protectorates). The proposed National CGP will incorporate for the first time new effluent limitations guidelines and new source performance standards, which EPA promulgated in December 2009. Once the new National CGP is effective, eligible existing and new construction projects on Tribal lands within Region 4, will be regulated under the new National CGP. The extension of the expiration date of the Region 4 CGP is necessary in order to make up for a delay in the issuance process of the new National CGP due to an error discovered in the December 2009 final rule regarding the calculation of the numeric limitation on turbidity. This numeric limit has since been stayed by EPA. EPA's proposed extension would provide the Agency with sufficient time to account for this delay and to meet its other permit issuance obligations.

NPDES permits issued for construction stormwater discharges are required under Section 402(a)(1) of the CWA to include conditions for meeting technology-based effluent limits established under Section 301 and, where applicable, Section 306. Once an effluent limitations guideline or new source performance standard is promulgated in accordance with these sections, any NPDES permits issued after the effective date of these requirements must incorporate limits based on such limitations and standards. See 40 CFR 122.44(a)(1). In the case of the CGP, EPA promulgated effluent limitations guidelines and new source performance standards for the construction and development point source category on December 1, 2009 ("C&D rule"), which for the first time imposed a set of minimum Federal numeric and non-numeric effluent limitations on regulated construction sites. See 74 FR 62996 (December 1, 2009). The C&D rule (located at 40 CFR part 450) became effective on February 1, 2010, thus requiring that any NPDES permit issued after this date, whether issued by EPA or an authorized state, must incorporate the substantive technology-based requirements of the rule into the permit. For the new National CGP, this means that EPA must incorporate the effective requirements of the C&D rule into the permit.

Among other requirements, the C&D rule subjected discharges from certain larger construction sites to a numeric effluent limitation of 280 NTU for the pollutant turbidity starting in August of 2011 (for sites disturbing 20 or more acres at one time) and February of 2014 (for sites disturbing 10 or more acres at one time). Subsequent to the promulgation of the C&D rule, EPA received two petitions for reconsideration of the rule. These petitions pointed out a potential error in the calculation of the numeric limitation. Based on EPA's examination of the dataset underlying the 280 NTU limit, EPA concluded that it improperly interpreted the data and, as a result, the calculations in the existing administrative record are no longer adequate to support the 280 NTU numeric effluent limitation. In response to this finding, EPA finalized a stay of the 280 numeric NTU limit and associated monitoring requirements (see 40 CFR 450.22(a)) on January 4, 2011, in order to enable the Agency to correct its error in calculating the numeric limitation. See 75 FR 68215 (November 5, 2010). EPA is currently in the process of initiating a limited rulemaking to correct the numeric limitation.

Preceding the decision to stay the numeric turbidity limit, the uncertainty surrounding the error in calculating the 280 NTU limit, and the appropriate way for EPA to address it, caused a delay of several months to the permit issuance process for the new National CGP. EPA believes it is impracticable to finalize the new National CGP when considering the minimum tasks required of the Agency to finalize the permit.

With the setback of time related to the stay of the 280 NTU limit, EPA needs additional time to complete the permit issuance process as explained above. EPA believes that the proposed extension of the expiration date of the Region 4 CGP to September 1, 2012, will provide the sufficient time for the Agency to finalize the new National CGP. EPA believes it is imperative that sufficient time to incorporate the C&D ELG into the new National CGP is allotted. If EPA does not extend the expiration date of the Region 4 CGP, no new construction projects could receive general permit coverage between September 1, 2011, and the effective date of the new National CGP, leaving individual NPDES permits as the only available option for permitting new projects. The sole reliance on individual permits would mean that discharge authorizations would almost certainly be delayed due to the greater amount of time and Agency resources that are required for developing and issuing individual permits. In turn, construction projects that need to begin construction activities on or after midnight August 31, 2011, for the 2009 Regional CGP, would be delayed for an uncertain amount of time until EPA can review their individual permit application and issue the necessary permits. Rather than risk detrimental delays to new construction projects, with no clear benefit to our nation's surface waters, EPA Region 4 has decided that it is advisable to instead propose a modification to the 2009 Region 4 CGP to extend the expiration date until September 1, 2012.

*D. EPA's Authority To Modify NPDES Permits*

EPA regulations establish when the permitting authority may make modifications to existing NPDES permits. In relevant part, EPA regulations state that "[w]hen the Director receives any information * * * he or she may determine whether or not one or more of the causes listed in paragraph (a) * * * of this section for modification * * * exist. If cause exists, the Director may modify * * * the permit accordingly, subject to the limitations of 40 CFR 124.5(c)." 40 CFR 122.62. For purposes of this **Federal Register** notice, the relevant cause for modification is at 40 CFR 122.62(a)(2), which states that a permit may be modified when "[t]he Director has received new information" and that information was not available at the time of permit issuance * * * and would have justified the application of different permit conditions at the time of issuance." Pursuant to EPA regulations, "[w]hen a permit is modified, only the conditions subject to the modification are reopened." 40 CFR 122.62.

In the case of the Region 4 CGP, a permit modification is justified based on the new information EPA received following the issuance of the permit, and more specifically, in terms of the delay to the permit process associated with the discovery of the numeric limit calculation error and resulting stay to the numeric turbidity limit. If this information was available at the time of issuance of the Region 4 CGP, it would have justified EPA establishing an expiration date for the Region 4 CGP that was later than August 31, 2011. As a result, cause exists under EPA regulations to justify modification of the Region 4 CGP to extend the permit until September 1, 2012. If the proposed modification is finalized, the Region 4 CGP would expire at midnight, on

September 1, 2012, or on the effective date of the proposed new National CGP, whichever is earlier.

EPA notes that, by law, NPDES permits cannot be extended beyond 5 years. See 40 CFR 122.46. The proposed extension of the expiration date of the Region 4 CGP complies with this restriction. The Region 4 CGP was issued with an effective date of September 1, 2009. Assuming the extension of the expiration date of the Region 4 CGP is finalized as proposed, the permit would still have been in effect for less than the 5-year limit.

**Authority:** Clean Water Act, 33 U.S.C. 1251 *et seq.*

Signed this 27th day of May, 2011.

**Douglas Mundrick,**

*Acting Director, Water Protection Division, Region 4.*

[FR Doc. 2011–14197 Filed 6–8–11; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

## [EPA–R07–OW–2011–0504; FRL–9317–5]

## Notice of Approval of the Primacy Application for National Primary Drinking Water Regulations for the State of Missouri

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of approval and solicitation of requests for a public hearing.

**SUMMARY:** The Environmental Protection Agency (EPA) is hereby giving notice that the State of Missouri is revising its approved Public Water System Supervision Program under the Missouri Department of Natural Resources (MDNR). The EPA has determined that these revisions are no less stringent than the corresponding Federal regulations. Therefore, the EPA intends to approve these program revisions.

**DATES:** This determination to approve the Missouri program revision is made pursuant to 40 CFR 142.12(d)(3). This determination shall become final and effective on July 11, 2011, unless (1) A timely and appropriate request for a public hearing is received or (2) the Regional Administrator elects to hold a public hearing on his own motion. Any interested person, other than Federal Agencies, may request a public hearing. All interested parties may request a public hearing on the approval of these program revisions to the EPA Regional Administrator to the address shown below by July 11, 2011. If a substantial request for a public hearing is made within the requested thirty day time frame, a public hearing will be held and a notice will be given in the **Federal Register** and a newspaper of general circulation. Frivolous or insubstantial requests for a hearing may be denied by the Regional Administrator.

**ADDRESSES:** Any request for a public hearing shall include the following information: (1) Name, address and telephone number of the individual organization or other entity requesting a hearing; (2) a brief statement of the requesting person's interest in the Regional Administrator's determination and a brief statement on information that the requesting person intends to submit at such hearing; (3) the signature of the individual making the request or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity. Requests for Public Hearing shall be addressed to: Karl Brooks, Regional Administrator, Environmental Protection Agency-Region 7, 901 North 5th Street, Kansas City, Kansas 66101.

All documents relating to this determination are available for review between the hours of 9 a.m. and 4:30 p.m., Monday through Friday, at the following offices:

(1) Missouri Department of Natural Resources, Public Drinking Water Branch, 1101 Riverside Drive, Jefferson City, MO 65101. (2) Environmental Protection Agency-Region 7, Water Wetlands and Pesticides Division, Drinking Water Management Branch, 901 North 5th Street, Kansas City, Kansas 66101.

**FOR FURTHER INFORMATION CONTACT:** Neftali Hernandez-Santiago, Environmental Protection Agency-Region 7, Drinking Water Management Branch, (913) 551–7036, or by e-mail at *hernandez-santiago.neftali@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the EPA has determined to approve an application by the Missouri Department of Natural Resources to incorporate the following EPA National Primary Drinking Water Regulations: (1) Stage 2 Disinfectants and Disinfection Byproducts Rule (January 4, 2006, 71 FR 388) and (2) Long Term 2 Enhanced Surface Water Treatment Rule (January 5, 2006, 71 FR 654). During the review of the state's drinking water regulations, EPA noted an issue related to best available technology (BAT). Under the Safe Drinking Water Act, EPA must specify the best available technology for each maximum contaminant level (MCL) or maximum residual disinfectant level (MRDL) that is set. Public water systems that are unable to achieve an MCL or MRDL may be granted a variance on condition that the system use the BATs, treatment techniques, or other means which the Administrator finds are available (taking costs into consideration), based upon an evaluation satisfactory to the State that indicates that alternative sources of water are not reasonably available to the system. Missouri allows variances to MCLs but has not adopted the BATs listed in 40 CFR 141.64(a) and (b). Since Missouri has the authority to grant variances, the state must also adopt the BATs specified by the EPA Administrator, in order to be consistent with the language in Sections 1415 and 1416 of the SDWA. The Missouri rule language currently states that the system installs BATs that the state (department) finds to be available; this language is less stringent than the Federal statute requires. EPA Region 7 has negotiated a resolution to this issue with MDNR, concluding that, until Missouri promulgates a rule adopting EPA's BATs, MDNR agrees to issue variances only to systems that have agreed, as a condition of being issued the variance, to utilize BATs, treatment techniques, or other means, which the EPA Administrator, taking cost into consideration, finds generally available, in accordance with the requirements of Title 40 of the CFR and Sections 1415 and 1416 of the SDWA. In light of Missouri's agreement to issue variances only to systems that have agreed to install BATs, treatment techniques, or other means consistent with requirements of the SDWA and its implementing regulations, EPA has determined that Missouri continues to meet requirements for primary enforcement responsibility of the SDWA, as specified in 40 CFR 142.10.

**Authority:** Section 1413 of the Safe Drinking Water Act, as amended, and 40 CFR 142.10, 142.12(d) and 142.13.

Dated: May 31, 2011.

**Karl Brooks,**

*Regional Administrator, Region 7.*

[FR Doc. 2011–14297 Filed 6–8–11; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Federal Communications Commission (FCC), as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

**DATES:** Written PRA comments should be submitted on or before August 8, 2011. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at (202) 395–5167, or via e-mail to *Nicholas_A._Fraser@omb.eop.gov* and to the Federal Communications Commission via e-mail to *PRA@fcc.gov* and *Cathy.Williams@fcc.gov.*

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0157.

*Title:* Section 73.99, Presunrise Service Authorization and Postsunset Service Authorization.

*Form Number:* Not applicable.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit entities.

*Number of Respondents and Responses:* 200 respondents; 200 responses.

*Frequency of Response:* Annual and on occasion reporting requirements.

*Estimated Time per Response:* 0.25 hours.

*Total Annual Burden:* 50 hours.

*Total Annual Costs:* $15,000.

*Obligation To Respond:* Required to obtain or retain benefits. The statutory authority is contained in Section 154(i) of the Communications Act of 1934, as amended.

*Nature and Extent of Confidentiality:* There is no need for confidentiality required with this collection of information.

*Privacy Impact Assessment(s):* No impact(s).

*Needs and Uses:* 47 CFR 73.99(e) requires the licensee of an AM broadcast station intending to operate with a presunrise or postsunset service authorization to submit by letter the licensee's name, call letters, location, the intended service, and a description of the method whereby any necessary power reduction will be achieved. Upon submission of this information, operation may begin without further authority. The FCC staff uses the letter to maintain complete technical information about the station to ensure that the licensee is in full compliance with the Commission's rules and will not cause interference to other stations.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary, Office of the Secretary, Office of Managing Director.*

[FR Doc. 2011–14304 Filed 6–8–11; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL ELECTION COMMISSION

### Sunshine Act Notice

**AGENCY:** Federal Election Commission.

**DATE AND TIME:** Tuesday, June 14, 2011 at 10 a.m.

**PLACE:** 999 E Street, NW., Washington, DC.

**STATUS:** This meeting will be closed to the public.

**ITEMS TO BE DISCUSSED:** Compliance matters pursuant to 2 U.S.C. 437g. Audits conducted pursuant to 2 U.S.C. 437g, 438(b), and Title 26, U.S.C. Matters concerning participation in civil actions or proceedings or arbitration. Internal personnel rules and procedures or matters affecting a particular employee.

* * * * *

**PERSON TO CONTACT FOR INFORMATION:** Judith Ingram, Press Officer. Telephone: (202) 694–1220.

**Shelley E. Garr,**

*Deputy Secretary of the Commission.*

[FR Doc. 2011–14477 Filed 6–7–11; 4:15 pm]

**BILLING CODE 6715–01–P**

## FEDERAL MARITIME COMMISSION

### Ocean Transportation Intermediary License; Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for a license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF)—Ocean Transportation Intermediary (OTI) pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. chapter 409 and 46 CFR 515). Notice is also hereby given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a license.

Interested persons may contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573, by telephone at (202) 523–5843 or by e-mail at *OTI@fmc.gov.*

Balkans Air Corporation (NVO & OFF), 1703 Bath Avenue, Brooklyn, NY 11214. Officers: Begator Hila, President, (Qualifying Individual), Skender Gashi, CEO, Application Type: Add NVO License.

Beyond Shipping, Inc. (NVO), 2000 Silver Hawk Drive, #2, Diamond Bar, CA 91765. Officer: Yilin Yang, President/Secretary/CFO, (Qualifying Individual), Application Type: New NVO License.

Caicos Caribbean Lines, Inc. (NVO), 9999 NW. 89th Avenue, Medley, FL 33178. Officer: Joanne Tyson, President/Secretary/Treasurer, (Qualifying Individual), Application Type: New NVO License.

Cargonet Logistics, Corp. (NVO), 4713 Deeboyar, Lakewood, CA 90712. Officer: Tan Sek, Pres/VP/Sec/Treasurer, (Qualifying Individual), Application Type: License Transfer.

Compass Freight Forwarding, Inc. (NVO & OFF), 7982 Capwell Drive, 2nd Floor, Oakland, CA 94621. Officers: Ylma E. Searle, Vice President/Treasurer, (Qualifying Individual), Victor R. Lacayo, President, Application Type: License Transfer.

JDB International Inc. dba Gava International, Freight Consolidators (USA), Inc. (NVO &

OFF), 500 Country Club Drive, Bensenville, IL 60106. Officers: Dale Jordon, Director (Operations), (Qualifying Individual), Denzil Dsouza, CFO, Application Type: New NVO & OFF License.

K & S Freight Systems, Inc. (NVO & OFF), 2801 NW. 74th Avenue, #219, Miami, FL 33122. Officer: Nelson Solano, President, (Qualifying Individual), Application Type: Add OFF Service.

Oceanic Link USA LLC (NVO & OFF), 5430 Jimmy Carter Blvd., Suite 216, Norcross, GA 30093. Officers: Mohsinul Haque, CEO, (Qualifying Individual), Maisun Maliha, CFO, Application Type: New NVO & OFF License.

The Shaker Group, Inc. (NVO & OFF), 862 Albany Shaker Road, Latham, NY 12110. Officer: Geoffrey A. Pappas, President/Secretary, (Qualifying Individual), Application Type: New NVO & OFF License.

The Ultimate Logistics Service Corporation (NVO & OFF), 3 Birch Place, Pine Brook, NJ 07058. Officer: Michael K. Cheng, President/Secretary/Treasurer, (Qualifying Individual), Application Type: New NVO & OFF License.

Dated: June 3, 2011

**Karen V. Gregory,**

*Secretary.*

[FR Doc. 2011–14308 Filed 6–8–11; 8:45 am]

**BILLING CODE 6730–01–P**

## FEDERAL TRADE COMMISSION

### Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination—on the dates indicated—of the waiting period provided by law and the premerger notification rules. The listing for each transaction includes the transaction number and the parties to the transaction. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

EARLY TERMINATIONS GRANTED MAY 1, 2011 THRU MAY 31, 2011

| ET date | Trans. No. | ET req. status | Party name |
|---|---|---|---|
| 05/02/2011 | 20110740 | G | API Technologies Corp.; Spectrum Control, Inc.; API Technologies Corp. |
| | 20110764 | G | West Corporation; Smoothstone IP Communications Corporation; West Corporation. |
| | 20110766 | G | TPG Star, L.P.; Abbas Yazdani; TPG Star, L.P. |
| | 20110768 | G | AEA Investors 2006 Fund L.P.; Cogent Healthcare, Inc.; AEA Investors 2006 Fund L.P. |
| | 20110785 | G | EQT Infrastructure (No.1) LP; Parthenon Investors II, L.P.; EQT Infrastructure (No.1) LP. |
| | 20110787 | G | Tom Gores; WMD Family Trust, dated May 6, 2002; Tom Gores. |
| | 20110794 | G | Chesapeake Energy Corporation; Bronco Drilling Company, Inc.; Chesapeake Energy Corporation. |
| 05/03/2011 | 20110790 | G | Endo Pharmaceuticals Holdings Inc.; American Medical Systems Holdings, Inc.; Endo Pharmaceuticals Holdings Inc. |
| 05/04/2011 | 20110642 | G | Valitas Equity LLC; America Service Group, Inc.; Valitas Equity LLC. |
| | 20110755 | G | Meda AB (publ); Novartis AG; Meda AB (publ). |
| | 20110763 | G | Mr. Vincent Viola; Madison Tyler Holdings, LLC; Mr. Vincent Viola. |
| | 20110781 | G | AmSurg Corp.; National Surgical Care, Inc.; AmSurg Corp. |
| 05/05/2011 | 20110220 | G | James A. Perdue; Coleman Natural Foods, L.L.C.; James A. Perdue. |
| | 20110789 | G | Baxter International Inc.; Essex Woodlands Health Ventures Fund Vi, L.P.; Baxter International Inc. |
| | 20110792 | G | SCF–VI, L.P.; NEWCO; SCF–VI, L.P. |
| | 20110793 | G | SCF–VII, L.P.; NEWCO; SCF–VII, L.P. |
| 05/06/2011 | 20110797 | G | Alliance Data Systems Corporation; D.E. Shaw Composite International Fund; Alliance Data Systems Corporation. |
| | 20110798 | G | CCMP Capital Investors II, L.P.; August Troendle; CCMP Capital Investors II, L.P. |
| | 20110803 | G | The Hanover Insurance Group, Inc.; Chaucer Holdings PLC; The Hanover Insurance Group, Inc. |
| | 20110805 | G | Marathon Oil Corporation; William J. McEnery; Marathon Oil Corporation. |
| 05/09/2011 | 20110810 | G | American Securities Partners V. L.P.; SCSG EA Acquisition Company, Inc.; American Securities Partners V. L.P. |
| | 20110812 | G | Total S.A.; SunPower Corporation; Total S.A. |
| 05/10/2011 | 20110808 | G | URS Corporation; New Mountain Partners, L.P.; URS Corporation. |
| 05/12/2011 | 20110680 | G | The Hearst Family Trust; Lagardere SCA; The Hearst Family Trust. |
| | 20110778 | G | Baker Brothers Life Sciences, L.P.; Genomic Health, Inc.; Baker Brothers Life Sciences, LP. |
| | 20110784 | G | Leeds Equity Partners V, L.P.; 2003 TIL Settlement; Leeds Equity Partners V, L.P. |
| 05/13/2011 | 20110813 | G | Stefan Quandt; DataCard Corporation; Stefan Quandt. |
| | 20110819 | G | Wolters Kluwer N,V.; Robert D. Kescher; Wolters Kluwer N,V. |

EARLY TERMINATIONS GRANTED MAY 1, 2011 THRU MAY 31, 2011—Continued

| ET date | Trans. No. | ET req. status | Party name |
|---|---|---|---|
| 05/17/2011 | 20110824 | G | RadiSys Corporation; Continuous Computing Corporation; RadiSys Corporation. |
| | 20110825 | G | Thoma Bravo Fund IX, L.P.; Tripwire, Inc.; Thoma Bravo Fund IX, L.P. |
| | 20110827 | G | General Mills, Inc.; Sodiaal Union; General Mills, Inc. |
| | 20110829 | G | Ag Real Value Fund, LLC; Charlesbank Equity Fund V, L.P.; Ag Real Value Fund, LLC. |
| | 20110833 | G | General Mills, Inc.; PAI Europe III–B FCPR; General Mills, Inc. |
| | 20110844 | G | Monex Group, Inc.; TradeStation Group, Inc.; Monex Group, Inc. |
| | 20110845 | G | The Williams Companies, Inc.; BP p.l.c.; The Williams Companies, Inc. |
| 05/18/2011 | 20110832 | G | STG III, L.P.; The Edward W. Scripps Trust; STG III, L.P. |
| | 20110847 | G | Silver Lake Partners III Cayman (AIV III), L.P.; Smart Modular Technologies (WWH), Inc.; Silver Lake Partners III Cayman (MV III), L.P. |
| 05/19/2011 | 20110796 | G | Centerbridge Capital Partners II, L.P.; ValueAct Capital Master Fund, L.P.; Centerbridge Capital Partners II, L.P. |
| | 20110802 | G | General Electric Company; Applied Precision, Inc.; General Electric Company. |
| | 20110821 | G | Valero Energy Corporation; Chevron Corporation; Valero Energy Corporation. |
| | 20110834 | G | Trinity Health Corporation; Loyola University of Chicago; Trinity Health Corporation. |
| | 20110835 | G | Auto Club Insurance Association; Fremont Michigan InsuraCorp., Inc.; Auto Club Insurance Association. |
| 05/20/2011 | 20110826 | G | Toshiba Corporation; Vital Images, Inc.; Toshiba Corporation. |
| | 20110836 | G | NANA Regional Corporation, Inc.; Huntsman Gay Capital Partners Fund, L.P.; NANA Regional Corporation, Inc. |
| | 20110838 | G | Sara Lee Corporation; Encore Consumer Capital Fund, L.P.; Sara Lee Corporation. |
| | 20110843 | G | Oak Hill Capital Partners III, L.P.; Intermedia.net, Inc.; Oak Hill Capital Partners III, L.P. |
| | 20110848 | G | Roark Capital Partners II, LP; Bruckmann, Rosser, Sherrill & Co. II, L.P.; Roark Capital Partners II, LP. |
| | 20110851 | G | Legrand S.A.; Robert J. Schluter; Legrand S.A. |
| | 20110861 | G | Samick Musical Instruments Co., Ltd.; Steinway Musical Instruments, Inc.; Samick Musical Instruments Co., Ltd. |
| | 20110863 | G | SuccessFactors, Inc.; Plateau Systems, Ltd.; SuccessFactors, Inc. |
| | 20110866 | G | Yukon Holdco Inc.; Husky International Ltd.; Yukon Holdco Inc. |
| 05/23/2011 | 20110831 | G | Aetna Inc.; JPMorgan Chase & Co.; Aetna Inc. |
| | 20110868 | G | Rambus, Inc.; Paul Kocher; Rambus, Inc. |
| | 20110871 | G | Avista Capital Partners II, L.P.; Brandon W. Freeman; Avista Capital Partners II, L.P. |
| | 20110872 | G | Francois Pinault; Volcom, Inc.; Francois Pinault. |
| 05/24/2011 | 20110828 | G | Golden Gate Capital Opportunity Fund, L.P.; Lawson Software, Inc.; Golden Gate Capital Opportunity Fund, L.P. |
| | 20110852 | G | High Sierra Energy, LP; Marcum Midstream 1995–2 Business Trust; High Sierra Energy, LP. |
| | 20110869 | G | Cerberus International, Ltd.; Scottish Re Group Limited; Cerberus International, Ltd. |
| 05/25/2011 | 20110849 | G | Actuant Corporation; American Securities Partners III, L.P.; Actuant Corporation. |
| 05/26/2011 | 20110811 | G | Pearson plc; Schoolnet, Inc.; Pearson plc. |
| 05/27/2011 | 20110816 | G | Solera Holdings, Inc.; Providence Equity Partners VI L.P.; Solera Holdings, Inc. |
| | 20110859 | G | Welsh, Carson, Anderson & Stowe IX, L.P.; MedCath Corporation; Welsh, Carson, Anderson & Stowe IX, L.P |
| | 20110884 | G | INC Research Holdings, Inc.; Kendle International Inc.; INC Research Holdings, Inc. |
| | 20110885 | G | Onex Partners III LP; JELD–WEN Holding, inc.; Onex Partners III LP. |
| | 20110886 | G | Gerald W. Schwartz; JELD–WEN HOLDING, Inc.; Gerald W. Schwartz. |
| | 20110888 | G | Avista Capital Partners II L.P.; Aurora Equity Partners II L.P.; Avista Capital Partners II, L.P. |
| | 20110889 | G | Apollo Investment Fund VII, L.P.; CKx, Inc.; Apollo Investment Fund VII, L.P. |
| | 20110892 | G | Autonomy Corporation plc; Iron Mountain Incorporated; Autonomy Corporation plc. |
| | 20110893 | G | Charlesbank Equity Fund VII, Limited Partnership; DEI Holdings, Inc.; Charlesbank Equity Fund VII, Limited Partnership. |

EARLY TERMINATIONS GRANTED MAY 1, 2011 THRU MAY 31, 2011—Continued

| ET date | Trans. No. | ET req. status | Party name |
|---|---|---|---|
| | 20110894 | G | Olympic Steel, Inc.; Chicago Tube & Iron Company; Olympic Steel, Inc. |
| | 20110895 | G | Oak Investment Partners XII, L.P.; The FRS Company; Oak Investment Partners XII, L.P. |
| | 20110906 | G | Mr. Leonard Blavatnik; Warner Music Group Corp.; Mr. Leonard Blavatnik. |
| | 20110907 | G | Northern Trust Corporation; Kenneth C. Griffin; Northern Trust Corporation. |
| | 20110909 | G | Houston Baseball Partners LLC; Robert Drayton McLane, Jr.; Houston Baseball Partners LLC. |

**FOR FURTHER INFORMATION CONTACT:** Sandra M. Peay, Contact Representative, or Renee Chapman, Contact Representative.

Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room H–303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 2011–14103 Filed 6–8–11; 8:45 am]

**BILLING CODE 6750–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

**[Document Identifier: OS–0990–New; 60-day Notice]**

### Agency Information Collection Request. 60-Day Public Comment Request

**AGENCY:** Office of the Secretary, HHS.

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 a proposed information collection request 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.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov,* or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be directed to the OS Paperwork Clearance Officer at the above e-mail address within 60-days.

*Proposed Project:* The Office of Adolescent Health (OAH) Teen Pregnancy Prevention Performance Measure Collection—OMB No. OS–0990–NEW—Office of Adolescent Health and the Administration for Children, Youth and Families.

*Abstract:* The Office of Adolescent Health (OAH) and the Administration for Children, Youth and Families (ACYF), under the U.S. Department of Health and Human Services (HHS), are funding a total of 107 grantees to conduct teen pregnancy prevention programs. Grantees are funded to either replicate evidence-based teen pregnancy prevention programs (75 OAH grantees) or to implement research and demonstration programs to test new and innovative approaches to teen pregnancy prevention (19 OAH grantees and 13 ACYF grantees). Grants are funded for 5 years at levels ranging from $400,000 to $4 million per year. Interventions for these different programs vary widely in terms of duration (from 1 day to 4 years), setting (schools, clinics, or community based settings), populations served (middle school students, high school students, parents of teens) and content (*e.g.,* youth development programs or sex education programs). Funding requirements for the grantees included the collection and reporting of data for performance measurement. The performance measure collection is important to OAH and ACYF because it will provide the agency with data both to effectively monitor these programs, and to comply with accountability and Federal performance requirements for the 1993 Government Performance and Results Act (Pub. L. 103–62).

ESTIMATED ANNUALIZED BURDEN TABLE

| Forms (if necessary) | Type of respondent | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|---|
| Perceived impact questions | Youth participating in programs | 100,000 | 1 | 5/60 | 8,333 |
| Reporting form for reach | Grantee program staff | 107 | 2 | 4 | 856 |
| Tier 1 A/B performance measure reporting form. | Grantee program staff—Tier 1 A/B | 59 | 1 | 19 | 1,121 |
| Tier 1 C/D and Tier 2/PREIS performance measure reporting form. | Grantee program staff—Tier 1 C/D and Tier 2/PREIS. | 48 | 1 | 21 | 1,008 |
| Total | | | | | 11,318 |

**Mary Forbes,**

*Office of the Secretary, Paperwork Reduction Act Clearance Officer.*

[FR Doc. 2011–14271 Filed 6–8–11; 8:45 am]

**BILLING CODE 4150–32–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

**[Document Identifier: OS–0990-new; 30-day notice]**

### Agency Information Collection Request. 30-Day Public Comment Request

**AGENCY:** Office of the Secretary, HHS.

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 a proposed collection 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.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov,* or call the Reports Clearance Office on (202) 690–5683. Send written comments and recommendations for the proposed information collections within 30 days of this notice directly to the OS OMB Desk Officer; faxed to OMB at 202–395–5806.

*Proposed Project:* Provide Services for the Dissemination of CER to Patients and Providers to Increase Adoption—OMB No. 0990–New—Assistant Secretary for Planning and Evaluation (ASPE).

*Abstract:* This research leverages best practices in behavior change, interaction design, and service innovation to increase the understanding and adoption of Comparative Effectiveness Research (CER) information by physicians and patients. By truly understanding the desires, behaviors and attitudes of patients and care providers across various segments, this project can significantly improve the dissemination, translation, and adoption of evidence-based, outcomes-oriented CER findings.

The purpose of this project is "to strengthen the link between evidence production and strategies for conveying this information in ways that encourage evidence-based behavior change among providers and patients. The central question is how best to get CER information to physicians and patients in a way they understand. This task is considered critical to capitalizing on the Department's CER investment."

| Type of respondent | Form name | Number of respondents | Number responses per respondent | Average burden per response (in hours) | Total burden hours |
|---|---|---|---|---|---|
| Practice | Form A: demographics for target population and colon cancer screening rates. | 10 | 2 | 4 | 80 |
| Healthcare Providers (Physicians, Nurse Practitioners, Physician Assistants and Nurses). | Form B: tallies when use dashboard and/or show Web-based tool to patient in office. | 40 | 563 | 1/60 | 375 |
| Individual/patients | Form C: Experience Survey on Web-based tool. | 4,750 | 1 | 3/60 | 238 |
| Healthcare Providers (Physicians, Nurse Practitioners, Physician Assistants, Nurses). | Form D: Experience Survey | 40 | 4 | 1/60 | 3 |
| Healthcare Providers (Physicians, Nurse Practitioners, Physician Assistants, Nurses). | Discussion Group | 32 | 2 | 2 | 128 |
| Individual/patients | Discussion Group | 48 | 2 | 2 | 192 |
| Total | | | | | 1,016 |

**Mary Forbes,**

*Office of the Secretary, Paperwork Reduction Act Clearance Officer.*

[FR Doc. 2011–14272 Filed 6–8–11; 8:45 am]

**BILLING CODE 4150–05–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

**[Document Identifier OS–0937–0191; 30-Day Notice]**

### Agency Information Collection Request. 30-Day Public Comment Request

**AGENCY:** Office of the Secretary, HHS.

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 a proposed collection 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.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov,* or call the Reports Clearance Office on (202) 690–5683. Send written comments and

recommendations for the proposed information collections within 30 days of this notice directly to the OS OMB Desk Officer; faxed to OMB at 202–395–5806.

*Proposed Project*—Application packets for Real Property for Public Health Purposes—OMB No. 0937–0191—Reinstatement without change—Office of Assistant Secretary for Administration—Program Support Center/Federal Property Assistance Program.

*Abstract:* These applications are completed and submitted to HHS by State and local governments and nonprofit institutions when applying for acquisition of excess/surplus, underutilized/unutilized, and/or off-site Federal real property. Submitted applications are used to determine if institutions/organizations are eligible to purchase, lease or use property under the provisions of the surplus real property program.

ESTIMATED ANNUALIZED BURDEN TABLE

| Type of respondent | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| State, local, or tribal governments, nonprofits | 20 | Varies | 200 | 4,000 |

**Mary Forbes,**

*Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.*

[FR Doc. 2011–14270 Filed 6–8–11; 8:45 am]

**BILLING CODE 4151–17–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

**AGENCY:** National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** HHS gives notice concerning the final effect of the HHS decision to designate a class of employees from Vitro Manufacturing, Canonsburg, Pennsylvania, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On April 29, 2011, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

All Atomic Weapons Employer employees who worked at Vitro Manufacturing in Canonsburg, Pennsylvania, from January 1, 1958 through December 31, 1959, for a number of work days aggregating at least 250 work days, occurring either solely under this employment or in combination with work days within the parameters established for one or more other classes of employees in the Special Exposure Cohort.

This designation became effective on May 29, 2011, as provided for under 42 U.S.C. 7384*l*(14)(C). Hence, beginning on May 29, 2011, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

**FOR FURTHER INFORMATION CONTACT:** Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 877–222–7570. Information requests can also be submitted by e-mail to *dcas@cdc.gov.*

**John Howard,**

*Director, National Institute for Occupational Safety and Health.*

[FR Doc. 2011–14354 Filed 6–8–11; 8:45 am]

**BILLING CODE 4163–19–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

**AGENCY:** National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** HHS gives notice concerning the final effect of the HHS decision to designate a class of employees from the Linde Ceramics Plant in Tonawanda, New York, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On April 21, 2011, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

All Atomic Weapons Employees who worked at the Linde Ceramics Plant in Tonawanda, New York, from January 1, 1954 through December 31, 1969, for a number of work days aggregating at least 250 work days, occurring either solely under this employment, or in combination with work days within the parameters established for one or more other classes of employees in the Special Exposure Cohort.

This designation became effective on May 21, 2011, as provided for under 42 U.S.C. 7384*l*(14)(C). Hence, beginning on May 21, 2011, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

**FOR FURTHER INFORMATION CONTACT:** Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 877–222–7570. Information requests can also be submitted by e-mail to *DCAS@CDC.GOV.*

**John Howard,**

*Director, National Institute for Occupational Safety and Health.*

[FR Doc. 2011–14351 Filed 6–8–11; 8:45 am]

**BILLING CODE 4163–19–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

**AGENCY:** National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** HHS gives notice concerning the final effect of the HHS decision to designate a class of employees from the Wah Chang facility, Albany, Oregon, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On April 29, 2011, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS

designated the following class of employees as an addition to the SEC:

All Atomic Weapons Employer employees who worked in any building at the Wah Chang facility in Albany, Oregon, for the operational period from January 1, 1971 through December 31, 1972, for a number of work days aggregating at least 250 work days, occurring either solely under this employment or in combination with work days within the parameters established for one or more other classes of employees included in the Special Exposure Cohort.

This designation became effective on May 29, 2011, as provided for under 42 U.S.C. 7384*l*(14)(C). Hence, beginning on May 29, 2011, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

**FOR FURTHER INFORMATION CONTACT:** Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 877–222–7570. Information requests can also be submitted by e-mail to *dcas@cdc.gov.*

**John Howard,**

*Director, National Institute for Occupational Safety and Health.*

[FR Doc. 2011–14355 Filed 6–8–11; 8:45 am]

**BILLING CODE 4163–19–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

**AGENCY:** National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** HHS gives notice concerning the final effect of the HHS decision to designate a class of employees from the Norton Company, Worcester, Massachusetts, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On April 29, 2011, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

All atomic weapons employees who worked in any building or area at the facility owned by the Norton Co. (or a subsequent owner) in Worcester, Massachusetts, during the period from January 1, 1958 through October 10, 1962, for a number of work days aggregating at least 250 work days, occurring either solely under this employment or in combination with work days within the parameters established for one or more other classes of employees included in the Special Exposure Cohort.

This designation became effective on May 29, 2011, as provided for under 42 U.S.C. 7384*l*(14)(C). Hence, beginning on May 29, 2011, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

**FOR FURTHER INFORMATION CONTACT:** Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 877–222–7570. Information requests can also be submitted by e-mail to *DCAS@CDC.GOV.*

**John Howard,**

*Director, National Institute for Occupational Safety and Health.*

[FR Doc. 2011–14356 Filed 6–8–11; 8:45 am]

**BILLING CODE 4163–19–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

### Findings of Misconduct in Science/Research Misconduct

**AGENCY:** Office of the Secretary, HHS.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that on May 16, 2011, the Department of Health and Human Services (HHS) Debarring Official, on behalf of the Secretary of HHS, issued a final notice of debarment based on the misconduct in science and research misconduct findings of the Office of Research Integrity (ORI) in the following case:

*Philippe Bois, Ph.D., St. Jude Children's Research Hospital:* Based on the findings of an investigation report by St. Jude Children's Research Hospital (St. Jude) and additional analysis conducted by ORI during its oversight review, ORI found that Philippe Bois, Ph.D., former postdoctoral fellow, Department of Biochemistry, St. Jude, engaged in misconduct in science and research misconduct in research funded by National Institute of General Medical Sciences (NIGMS), National Institutes of Health (NIH), grant R01 GM071596, and National Cancer Institute (NCI), NIH, grants P30 CA021765, P01 CA071907, R01 CA072996, and R01 CA100603.

ORI found that the Respondent knowingly and intentionally falsified data reported in two (2) papers:

1. Bois, P.R., Izeradjene, K., Houghton, P.J., Cleveland, J.L., Houghton, J.A., & Grosveld, C.G. "FOXO1a acts as a selective tumor suppressor in alveolar rhabdomyosarcoma." *J. Cell. Biol.* 170:903–912, September 2005 (hereafter referred to as "*JCB* 2005"); and
2. Bois, P.R., Borgon, R.A., Vornhein, C., & Izard, T. "Structural dynamics of α-actinin-vinculin interactions." *Mol. Cell. Biol.* 25:6112–6122, July 2005 (hereafter referred to as "*MCB* 2005").

Specifically, ORI found:

• Respondent committed misconduct in science and research misconduct by knowingly and intentionally falsely reporting in Figure 1A of *JCB* 2005 that FOXO1a was not expressed in cell lysates from alveolar rhabdomyosarcoma (ARMS) tumor biopsies, by selecting a specific FOXO1a immunoblot to show the desired result.

• Respondent engaged in misconduct in science and research misconduct by falsifying data presented in Figure 4B of *MCB* 2005 showing SDS–PAGE for papain digestion of VBS3 and αVBS, by falsely labeling lane 1 to represent papain only digestion, by falsely labeling lane 5 to represent papain digestion of the αVBS peptide, and by falsely inserting a band in lane 3 to represent the αVBS peptide.

ORI issued a charge letter enumerating the above findings of misconduct in science and proposing HHS administrative actions. Dr. Bois subsequently requested a hearing before an Administrative Law Judge (ALJ) of the Departmental Appeals Board (DAB) to dispute these findings. ORI moved to dismiss Dr. Bois' hearing request. On May 16, 2011, the ALJ of the DAB ruled in ORI's favor and dismissed Dr. Bois' hearing request. The ALJ found that Dr. Bois had not raised a genuine dispute over facts or law material to the findings of research misconduct and dismissed the hearing request pursuant to 42 CFR 93.504(a)(2), (3).

Thus, the misconduct in science and research misconduct findings set forth above became effective, and the following administrative actions have been implemented for a period of three (3) years, beginning on May 26, 2011:

(1) Dr. Bois is debarred from eligibility for any contracting or subcontracting with any agency of the United States Government and from eligibility for, or involvement in, nonprocurement programs of the United States Government, referred to as "covered transactions," pursuant to HHS' Implementation of OMB Guidelines to Agencies on

Governmentwide Debarment and Suspension (2 CFR 376 *et seq.*); and

(2) Dr. Bois is prohibited from serving in any advisory capacity to the U.S. Public Health Service (PHS), including but not limited to service on any PHS advisory committee, board, and/or peer review committee, or as a consultant.

**FOR FURTHER INFORMATION CONTACT:** Director, Division of Investigative Oversight, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453–8800.

**John Dahlberg,**

*Director, Division of Investigative Oversight, Office of Research Integrity.*

[FR Doc. 2011–14273 Filed 6–8–11; 8:45 am]

**BILLING CODE 4150–31–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Committee on Vital and Health Statistics; Meeting

Pursuant to the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) announces the following advisory committee meeting.

*Name:* National Committee on Vital and Health Statistics (NCVHS), Full Committee Meeting.

*Time and Date:* June 15, 2011 9 a.m.–2:30 p.m. June 16, 2011 10 a.m.–3 p.m. June 17, 2011 9 a.m.–5 p.m.

*Place:* Double Tree Hotel, 300 Army Navy Drive, Arlington, VA 22202, (703) 416–4100.

*Status:* Open.

*Purpose:* At this meeting the Committee will hear presentations and hold discussions on several health data policy topics. On the morning of the first day the Committee will hear updates from the Department, the Center for Medicare and Medicaid Services, and the Office of the National Coordinator. A discussion of a letter to the HHS Secretary regarding a report of the President's Council of Advisors on Science and Technology (PCAST) will also take place. In the afternoon there will be a Standards Subcommittee update and a briefing from the Privacy and Populations Subcommittee Workshop and HHS/IOM Health Data Health Information Forum.

On the morning of the second day there will be a review of the final PCAST letters. There will also be a briefing on the Department's Mulit-Payor Claims Database. Subcommittees will also present their reports.

On the third day public and private stakeholders will convene to update the Standards Subcommittee on the status of preparations for the upcoming compliance deadlines for new versions of the updated HIPAA Standards (5010, D.0), a new standard (Medicaid subrogation—NCPDP Version 3.0) and updated code sets under ICD–10. The compliance date for the updated and new standards is January 1, 2012, and the compliance deadline for ICD–10 is October 1, 2013.

The times shown above are for the full Committee meeting. Subcommittee breakout sessions can be scheduled for late in the afternoon of the first day and second day and in the morning prior to the full Committee meeting on the second day. Agendas for these breakout sessions will be posted on the NCVHS website (URL below) when available.

*Contact Person for More Information:* Substantive program information as well as summaries of meetings and a roster of committee members may be obtained from Marjorie S. Greenberg, Executive Secretary, NCVHS, National Center for Health Statistics, Centers for Disease Control and Prevention, 3311 Toledo Road, Room 2402, Hyattsville, Maryland 20782, telephone (301) 458–4245. Information also is available on the NCVHS home page of the HHS Web site: *http://www.ncvhs.hhs.gov/,* where further information including an agenda will be posted when available.

Should you require reasonable accommodation, please contact the CDC Office of Equal Employment Opportunity on (301) 458–4EEO (4336) as soon as possible.

Dated: June 1, 2011.

**James Scanlon,**

*Deputy Assistant Secretary for Planning and Evaluation, Science and Data Policy, Office of the Assistant Secretary for Planning and Evaluation.*

[FR Doc. 2011–14249 Filed 6–8–11; 8:45 am]

**BILLING CODE 4151–05–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Announcement of Meeting of the Secretary's Advisory Committee on National Health Promotion and Disease Prevention Objectives for 2020

**AGENCY:** Department of Health and Human Services, Office of the Secretary, Office of the Assistant Secretary for Health, Office of Disease Prevention and Health Promotion.

**ACTION:** Notice of Meeting.

**Authority:** 42 U.S.C. 217a, Section 222 of the Public Health Service Act, as amended. The Committee is governed by the provision of Public Law 92–463, as amended (5 U.S.C. appendix 2), which sets forth standards for the formation and use of advisory committees.

**SUMMARY:** The U.S. Department of Health and Human Services (HHS) announces the next Federal advisory committee meeting regarding the national health promotion and disease prevention objectives for 2020. This meeting will be open to the public and will be held online via WebEx software. The Secretary's Advisory Committee on National Health Promotion and Disease Prevention Objectives for 2020 will address efforts to implement the nation's health promotion and disease prevention objectives and strategies to improve the health status and reduce health risks for Americans by the year 2020. The Committee will provide to the Secretary of Health and Human Services advice and consultation for implementing Healthy People 2020, the nation's health promotion and disease prevention goals and objectives, and provide recommendations for initiatives to occur during the implementation phase of the goals and objectives.

**DATES:** The Committee will meet on June 30, 2011, from Noon to 2 p.m. Eastern Daylight Time (EDT).

**ADDRESSES:** The meeting will be held on the Internet via WebEx software. For detailed instructions about how to make sure that your windows computer and browser are set up for WebEx, please visit the "Secretary's Advisory Committee" Web page of the Healthy People Web site (*http://healthypeople.gov/2020/about/advisory/default.aspx*) and click on "Register to Attend."

**FOR FURTHER INFORMATION CONTACT:** Emmeline Ochiai, Designated Federal Officer, Secretary's Advisory Committee on National Health Promotion and Disease Prevention Objectives for 2020, U.S. Department of Health and Human Services, Office of the Assistant Secretary for Health, Office of Disease Prevention and Health Promotion, 1101 Wootton Parkway, Room LL–100, Rockville, MD 20852, (240) 453–8259 (telephone), (240) 453–8281 (fax). Additional information is available on the Internet at *http://www.healthypeople.gov.*

**SUPPLEMENTARY INFORMATION:**

*Purpose of Meeting:* The Committee will develop its recommendations regarding the Healthy People 2020 Leading Health Indicators.

*Background:* Healthy People provides science-based, 10-year national objectives for promoting health and preventing disease. Since 1979, Healthy People has set and monitored national health objectives to meet a broad range of health needs, encourage collaborations across sectors, guide individuals toward making informed health decisions, and measure the impact of our prevention and health promotion activities. On December 2, 2010, HHS launched Healthy People 2020 and its 42 topic areas. Healthy People 2020 reflects assessments of major risks to health and wellness, changing public health priorities, and emerging issues related to our nation's health, preparedness, and prevention.

*Public Participation at Meeting:* Members of the public are invited to

listen to the online Committee meeting. There will be no opportunity for oral public comments during the online Committee meeting. Written comments, however, can be e-mailed to *healthypeople@nhic.org.*

To listen to the Committee meeting, individuals must pre-register to attend at the Healthy People Web site located at *http://www.healthypeople.gov.* Participation in the meeting is limited. Registrations will be accepted until maximum capacity is reached and must be completed by 5 p.m. E.D.T. on June 29, 2011. A waiting list will be maintained should registrations exceed capacity. Individuals on the waiting list will be contacted as additional space for the meeting becomes available.

Registration questions may be directed to Hilary Scherer at *HP2020@norc.org* (e-mail), (301) 634–9374 (phone), or (301) 634–9301 (fax).

Dated: May 26, 2011.

**Carter Blakey,**

*Acting Director, Office of Disease Prevention and Disease Prevention.*

[FR Doc. 2011–14338 Filed 6–8–11; 8:45 am]

**BILLING CODE 4150–32–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Agency for Healthcare Research and Quality

### CHIPRA Pediatric Quality Measures Program: Request for Nominations for Expert Panelists

**AGENCY:** Agency for Healthcare Research and Quality (AHRQ), HHS.

**ACTION:** Notice of request for nominations for expert panelists.

**SUMMARY:** This notice requests members of the public to nominate experts to provide individual input into the CHIPRA Pediatric Quality Measures Program. Section 401(a) of the Children's Health Insurance Program Reauthorization Act (CHIPRA) of 2009 (Pub. L. 111–3) amended the Social Security Act (the Act) by adding Section 1139A, which directs the Secretary of the Department of Health and Human Services (HHS) to establish a Pediatric Quality Measures Program. The purpose of the Pediatric Quality Measures Program is to (a) Improve and strengthen the initial core child health care quality measures established pursuant to Section 1139A(a) of the Act; (b) expand on existing quality measures used by public and private health care purchasers and advance the development of such new and emerging quality measures; and (c) increase the portfolio of evidence-based, consensus pediatric quality measures available to public and private purchasers of children's health care services, providers, and consumers. A meeting of the experts will be held on September 18, 2011, in Bethesda, Maryland. We are seeking experts who can provide individual comment on the criteria by which new or enhanced children's health care quality measures will be evaluated. Expert panels will be convened in subsequent years to evaluate new or enhanced children's health care quality measures using these criteria. These evaluations will take place annually before recommended changes to the core set of children's health care quality measures are published in the **Federal Register** on or before January 1, 2013; January 1, 2014; and December 31, 2014. The initial core set of children's health care quality measures was published December 29, 2009, in Volume 74, No. 248 of the **Federal Register**.

Section 1139A(b) of the Act identifies several minimum criteria that the core set of children's health care quality measures must meet and requires consultation with stakeholders in identifying gaps in existing pediatric quality measures and establishing priorities for development and advancement of such measures. AHRQ will convene a group of experts representing a broad range of stakeholder groups. These experts will be asked to provide individual comments on the additional aspects of validity, feasibility, importance, understandability, or other criteria that should be considered when reviewing quality measures. They will also be asked to provide individual comments on the documentation required to provide evidence that each criterion has been met.

We seek nominations for a panel of 15 experts that will include representatives from among the following groups: State Medicaid Programs and Children's Health Insurance Programs (CHIP); pediatricians, children's hospitals, and other primary and specialized pediatric health care professionals (including members of the allied health professions) who specialize in the care and treatment of children, particularly children with special physical, mental, and developmental health care needs; dental professionals, including pediatric dental professionals; health care providers that furnish primary health care to children and families who live in urban and rural medically underserved communities or who are members of distinct population subgroups at heightened risk for poor health outcomes; national organizations representing children, including children with disabilities and children with chronic conditions; national organizations representing consumers and purchasers of children's health care; national organizations and individuals with expertise in pediatric health quality measurement; and voluntary consensus standards setting organizations and other organizations involved in the advancement of evidence-based measures of health care. Individuals, who are affiliated with the CHIPRA PQMP Centers of Excellence as subcontractors, stakeholders, or key personnel ("affiliated individuals"), are not eligible to apply. However, other individuals from entities represented by the affiliated individuals are eligible to apply.

We are seeking individuals who are distinguished in their knowledge of health care disparities (*e.g.,* racial and ethnic disparities), child health quality measurement methods, and the application of health information technology to quality measurement. Individuals are particularly sought with experience and success in activities specified in the summary above.

**DATES:** Nominations should be received on or before 21 days after date of publication.

**ADDRESSES:** Nominations should be e-mailed to *chipra@AHRQ.hhs.gov.* Nominations may also be mailed to Edwin Lomotan, AHRQ, 540 Gaither Road, Room 2202, Rockville, Maryland 20850.

**FOR FURTHER INFORMATION CONTACT:** *chipra@AHRQ.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** Section 401(a) of the Children's Health Insurance Program Reauthorization Act (CHIPRA) of 2009 (Pub. L. 111–3) amended the Social Security Act (the Act) by adding Section 1139A, which directs the Secretary of HHS to establish a Pediatric Quality Measures Program. Section 1139A(b)(3) of the Act provides that the Secretary of HHS shall consult with various entities in establishing priorities for development and advancement of children's health care quality measures. The Secretary delegated this task to the Centers for Medicare & Medicaid Services (CMS). The Centers for Medicare & Medicaid Services (CMS) entered into an Interagency Agreement with the Agency for Healthcare Research and Quality (AHRQ), by which CMS and AHRQ would collaborate to develop the Pediatric Quality Measures Program.

Under the Pediatric Quality Measures Program, AHRQ has funded seven

Centers of Excellence through cooperative agreements under the funding opportunity announcement HS11–001, the CHIPRA PQMP Centers of Excellence. For more information, *see http://www.AHRQ.gov/chipra/PQMPFACT.htm.* These seven Centers of Excellence, in concert with two CMS-funded CHIPRA Quality Demonstration grantee States (Massachusetts and Illinois), will develop new and enhanced children's health care quality measures and will participate in the process to identify and refine criteria by which new or enhanced children's health care quality measures will be evaluated.

The expected time commitment for expert panelists is up to 3 days. This includes travel to and from the expert panel meeting to be held on September 18, 2011, as one of the pre-meetings to the AHRQ Annual Conference in Bethesda, Maryland; review of materials in advance of the in-person meeting; and attendance at the full-day in-person meeting on September 18, 2011.

Interested persons may nominate one or more qualified persons for the expert panel. Self-nominations are accepted. Nominations shall include: (1) A copy of the nominee's resume or curriculum vitae; (2) a statement of the stakeholder group or groups that the nominee would represent, from among the following: State Medicaid Programs and Children's Health Insurance Programs (CHIP); pediatricians, children's hospitals, and other primary and specialized pediatric health care professionals (including members of the allied health professions) who specialize in the care and treatment of children, particularly children with special physical, mental, and developmental health care needs; dental professionals, including pediatric dental professionals; health care providers that furnish primary health care to children and families who live in urban and rural medically underserved communities or who are members of distinct population sub-groups at heightened risk for poor health outcomes; national organizations representing children, including children with disabilities and children with chronic conditions; national organizations representing consumers and purchasers of children's health care; national organizations and individuals with expertise in pediatric health quality measurement; and voluntary consensus standards setting organizations and other organizations involved in the advancement of evidence-based measures of health care; (3) a statement that the nominee is willing to serve as a member of the expert panel; (4) a statement about any financial interest, arrangement or affiliation with any entity that may create a potential conflict of interest for the nominee or his or her family; if any, please describe the relationship with each entity as either Grant/Research Support, Consultant, Speakers Bureau, Major Stock Shareholder, or Other Financial or Material Support; and (5) a statement about any intellectual interest in a study or other research related to children's health care quality measures, if any. Please note that once you are nominated, AHRQ may consider your nomination for future expert panels related to the Pediatric Quality Measures Program.

AHRQ strives to ensure that membership on expert panels is fairly balanced in terms of points of view represented and the panel's function. Every effort is made to ensure that the views of women, all ethnic and racial groups, and people with disabilities are represented on expert panels and, therefore, AHRQ encourages nominations of qualified candidates from these groups. AHRQ also encourages geographic diversity in the composition of expert panels. Selection of panelists shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, disability, and cultural, religious, or socioeconomic status.

Dated: May 27, 2011.

**Carolyn M. Clancy,**

*Director, AHRQ.*

[FR Doc. 2011–14112 Filed 6–8–11; 8:45 am]

**BILLING CODE M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration on Aging

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Extension of Certification of Maintenance of Effort for the Title III and Minor Revisions to the Certification of Long-Term Care Ombudsman Program Expenditures

**AGENCY:** Administration on Aging, HHS.

**ACTION:** Notice.

**SUMMARY:** The Administration on Aging (AoA) is announcing that the proposed collection of information listed below has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Submit written comments on the collection of information by July 11, 2011.

**ADDRESSES:** Submit written comments on the collection of information by fax 202–395–6974 to the OMB Desk Officer for AoA, Office of Information and Regulatory Affairs, OMB.

**FOR FURTHER INFORMATION CONTACT:** Becky Kurtz, National Long-Term Care Ombudsman, Administration on Aging, Washington, DC 20201.

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, AoA has submitted the following proposed collection of information to OMB for review and clearance. AoA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of AoA's functions, including whether the information will have practical utility; (2) the accuracy of AoA'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.

The Certification on Maintenance of Effort for the Title III and Certification of Long-Term Care Ombudsman Program Expenditures provides statutorily required information regarding state's contribution to programs funded under the Older American's Act and conformance with legislative requirements, pertinent Federal regulations and other applicable instructions and guidelines issued by the Administration on Aging. This information will be used for Federal oversight of Title III Programs and the Title VII Ombudsman Program.

AoA estimates the burden of this collection of information as follows: 56 State Agencies on Aging respond annually with an average burden of one half (½) hour per State agency or a total of twenty-eight hours for all state agencies annually. The proposed data collection tools may be found on the AoA Web site for review at *http://www.aoa.gov/AoARoot/AoA_Programs/Tools_Resources/Cert_Forms.aspx.*

In the **Federal Register** of March 29, 2011 (Vol. 76 No. 60 Page 17419) the agency requested comments on the proposed collection of information. One comment was received. The National Association of State Long-Term Care Ombudsmen (NASOP) commented that the forms are necessary for proper stewardship of public funds and to assure that states are complying with the requirements of the Older

Americans Act; and commented favorably about the proposed addition of the State Ombudsman's signature on the Certification of Long-Term Care Ombudsman Program Expenditures and the proposed reference on the form to the minimum funding requirements.

Dated: June 6, 2011.

**Kathy Greenlee,**

*Assistant Secretary for Aging.*

[FR Doc. 2011–14295 Filed 6–8–11; 8:45 am]

**BILLING CODE 4154–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Submission for OMB Review; Comment Request

*Title:* AFI Financial Education Practices and Cost Study.

*OMB No.:* New.

**Description**

The Office of Community Services (OCS) within the Administration for Children and Families is conducting a descriptive study of Financial Education Practices among Assets for Independence (AFI) grantees to increase its knowledge about current practices in financial education for AFI participants and the costs involved to provide the financial education.

The Assets for Independence program is a national demonstration through which OCS awards grants to community-based nonprofit organizations, and State, local, and Tribal government agencies nationwide. The AFI program is authorized in Section 402 of the Community Opportunities, Accountability, and Training and Educational Services Act of 1998 (Title IV of Public Law 105–285). Grantees implement five year projects that empower low-income families and individuals to save earned income and purchase an economic asset as a means for becoming economically self-sufficient. Grantees provide eligible low-income individuals and families access to matched savings accounts, known as individual development accounts (IDAs). In addition, grantees provide asset-building services to program participants, such as financial literacy education, and specialized asset-specific training regarding asset purchase and ownership.

This data collection effort will provide OCS with a better understanding of the future needs of AFI grantees in financial education and help OCS to build strategies to strengthen the quality of the financial education provided to AFI participants. The data collection will be collected once through two instruments: The Survey of Financial Education Practices of AFI Grantees and the AFI Financial Education Cost Data Form.

The Survey of Financial Education Practices of AFI Grantees will be a Web-based survey consisting mainly of multiple choice questions. All current AFI grantees (approximately 300 grantees) will be asked to complete the survey. The AFI Financial Education Cost Data Form is a supplement to the grantee practices survey. A smaller sample of grantees (approximately 35 grantees) representing a variety of organizational types will be randomly selected to complete this supplemental survey on the costs of providing financial education. The Cost Data Form will be sent to grantees to complete and technical assistance will be provided to grantees to help them complete the form.

Specific areas to be covered in this study include: topics covered by financial education; formats used in delivering financial education; assessment tools that are used to determine participant needs and effectiveness of training efforts; challenges encountered in providing financial education; training materials used; costs and sources of funding for training; strategies for tracking participant progress in developing financial skills; and participant outcomes related to financial education.

**Respondents**

All active AFI grantee agencies, their partners or sub-grantees, an estimated 300 agencies will respond to IC1, a Survey of Financial Education Practices.

IC2, the Financial Education cost form, will be administered to financial personnel of all active AFI grantees who have completed at least three years of their five-year project period, an estimated 30 agencies.

IC3, the Financial Education cost form, will be administered to financial personnel of all active AFI sub grantees who have completed at least three years of their five-year project period, an estimated 42 agencies.

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| AFI grantee agencies, their partner or sub-grantees | 300 | 1 | 1 | 300 |
| AFI grantee agencies' financial personnel | 30 | 1 | 2 | 60 |
| AFI sub grantees financial personnel | 42 | 1 | 2 | 84 |

Estimated Total Annual Burden Hours: 444.

**Additional Information**

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov.*

**OMB Comment**

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following:

Office of Management and Budget, Paperwork Reduction Project,

*Fax:* 202–395–7285,

*E-mail: oira_submission@omb.eop.gov,*

*Attn:* Desk Officer for the Administration for Children and Families.

**Robert Sargis,**

*Reports Clearance Officer.*

[FR Doc. 2011–14305 Filed 6–8–11; 8:45 am]

**BILLING CODE 4184–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Proposed Information Collection Activity; Comment Request

*Title:* Application Requirements for the Low Income Home Energy Assistance Program (LIHEAP) Residential Energy Assistance Challenge Program (REACH) Model Plan.

*OMB No.* 0970–0348.

**Description**

States, including the District of Columbia, Tribes, Tribal organizations and Territories applying for LIHEAP REACH funds must Submit an annual application prior to receiving Federal funds. The Human Services Amendments of 1994 (Pub. L. 103–252) amended the LIHEAP statute to add Section 2607B, which established the REACH program. REACH was funded for the first time in FY 1996 and is intended to: (1) Minimize health and safety risks that result from high energy burdens on low-income Americans; (2) reduce home energy vulnerability and prevent homelessness as a result of the inability to pay energy bills; (3) increase the efficiency of energy usage by low-income families, helping them achieve energy self-sufficiency; and (4) target energy assistance to individuals who are most in need. The REACH Model Plan clarifies the information being requested and ensures the submission of all the information required by statute. The form facilitates our response to numerous queries each year concerning the information that should be included in the REACH application. Submission of a REACH application and use of the REACH Model Plan is voluntary. Grantees have the option to use another format.

**Respondents**

State Governments, Tribal governments, Insular Areas, the District of Columbia, and Commonwealth of Puerto Rico.

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| REACH Model Plan | 51 | 1 | 72 | 3,672 |

Estimated Total Annual Burden Hours: 3,672.

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

**Robert Sargis,**

*Reports Clearance Officer.*

[FR Doc. 2011–14283 Filed 6–8–11; 8:45 am]

**BILLING CODE 4184–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Agency Information Collection Activities; Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, e-mail *paperwork@hrsa.gov* or call the HRSA Reports Clearance Officer at (301) 443–1129.

Comments are invited on: (a) The proposed collection of information for the proper performance of the functions of the agency; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

**Proposed Project: National Health Service Corps Site Application (OMB No. 0915–0230)—Revision**

The National Health Service Corps (NHSC) of the Bureau of Clinician Recruitment and Service (BCRS), HRSA, is committed to improving the health of the Nation's underserved by uniting communities in need with caring health professionals, and by supporting their efforts to build better systems of care. The NHSC Site Application, which renames and revises the previous Recruitment and Retention Assistance Application, requests information on the clinical service site, sponsoring agency, recruitment contact, staffing levels, service users, charges for services, employment policies, and fiscal management capabilities. Assistance in completing the application may be obtained through the appropriate State Primary Care Offices, State Primary Care Associations and the NHSC. The information on the application is used for determining the eligibility of sites for assignment of NHSC-obligated health professionals

and to verify the need for NHSC clinicians. Approval as an NHSC service site is good for three years; sites wishing to remain eligible for assignment of NHSC providers must submit a new Site Application every three years.

The annual estimate of burden is as follows:

| Instrument | Number of respondents | Responses per respondent | Total responses | Hours per response | Total burden hours |
|---|---|---|---|---|---|
| NHSC Site Application | 3,000 | 1 | 3,000 | 0.5 | 1,500 |

E-mail comments to *paperwork@hrsa.gov* or mail to the HRSA Reports Clearance Officer, Room 10–33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: June 6, 2011.

**Reva Harris,**

*Acting Director, Division of Policy and Information Coordination.*

[FR Doc. 2011–14341 Filed 6–8–11; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Government-Owned Inventions; Availability for Licensing

**AGENCY:** National Institutes of Health, Public Health Service, HHS.

**ACTION:** Notice.

**SUMMARY:** The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of Federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

**ADDRESSES:** Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301–496–7057; fax: 301–402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

**X-Clometer: Optimizing Portable Radiography**

*Description of Technology:* The technology offered for licensing and commercial development relates to a method and apparatus that can significantly improve the diagnostic performance of portable chest (CXR) and abdominal x-rays. This device quantifies angulation of a patient to provide for a better comparison of day-to-day improvement.

The portable CXR is one of the most commonly requested diagnostic medical tests around the world. They are performed nearly daily on some of the sickest patients in hospitals. Paradoxically, it is well documented that portable radiography of the chest is inconsistent and often inadequate.

An upright projection best evaluates effusions, rules out free air, or detects air-fluid levels. Optimally, the images are obtained at similar angles each day, even if not erect, to allow accurate comparisons and assessment of change. It is well documented that portable radiography of the chest is inconsistent and often inadequate. To achieve optimal quality of the exam the technologist attempts the most upright projection; balanced with patient condition and ability to achieve this often impossible task.

*Applications:* Portable chest and abdominal x-rays performed at patient's hospital bedside.

*Advantages*

• Currently, there is no quantitative marker to indicate degree of the upright position. Prior markers with small ball bearings sinking to a small circle only indicate if the patient is supine or not. This technology introduces a simple dynamic marker that can quantify the angle at a glance for the radiologist to best compare patient condition over time. This device objectively quantifies cassette angle with a ball bearing in a cylindrical tube with markers to indicate upright position in degrees.

• The technology improves performance of CXR, allowing reliable comparisons of patient condition over time. Thus, better therapies can be planned and unnecessary CT (Computerized Tomography) can be prevented.

• The technology improves care for Intensive Care Unit patients, as developing effusion and the need for immediate drainage (as one of many examples) can be more effectively assessed with the present apparatus. A widespread use of the device will save lives through improved diagnosis and comparison of effusions.

*Development Status*

• A performance of a visual prototype was demonstrated. The visual prototype was imaged at 5 selected angles with a chest phantom. Initial *in-vitro* results demonstrate that angles can be quantified to within 30 degrees.

• Improved prototypes with more accuracy are currently being manufactured for patient use. In-vivo studies will soon be underway to validate clinical utility.

*Inventors:* Les R. Folio (CC) and Lucas S. Folio.

*Relevant Publications*

1. Wandtke JC. Bedside chest radiography. Radiology. 1994; 190:1–10. [PMID: 8043058]

2. Pneumatikos I, Bouros D. Pleural effusions in critically ill patients. Respiration. 2008; 76(3):241–248. [PMID: 18824883]

3. Mattison LE, et al. Pleural effusions in the medical ICU: prevalence, causes, and clinical implications. Chest. 1997 Apr;111(4):1018–1023. [PMID: 9106583]

4. Fartoukh M, et al. Clinically documented pleural effusions in medical ICU patients: how useful is routine thoracentesis? Chest. 2002 Jan;121(1):178–184. [PMID: 11796448]

5. Bekemeyer WB, et al. Efficacy of chest radiography in a respiratory intensive care unit. A prospective study. Chest. 1985 Nov; 88(5): 691–696. [PMID: 4053711]

6. Tocino I. Chest imaging in intensive care unit. Eur J Radiol 1996 Aug;23(1):46–57. [PMID: 8872073]

*Patent Status:* U.S. Provisional Application No. 61/452,364 filed March 14, 2011 (HHS Reference No. E–063–2011/0–US–01).

*Licensing Status:* Available for licensing.

*Licensing Contacts*

• Uri Reichman, PhD, MBA; 301–435–4616; *UR7a@nih.gov.*

• Michael Shmilovich, Esq.; 301–435–5019; *shmilovm@mail.nih.gov.*

*Collaborative Research Opportunity:* The NIH Clinical Center, Radiology and

Imaging Sciences, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize X-Clometer. Please contact Ken Rose, PhD at 301–435–3132 or *rosek@mail.nih.gov* for more information.

**HIF1α-Targeted Therapy for Diabetes and Obesity**

*Description of Technology:* This technology describes the use of hypoxia inducible factor 1 alpha (HIF1α) inhibitors for the reduction of body weight and treatment of diabetes.

In obesity, the rapid expansion of adipose tissue outpaces the oxygen supply, resulting in hypoxia. HIF1α, a transcription factor that plays an essential role in cellular and systemic responses to low oxygen levels, is activated in these tissues, and causes inflammation that has been linked to insulin resistance and other metabolic dysfunction.

To examine the role of hypoxia in obesity and insulin resistance, investigators at the National Cancer Institute disrupted the HIF1α gene (or its dimerization partner, the HIF1β) in the adipose tissue of transgenic mice, and found that these mice were protected from obesity and insulin resistance when fed a high-fat (western) diet. In further experiments, administration of an HIF1α inhibitor to wild-type mice achieved similar reductions in fat mass and insulin resistance, as well as other indicators of metabolic disease. Thus, HIF1α inhibitors represent promising new leads for obesity and diabetes therapeutics.

*Applications:* HIF1α-targeted therapies for type 2 diabetes and obesity.

*Development Status:* Proof of concept has been demonstrated in mouse models.

*Inventors:* Frank J. Gonzalez and Changtao Jiang (NCI).

*Relevant Publications:* In preparation.

*Patent Status:* U.S. Provisional Application No. 61/423,936, filed December 16, 2010 (HHS Reference No. E–018–2011/0–US–01).

*Licensing Status:* Available for licensing.

*Licensing Contact:* Tara L. Kirby, PhD; 301–435–4426; *tarak@mail.nih.gov*

*Collaborative Research Opportunity:* The Center for Cancer Research, Laboratory of Metabolism (LM), is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize HIF1α inhibitors that can be used for the treatment of obesity and type 2 diabetes. The LM will be willing to collaborate with parties to evaluate potential inhibitors using the HIF1α adipose-specific knockout mice. Please contact John Hewes, PhD at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

**Synergistic Combination Agent (Ceramide and Vinca Alkaloids) for Cancer Therapy**

*Description of Technology:* Work by the Nanotechnology Characterization Laboratory (NCL), a joint initiative of NCI, NIST, and the FDA, has led to the discovery of a novel combination chemotherapy. This combination is shown to have synergistic effects on cytotoxicity to cancer cells *in vitro,* and to cause a substantial decrease in tumor growth in preclinical tumor models *in vivo.* Combination therapy using these agents may enhance the response rate of different cancers to these drugs and may significantly reduce side effects by permitting a lower therapeutic dose to be administered.

The instant invention relates to a novel combination of ceramide and vinca alkaloids, which synergistically decrease cancer cell growth without increasing the toxicity profile compared to the individual drugs. The drug combination has been rigorously evaluated in both *in vitro* and *in vivo* models of cancer, and a dose range-finding toxicology study has been conducted in rodents.

This combination induces cell death via a novel mechanism (induction of autophagy with simultaneous blockade of autophagy flux). This mechanism appears to impart selectivity of the therapy to cancer cells.

Available for licensing are methods to use the combination therapy for cancer treatment.

*Applications:* Cancer treatment, especially for cancers sensitive to treatment with vinca alkaloids such as breast cancer, testicular cancer, head and neck cancer, Hodgkin's lymphoma, and non-small cell lung cancer.

*Advantages:* Vinca alkaloids alone at therapeutic doses produce the standard side effects of cancer chemotherapy. The vinca alkaloid-ceramide combination can be administered at lower doses with comparable efficacy and may allow for more frequent dosing (metronomic dosing). The novel mechanism of action of this combination appears to be selective to cancer cells.

*Development Status:* The drug combination has been evaluated in both human hepatocarcinoma models (*in vitro* cell culture assays) and human colon cancer models (*in vivo* mouse xenografts). Additional *in vivo* studies with other cancer types and early stage preclinical toxicology studies are being planned.

*Inventors:* Stephan T. Stern, Scott E. McNeil, Pavan Adiseshaiah (NCL/NCI)

*Patent Status:* U.S. Provisional Patent Application No. 61/451,925 filed March 11, 2011 (HHS Reference No. E–007–2011/0–US–01)

*Licensing Status:* Available for licensing or partnering for further development.

*Licensing Contact:* Betty B. Tong, PhD; 301–594–6565; *tongb@mail.nih.gov*

*Collaborative Research Opportunity:* The SAIC Frederick, Nanotechnology Characterization Laboratory, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize a ceramide and vinca alkaloid combination therapy for treatment of cancer. Please contact John Hewes, PhD at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

**Novel Small Molecule Inhibitors for the Treatment of Huntington's Disease**

*Description of Technology:* This technology is a collection of small molecules screened for their ability to prevent or reduce the cytotoxic effects of the protein, Huntingtin. Huntington's disease is a neurodegenerative disorder due to a dominantly acting expansion of a CAG trinucleotide repeat in exon 1 of the Huntington (*HTT)* gene resulting in production of the altered (mutant) protein Huntingtin, which has a long chain of polyglutamine (poly Q) attached to the exon 1 encoded protein sequence. Clinical and statistical analyses have shown that an increased number of poly Q repetition correlates with the probability of developing the disease, with 36 to 40 being the accepted cut off number for developing the disorder with high probability. It is known that poly Q repetitions impact the physical properties of Huntingtin and cause it to produce aggregates that precipitate and form inclusion bodies, which are toxic to the neuronal cells. The compounds of this invention have been screened multiply in a neuronal cell model of Huntington's disease containing an *HTT* with an expanded repeat in exon 1 of 103 Qs for their ability to inhibit cytotoxicity and protein aggregation.

*Applications:* Treatment of Huntington's disease.

*Development Status:* Early development.

*Inventors:* Juan Marugan, Joshua McCoy, Samarjit Patnaik, Steven Titus, Wei Zheng, Noel T. Southall, Wenwei Huang (NHGRI).

*Relevant Publications:* None.

*Patent Status:* U.S. Provisional Application No. 61/388,482 filed September 30, 2010 (HHS Reference No. E–258–2010/0–US–01).

*Licensing Status:* Available for licensing.

*Licensing Contact:* Steve Standley, PhD; 301–435–4074; *sstand@od.nih.gov.*

*Collaborative Research Opportunity:* The National Center for Translational Therapeutics is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize this technology further. Please contact Ms. Lili Portilla at *Lilip@nih.gov* for more information.

Dated: June 3, 2011.

**Richard U. Rodriguez,**

*Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.*

[FR Doc. 2011–14261 Filed 6–8–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Child Health and Human Development Special Emphasis Panel, Intellectual and Developmental Disabilities Research Centers 2011 (P30) Review.

*Date:* June 29–30, 2011.

*Time:* 8 a.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

*Contact Person:* Cathy J. Wedeen, PhD, Scientific Review Officer, Division of Scientific Review, OD, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01–G, Bethesda, MD 20892, 301–496–1485, *wedeenc@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: June 3, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–14264 Filed 6–8–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

**Project: Addiction Technology Transfer Centers (ATTC) National Workforce Data Collection—NEW**

The ATTC Network, a nationwide, multidisciplinary resource that draws upon the knowledge, experience and latest research of recognized experts in the field of addictions and behavioral health, is a unique CSAT initiative formed in 1993 in response to a shortage of well-trained addiction and behavioral health professionals in the public sector. The ATTC Network works to enhance the knowledge, skills and aptitudes of the addiction/behavioral health treatment and recovery services workforce by disseminating current health services research from the National Institute on Drug Abuse, National Institute on Alcohol Abuse and Alcoholism, National Institute of Mental Health, Agency for Health Care Policy and Research, National Institute of Justice, and other sources, as well as other SAMHSA programs. To accomplish this, the ATTC Network (1) Develops and updates state-of-the-art research based curricula and professional development training, (2) coordinates and facilitates meetings between Single State Authorities, Provider Associations and other key stakeholders, and (3) provides ongoing technical assistance to individuals and organizations at the local, regional and national levels.

In response to the emerging shortages of qualified addiction treatment and recovery services professionals, SAMHSA/CSAT instructed the ATTC National Office to lead the ATTC Network in the development and implementation of a national addiction treatment workforce data collection effort of those individuals who work in substance use specialty treatment services. The purpose of this survey and data collection is to gather information to guide the formation of effective national, regional, state, and organizational policies and strategies aimed at successfully recruiting and retaining a sufficient number of adequately prepared providers who are able to respond to the growing needs of those affected by substance use and mental health disorders; including co-occurring disorders and trauma. This data collection will offer a unique perspective on the clinical treatment field so that CSAT and the ATTC Network can better understand current successful strategies and methodologies being used in the workforce and develop appropriate training for emerging trends in the field.

Although SAMHSA/CSAT is the primary target audience for data collection findings, it is expected that the data collected and resulting reports will also be useful to the ATTC Network, as well as to Single State Agencies, provider organizations, professional organizations, training and education entities, and individuals in the workforce.

**Overview of Data Collection and Purposes**

Data will be collected from two main sources: (1) A random sample of clinical directors or a designated direct care supervisor from facilities listed in the I–SATS database. (2) A national sample of clinical directors and key thought leaders, identified by CSAT in conjunction with the ATTC network, in the substance use disorders treatment field. Respondents will be asked to participate in at least one of three (3) distinct methods. They are:

- A Web-based Clinical Director Survey (also available in paper format).
- On-line Focus Groups.

• Key Informant Telephone Interviews.

In addition to this original data collection, existing national data sets will also be utilized. Such data systems will include:

• Census 2000 datasets.
• National Survey of Substance Abuse Treatment Services (N–SSATS).
• SAMHSA Treatment Gap Projection Analysis.
• Treatment Episode Data.
• Bureau of Labor datasets such as Current Employment Statistics.
• Annapolis Coalition Data.

*Clinical Director Survey:* The Clinical Director Survey asks 57 questions of the clinical director or a designated direct care supervisor (direct care refers to staff members who spend a majority of their time providing clinical care for clients with substance use and/or co-occurring disorders as their primary diagnosis). For the purpose of this survey, the clinical director is defined as the person whose role it is to oversee direct clinical service delivery for this facility. The instrument asks respondents to report demographic information about both themselves and the direct care staff they supervise, information about the facility at which they currently work, as well as information about their job satisfaction, recruitment and retention strategies, clinician training and preparation, and staff turnover.

*On-line Focus Groups:* On-line Focus Groups will be utilized to gather qualitative data from two sources: (1) Clinical supervisors and/or direct care staff in leadership positions; (2) Thought leaders in addiction/behavioral health treatment to include Single State Authorities (SSAs), addiction treatment agency directors, academics, and policymakers. An on-line platform, *http://IdeaScale.com* will be used to gather qualitative data about future trends in substance use and co-occurring disorders and trauma treatment. IdeaScale will also be used to gather information from clinical supervisors and direct care staff on effective and creative staff development, recruitment, and retention strategies being used by the agency for which they work. These ideas will be posted for this community of invited participants to comment on and discuss; thus allowing a national audience to participate in this on-line focus group.

*Key Informant Telephone Interviews:* Based on participation in the on-line focus groups, a minimum of 40 IdeaScale respondents will be selected for telephone interviews. The purpose of these interviews is to enrich understanding surrounding current and future trends in substance use and co-occurring disorders and trauma treatment as well as effective workforce development, recruitment, and retention strategies. An interview script has been developed to guide the question formation for the interviews.

**Overview of Questions Related to Data Collection**

The objectives of the national addiction treatment workforce data collection effort are to understand the national demographics of the current workforce and how this differs across regions and states, in addition to exploring issues related to workforce development: (1) Staff training, recruitment and retention; (2) Professional development; and 3. Support for strategies and methodologies to prepare, recruit, retain, and sustain the workforce. To accomplish these objectives, CSAT outlined three primary questions to be addressed by the workforce data collection:

*(1) What are the basic demographics of the workforce?*

For the purposes of the ATTC data collection effort, this means that we will comprehensively describe the workforce comprised of direct care staff, clinical supervisors, and administrators in agencies represented in the Inventory of Substance Abuse Treatment Services (I–SATS).

*(2) What are the anticipated workforce development needs for 2011–2016?*

For the purposes of this data collection, the ATTC Network will identify the growth and capacity-building needs over the next five years of direct care staff, clinical supervisors, and administrators in agencies represented in the I–SATS registry.

*(3) What are the common strategies and methodologies to prepare, retain, and maintain the workforce?*

Identification of potentially effective strategies used to prepare and recruit individuals to enter the workforce (as previously defined), and encourage them to remain in the workforce and stay current on clinical and other job related skills (*e.g.,* evidence based practices).

This will be the first national survey of the substance use disorders treatment workforce. The quantitative survey and the qualitative interviews and analysis will be used to provide a snapshot of the current state of the addiction treatment workforce as it relates to demographics, workforce development needs, and retention and maintenance of a strong workforce. These data will provide national benchmark data that can be used to inform ongoing policy and practice.

Information collected from this workforce data collection will help CSAT and the ATTC Network to better understand the needs of the workforce and categorize some best practices for providing support to the field now and in the future. Emerging trends in addiction and/or co-occurring and trauma treatment and the existence of mental health problems in substance use disorder treatment and recovery services will be identified and shared with those in the addiction/behavioral health treatment field so appropriate training and funding can be allocated. The information from this data collection will also help CSAT identify areas where deficiencies in substance use and/or co-occurring disorder and trauma treatment exist and provide assistance to regions (and states) to help them develop and adopt strategies for addressing this.

The chart below summarizes the annualized burden for this project.

| Type of respondent | Number of respondents | Responses per respondent | Hours per response | Total annual burden hours |
|---|---|---|---|---|
| Clinical directors or supervisors; Web-based survey | 569 | 1 | .66 | 376 |
| Clinical directors or supervisors; On-line focus groups | 450 | 1 | .5 | 225 |
| Clinical directors or supervisors; Telephone interviews | 20 | 1 | .5 | 10 |
| Thought leaders; On-line focus groups | 250 | 1 | .5 | 125 |
| Thought leaders; Telephone interviews | 20 | 1 | .5 | 10 |
| Total | 1,109 | | | 746 |

Written comments and recommendations concerning the proposed information collection should be sent by July 11, 2011 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–7285.

Dated: June 3, 2011.

**Elaine Parry,**

*Director, Office of Management, Technology and Operations.*

[FR Doc. 2011–14279 Filed 6–8–11; 8:45 am]

**BILLING CODE 4162–20–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[Docket No. USCG–2011–0521]**

### Navigation Safety Advisory Council; Vacancies

**AGENCY:** Coast Guard, DHS.

**ACTION:** Request for applications.

**SUMMARY:** The Coast Guard seeks applications for membership on the Navigation Safety Advisory Council (NAVSAC). NAVSAC provides advice and recommendations to the Secretary, Department of Homeland Security, through the Commandant of the U.S. Coast Guard, on matters relating to prevention of maritime collisions, rammings, and groundings, including the Inland and International Rules of the Road, navigation regulations and equipment, routing measures, marine information, diving safety, and aids to navigation systems.

**DATES:** Applicants must submit a cover letter and resume on or before July 29, 2011.

**ADDRESSES:** Applicants should send their cover letter and resume to Mr. Mike Sollosi, Alternate Designated Federal Officer (ADFO), at the following address: Commandant (CG–553), Attn: Mr. Mike Sollosi, U.S. Coast Guard, 2100 2nd Street SW., STOP 7580, Washington, DC 20593–7580.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mike Sollosi, the NAVSAC Alternate Designated Federal Officer (ADFO), at phone 202–372–1545, fax 202–372–1991, or e-mail *Mike.M.Sollosi@uscg.mil;* or Mr. Dennis Fahr, at telephone 202–372–1531 or e-mail *Dennis.Fahr@uscg.mil.*

**SUPPLEMENTARY INFORMATION:** The NAVSAC is an advisory committee authorized in 33 U.S.C. 2073 and chartered under 5 U.S.C. App. (Pub. L. 92–463). NAVSAC provides advice and recommendations to the Secretary, through the Commandant of the U.S. Coast Guard, on matters relating to prevention of maritime collisions, rammings, and groundings, including the Inland and International Rules of the Road, navigation regulations and equipment, routing measures, marine information, diving safety, and aids to navigation systems.

The NAVSAC is expected to meet at least twice each year, or more often with the approval of the Designated Federal Officer (DFO). Members may be reimbursed for travel and per diem, as allowed by regulations and Department policy. All travel for NAVSAC business must be approved in advance by the DFO. The NAVSAC is comprised of not more than 21 members who shall have expertise in Inland and International vessel navigation Rules of the Road, aids to maritime navigation, maritime law, vessel safety, port safety, or commercial diving safety. Each member shall be appointed to represent the viewpoints and interests of one of the following groups or organizations, and at least one member shall be appointed to represent each membership category:

a. Commercial vessel owners or operators;

b. Professional mariners;

c. Recreational boaters;

d. The recreational boating industry;

e. State agencies responsible for vessel or port safety;

f. The Maritime Law Association.

Members serve as representatives and are not Special Government Employees as defined in section 202(a) of Title 18, United States Code.

The Coast Guard will consider applications for eight positions that will become vacant on November 11, 2011, in the following categories:

a. Commercial vessel owners or operators (one position);

b. Professional mariners (two positions);

c. Recreational boaters (one position);

d. The recreational boating industry (one position);

e. State agencies responsible for vessel or port safety (one position); and

f. The Maritime Law Association (two positions).

Members shall serve terms of office of up to three years, and approximately one-third of members' terms of office shall expire each year. A member appointed to fill an unexpired term shall be appointed for the remainder of such term. In the event NAVSAC is terminated, all appointments to the Council shall terminate.

Registered lobbyists are not eligible to serve on Federal advisory committees. Registered lobbyists are lobbyists required to comply with provisions contained in the Lobbying Disclosure Act of 1995 (Pub. L. 110–81, as amended).

In support of the Coast Guard policy on gender and ethnic nondiscrimination, we encourage qualified men and women and members of all racial and ethnic groups to apply. The Coast Guard values diversity; all the different characteristics and attributes that enhance the mission of the Coast Guard.

Dated: June 2, 2011.

**Dana A. Goward,**

*Director, Marine Transportation Systems Management, U.S. Coast Guard.*

[FR Doc. 2011–14332 Filed 6–8–11; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[Internal Agency Docket No. FEMA–1978–DR; Docket ID FEMA–2011–0001]**

### Tennessee; Major Disaster and Related Determinations

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.

**SUMMARY:** This is a notice of the Presidential declaration of a major disaster for the State of Tennessee (FEMA–1978–DR), dated May 9, 2011, and related determinations.

**DATES:** *Effective Date:* May 9, 2011.

**FOR FURTHER INFORMATION CONTACT:** Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that, in a letter dated May 9, 2011, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I have determined that the damage in certain areas of the State of Tennessee resulting from severe storms, flooding, tornadoes, and straight-line winds on April 4, 2011, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et*

*seq.* (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of Tennessee.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, W. Montague Winfield, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Tennessee have been designated as adversely affected by this major disaster:

Chester, Davidson, Decatur, Dickson, Henderson, Humphreys, Lake, Shelby, and Sumner Counties for Public Assistance.

All counties within the State of Tennessee are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

**W. Craig Fugate,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2011–14324 Filed 6–8–11; 8:45 am]

**BILLING CODE 9111–23–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[Internal Agency Docket No. FEMA–1975–DR; Docket ID FEMA–2011–0001]**

### Arkansas; Amendment No. 5 to Notice of a Major Disaster Declaration

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster declaration for the State of Arkansas (FEMA–1975–DR), dated May 2, 2011, and related determinations.

**DATES:** *Effective Date:* June 2, 2011.

**FOR FURTHER INFORMATION CONTACT:** Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

**SUPPLEMENTARY INFORMATION:** The notice of a major disaster declaration for the State of Arkansas is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of May 2, 2011.

Bradley County for Public Assistance, including direct Federal assistance. Jackson, Lee, Lonoke, Mississippi, Prairie, St. Francis, and Woodruff Counties for Public Assistance, including direct Federal 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; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

**W. Craig Fugate,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2011–14317 Filed 6–8–11; 8:45 am]

**BILLING CODE 9111–23–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[Internal Agency Docket No. FEMA–1979–DR; Docket ID FEMA–2011–0001]**

### Tennessee; Amendment No. 2 to Notice of a Major Disaster Declaration

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster declaration for the State of Tennessee (FEMA–1979–DR), dated May 9, 2011, and related determinations.

**DATES:** *Effective Date:* June 1, 2011.

**FOR FURTHER INFORMATION CONTACT:** Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

**SUPPLEMENTARY INFORMATION:** The notice of a major disaster declaration for the State of Tennessee is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of May 9, 2011.

Lincoln County for Individual Assistance.

Tipton County for Individual Assistance and Public Assistance, including direct Federal assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

**W. Craig Fugate,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2011–14321 Filed 6–8–11; 8:45 am]

**BILLING CODE 9111–23–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[Internal Agency Docket No. FEMA–1974–DR; Docket ID FEMA–2011–0001]**

### Tennessee; Amendment No. 3 to Notice of a Major Disaster Declaration

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster declaration for the State of Tennessee (FEMA–1974–DR), dated May 1, 2011, and related determinations.

**DATES:** *Effective Date:* June 2, 2011.

**FOR FURTHER INFORMATION CONTACT:** Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

**SUPPLEMENTARY INFORMATION:** The notice of a major disaster declaration for the State of Tennessee is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of May 1, 2011.

Knox and Montgomery Counties for Individual Assistance.

Blount, Campbell, Fentress, Franklin, Giles, Hickman, Houston, Humphreys, Jackson, Knox, Lawrence, Lewis, Lincoln, Loudon, Marshall, Montgomery, Moore, Perry, Pickett, Polk, Scott, Sequatchie, Smith, Sullivan, and Wayne Counties for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

**W. Craig Fugate,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2011–14320 Filed 6–8–11; 8:45 am]

**BILLING CODE 9111–23–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[Internal Agency Docket No. FEMA–1981–DR; Docket ID FEMA–2011–0001]**

### North Dakota; Amendment No. 1 to Notice of a Major Disaster Declaration

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster declaration for the State of North Dakota (FEMA–1981–DR), dated May 10, 2011, and related determinations.

**DATES:** *Effective Date:* June 2, 2011.

**FOR FURTHER INFORMATION CONTACT:** Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

**SUPPLEMENTARY INFORMATION:** The notice of a major disaster declaration for the State of North Dakota is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of May 10, 2011.

### Burleigh County for Public Assistance

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

**W. Craig Fugate,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2011–14319 Filed 6–8–11; 8:45 am]

**BILLING CODE 9111–23–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[Internal Agency Docket No. FEMA–1979–DR; Docket ID FEMA–2011–0001]**

### Tennessee; Major Disaster and Related Determinations

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.

**SUMMARY:** This is a notice of the Presidential declaration of a major disaster for the State of Tennessee (FEMA–1979–DR), dated May 9, 2011, and related determinations.

**DATES:** *Effective Date:* May 9, 2011.

**FOR FURTHER INFORMATION CONTACT:** Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that, in a letter dated May 9, 2011, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I have determined that the damage in certain areas of the State of Tennessee resulting from severe storms, tornadoes, straight line winds, and flooding beginning on April 19, 2011, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of Tennessee.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and Public Assistance in the designated areas, and Hazard Mitigation throughout the State. Direct Federal assistance is authorized. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for

a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, W. Montague Winfield, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Tennessee have been designated as adversely affected by this major disaster:

Dyer, Lake, Obion, Shelby, and Stewart Counties for Individual Assistance.

Benton, Carroll, Crockett, Dyer, Gibson, Henderson, Henry, Houston, Lake, Lauderdale, Madison, Montgomery, Obion, Shelby, and Stewart Counties for Public Assistance, including direct Federal assistance.

All counties within the State of Tennessee are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

**W. Craig Fugate,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2011–14322 Filed 6–8–11; 8:45 am]

**BILLING CODE 9111–23–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

**[CBP Dec. 11–14]**

### Western Hemisphere Travel Initiative: Designation of an Approved Native American Tribal Card Issued by the Pascua Yaqui Tribe as an Acceptable Document To Denote Identity and Citizenship

**AGENCY:** U.S. Customs and Border Protection, DHS.

**ACTION:** Notice.

**SUMMARY:** This notice announces that the Commissioner of U.S. Customs and Border Protection is designating an approved Native American Tribal Card issued by the Pascua Yaqui Tribe to U.S. citizens as an acceptable travel document for purposes of the Western Hemisphere Travel Initiative. The approved card may be used to denote identity and U.S. citizenship of Pascua Yaqui members entering the United States from contiguous territory or adjacent islands at land and sea ports of entry.

**DATES:** This designation will become effective on June 9, 2011.

**FOR FURTHER INFORMATION CONTACT:** Colleen Manaher, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Washington, DC 20229, 202–344–3003.

**SUPPLEMENTARY INFORMATION:**

#### Background

*The Western Hemisphere Travel Initiative*

Section 7209 of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Public Law 108–458, as amended, required the Secretary of Homeland Security (Secretary), in consultation with the Secretary of State, to develop and implement a plan to require U.S. citizens and Bermudian, Canadian, and Mexican nationals to present a passport or other document or combination of documents as the Secretary deems sufficient to denote identity and citizenship for all travel into the United States. *See* 8 U.S.C. 1185 note. On April 3, 2008, the Department of Homeland Security (DHS) and the Department of State promulgated a joint final rule, effective on June 1, 2009, that implemented the plan known as the Western Hemisphere Travel Initiative (WHTI) at U.S. land and sea ports of entry. *See* 73 FR 18384 (the WHTI land and sea final rule). It amended, among other sections of the Code of Federal Regulations (CFR), 8 CFR 212.0, 212.1, and 235.1. The WHTI land and sea final rule specifies the documents that U.S. citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico are required to present when entering the United States at land and sea ports of entry.

Under the WHTI land and sea final rule, one type of citizenship and identity document that may be presented upon entry to the United States at land and sea ports of entry from contiguous territory or adjacent islands [1] is a Native American Tribal Card that has been designated as an acceptable document to denote identity and citizenship by the Secretary, pursuant to section 7209 of IRTPA. Specifically, 8 CFR 235.1(e), as amended by the WHTI land and sea final rule, states:

> Upon designation by the Secretary of Homeland Security of a United States qualifying Tribal entity document as an acceptable document to denote identity and citizenship for the purposes of entering the United States, Native Americans may be permitted to present Tribal cards upon entering or seeking admission to the United States according to the terms of the voluntary agreement entered between the Secretary of Homeland Security and the Tribe. The Secretary of Homeland Security will announce, by publication of a notice in the **Federal Register**, documents designated under this paragraph. A list of the documents designated under this paragraph will also be made available to the public.

A "United States qualifying Tribal entity" is defined as a "Tribe, band, or other group of Native Americans formally recognized by the United States Government which agrees to meet WHTI document standards." [2] Native American Tribal cards are also referenced in 8 CFR 235.1(b) which lists the documents U.S. citizens may use to establish identity and citizenship when entering the United States. *See* 8 CFR 235.1(b)(7).

The Secretary has delegated to the Commissioner of CBP the authority to designate certain documents as acceptable border crossing documents for persons arriving in the United States by land or sea from within the Western Hemisphere, including certain United States Native American Tribal cards. *See* DHS Delegation Number 7105 (Revision 00), dated January 16, 2009.

*Tribal Card Program*

The WHTI land and sea final rule allowed U.S. Federally recognized Native American Tribes to work with CBP to enter into agreements to develop Tribal ID cards that can be designated as acceptable to establish identity and citizenship when entering the United States at land and sea ports of entry from contiguous territory or adjacent islands. CBP has been working with various U.S. Federally recognized Native American Tribes to facilitate the development of such cards.[3] As part of the process, CBP will enter into one or more agreements with a U.S. Federally recognized Tribe that specify the requirements for developing and issuing WHTI-compliant Tribal cards, including

[1] "Adjacent islands" is defined in 8 CFR 212.0 as "Bermuda and the islands located in the Caribbean Sea, except Cuba." This definition applies to 8 CFR 212.1 and 235.1.

[2] *See* 8 CFR 212.0. This definition applies to 8 CFR 212.1 and 235.1.

[3] The Native American Tribal cards qualifying to be a WHTI-compliant document for border crossing purposes are commonly referred to as "Enhanced Tribal Cards" or "ETCs."

a testing and auditing process to ensure that the cards are produced and issued in accordance with the terms of the agreements.

After production of the cards in accordance with the specified requirements, and successful testing and auditing by CBP of the cards and program, the Secretary of DHS or the Commissioner of CBP may designate the Tribal card as an acceptable WHTI-compliant document for the purpose of establishing identity and citizenship when entering the United States by land or sea from contiguous territory or adjacent islands. Such designation will be announced by publication of a notice in the **Federal Register**. A list of entities issuing WHTI-compliant documents and the kind of documents issued is available at *http://www.getyouhome.gov.*

*Pascua Yaqui WHTI-Compliant Tribal Card Program*

The Pascua Yaqui Tribe of Arizona (Pascua Yaqui Tribe) has voluntarily established a program to develop a WHTI-compliant Tribal card that denotes identity and U.S. citizenship. On May 27, 2009, CBP and the Pascua Yaqui Tribe signed a Memorandum of Agreement (MOA) to develop, issue, test, and evaluate Tribal cards to be used for border crossing purposes. Pursuant to this MOA, the cards are issued to members of the Pascua Yaqui Tribe who can establish identity, Tribal membership, and U.S. citizenship. The cards incorporate physical security features acceptable to CBP as well as facilitative technology allowing for electronic validation of identity, citizenship, and Tribal membership. In 2010, CBP and the Pascua Yaqui Tribe entered into two related agreements, a March 18, 2010, security agreement and an April 1, 2010, service level agreement. The former addresses confidentiality and information sharing, and the latter memorializes the technical specifications for the production, issuance and use of the card.

CBP has tested the cards developed by the Pascua Yaqui Tribe pursuant to the above agreements and has performed an audit of the Tribe's card program. On the basis of these tests and audit, CBP has determined that the cards meet the requirements of section 7209 of the IRTPA and are acceptable documents to denote identity and U.S. citizenship for purposes of entering the United States at land and sea ports of entry from contiguous territory or adjacent islands. CBP's continued acceptance of the Tribal card as a WHTI-compliant document is conditional on compliance with the MOA and all related agreements.

Acceptance and use of the WHTI-compliant Tribal card is voluntary for Tribe members. If an individual is denied a WHTI-compliant Tribal card, he or she may still apply for a passport or other WHTI-compliant document.

*Designation*

This notice announces that the Commissioner of CBP designates the Tribal card issued by the Pascua Yaqui Tribe in accordance with the MOA and all related agreements between the Tribe and CBP as an acceptable WHTI-compliant document pursuant to section 7209 of the IRTPA and 8 CFR 235.1(e). In accordance with these provisions, the approved card, if valid and lawfully obtained, may be used to denote identity and U.S. citizenship of Pascua Yaqui members who are entering the United States from contiguous territory or adjacent islands at land and sea ports of entry.

Dated: June 3, 2011.

**Alan D. Bersin,**

*Commissioner, U.S. Customs and Border Protection.*

[FR Doc. 2011–14352 Filed 6–8–11; 8:45 am]

**BILLING CODE 9111–14–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R5–R–2011–N043; BAC–4311–K9–S3]**

### Stewart B. McKinney National Wildlife Refuge, Middlesex County, CT; Comprehensive Conservation Plan and Environmental Assessment

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of intent; request for comments.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service) intend to prepare a comprehensive conservation plan (CCP) for Stewart B. McKinney National Wildlife Refuge (NWR). An environmental assessment (EA) evaluating effects of various CCP alternatives will also be prepared. We provide this notice in compliance with our policy to advise other Federal and State agencies, Tribes, and the public of our intentions, and to obtain suggestions and information on the scope of issues to consider in the planning process. We are also announcing public meetings and requesting public comments.

**DATES:** We will hold public meetings to begin the CCP planning process; see Public Meetings under **SUPPLEMENTARY INFORMATION** for dates, times, and locations. We will announce opportunities for public input in local news media throughout the CCP process.

**ADDRESSES:** Send your comments or requests for more information by any of the following methods:

*E-mail: northeastplanning@fws.gov.* Include "Stewart B. McKinney NWR" in the subject line of the message.

*Fax:* Attention: Bill Perry, 413–253–8468.

*U.S. Mail:* Bill Perry, Refuge Planner, U.S. Fish and Wildlife Service, 300 Westgate Center Drive, Hadley, MA 01035.

*In-Person Drop-off:* You may drop off comments during regular business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Bill Perry, 413–253–8688 (phone), *Bill_Perry@fws.gov* (e-mail).

**SUPPLEMENTARY INFORMATION**

#### Introduction

With this notice, we initiate our process for developing the CCP for Stewart B. McKinney NWR, with headquarters located in Middlesex County, CT. This notice complies with our CCP policy to: (1) Advise other Federal and State agencies, Tribes, and the public of our intention to conduct detailed planning on this refuge: and (2) obtain suggestions and information on the scope of issues to consider in the environmental document and during development of the CCP.

#### Background

*The CCP Process*

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd-668ee) (Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System (NWRS), consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years

in accordance with the Administration Act.

Each unit of the NWRS was established for specific purposes. We use these purposes as the foundation for developing and prioritizing the management goals and objectives for each refuge within the NWRS mission, and to determine how the public can use each refuge. The planning process is a way for us and the public to evaluate management goals and objectives that will ensure the best possible approach to wildlife, plant, and habitat conservation, while providing for wildlife-dependent recreation opportunities that are compatible with each refuge's establishing purposes and the mission of the NWRS.

Our CCP process provides participation opportunities for Tribal, State, and local governments, agencies, organizations, and the public. At this time, we encourage input in the form of issues, concerns, ideas, and suggestions for the future management of Stewart B. McKinney NWR.

We will conduct the environmental review of this project and develop an EA in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (NEPA) (42 U.S.C. 4321 *et seq.*); NEPA regulations (40 CFR parts 1500–1508); other appropriate Federal laws and regulations; and our policies and procedures for compliance with those laws and regulations.

*Stewart B. McKinney National Wildlife Refuge*

Stewart B. McKinney NWR encompasses over 900 acres of forest, barrier beach, tidal wetland, and island habitats. The refuge consists of 10 separate units along the Connecticut coast from Westbrook to Greenwich. Lands include eight islands and three coastline locations. Located in the Atlantic Flyway, the refuge provides important resting, feeding, and nesting habitat for many species of wading birds, shorebirds, songbirds, and terns, including the endangered roseate tern. Adjacent waters serve as wintering habitat for brant, scoters, American black duck, and other waterfowl.

The refuge was established in 1972 under the name Salt Meadow NWR. It was re-designated by Congress as the Connecticut Coastal NWR in 1984. The refuge was then renamed again in 1987 to honor the late U.S. Congressman Stewart B. McKinney, who was instrumental in the establishment of the refuge. Under the Migratory Bird Conservation Act (16 U.S.C. 715–715d, 715e, 715f–715r) of 1929, (45 Stat. 1222), the original unit was established, "*for use as an inviolate sanctuary, or any other management purposes, for migratory birds.*" The purposes of the refuge include: enhancing the populations of herons, egrets, terns, and other shore and wading birds within the refuge; encouraging natural diversity of fish and wildlife within the refuge; and providing opportunities for scientific research, environmental education, and fish and wildlife-dependent recreation.

The 347-acre Salt Meadow Unit includes salt marsh and forested upland habitat in the Town of Westbrook. It provides roosting and courtship grounds for early successional birds such as American woodcock, breeding grounds for sharp-tailed sparrows, and migration and nesting areas for other passerines. The Faulkner Island Unit is a 5-acre maritime island located off the coast of Guilford in Long Island Sound. It provides breeding habitat for over 100 pairs of the Federally endangered roseate tern, and is home to more than 3,500 pairs of common terns, a State species of concern. The Milford Point Unit is a 22-acre barrier beach peninsula located at the mouth of the Housatonic River in the Town of Milford. It is a breeding site for the Federally threatened piping plover. The 525-acre tidal marsh complex of the Great Meadows Unit is located on the Connecticut shoreline in the Town of Stratford. It provides foraging habitat for the Federally and State-threatened piping plover, and for the State-threatened least tern. Other Federally listed threatened and State-endangered or special concern species have been seen at Great Meadows, including the sharp-tailed sparrow, least bittern, pied-billed grebe, and bald eagle. Other island units include the 70-acre Chimon Island Unit, 57-acre Sheffield Island Unit, 1½-acre Goose Island Unit, 3-acre Peach Island Unit, 31-acre Calf Island Unit, and 5-acre Outer Island Unit. These islands provide foraging habitat for large numbers of wading birds such as herons, egrets, and ibises, as well as migratory shorebirds and passerines. The small blocks of undeveloped salt marsh, grassland, and coastal forest on these islands provide thousands of birds with essential migratory and nesting habitat along the highly developed New England coast.

The predominant public uses on refuge lands are wildlife observation and photography. There are walking trails and boardwalks, observation blinds and decks, and special use permits for island tours on remote island sites.

**Scoping: Preliminary Issues, Concerns, and Opportunities**

We have identified preliminary issues, concerns, and opportunities that we may address in the CCP. We have briefly summarized these issues below. During public scoping, we may identify additional issues. These include invasive species management, public use management consistent with protecting habitats, and sea level rise due to climate change.

**Public Meetings**

We will give the public an opportunity to provide input at public meetings. Public meetings will be announced on our Web site at *http://www.fws.gov/northeast/planning/Mckinney/ccphome.html.* You can obtain the schedule from the planning team leader or project leader (see **ADDRESSES**). You may also send comments anytime during the planning process by mail, e-mail, or fax (see **ADDRESSES**). There will be additional opportunities to provide public input once we have prepared the draft CCP.

**Public Availability of Comments**

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: April 18, 2011.

**Donna T. Stovall,**

*Acting Regional Director, U.S. Fish and Wildlife Service.*

[FR Doc. 2011–14325 Filed 6–8–11; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management,

**[CA0600–L12200000.AL0000.LXSS026B0000]**

## Notice of Intent To Collect Fees on Public Land in the San Joaquin River Gorge Special Recreation Management Area, in Eastern Fresno and Madera Counties, CA

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Intent.

**SUMMARY:** Pursuant to applicable provisions of the Federal Lands

Recreation Enhancement Act (REA), the Bureau of Land Management's (BLM) Bakersfield Field Office proposes to begin collecting fees in fiscal year 2011 at the San Joaquin River Gorge (SJRG) Special Recreation Management Area (SRMA) in eastern Fresno and Madera Counties, California, and by this notice is announcing the opening of the comment period. The fee proposal results from analysis and planning direction provided by the SJRG Business Plan, which outlines operational goals of the area and the purpose of the fee program.

**DATES:** To ensure that comments will be considered, the BLM must receive written comments on the BLM's proposal to collect fees in the SJRG SRMA by July 11, 2011. Effective 6 months after the publication of this notice, the BLM's Bakersfield Field Office would initiate fee collection in the San Joaquin River Gorge Special Recreation Management Area, unless the BLM publishes a **Federal Register** notice to the contrary.

**ADDRESSES:** You may submit comments on this fee collection proposal by any of the following methods:

- *E-mail: Tim_Smith@blm.gov.*
- *Fax:* (661) 391–6041.
- *Mail:* Field Manager, Bureau of Land Management, Bakersfield Field Office, 3801 Pegasus Drive, Bakersfield, California 93308.

Copies of the fee proposal are available in the Bakersfield Field Office at the above address and online at *http://www.ca.blm.gov/bakersfield.*

**FOR FURTHER INFORMATION CONTACT:** Timothy Z. Smith, Field Manager, telephone (661) 391–6000 or at the address above. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The San Joaquin River Gorge Management Area is a popular recreation area offering significant opportunities for outdoor recreation and has received substantial Federal investment. The BLM's commitment is to find the proper balance between public use and the protection of resources. The BLM's policy is to collect fees at all specialized recreation sites, or where the BLM at Federal expense provides facilities, equipment or services in connection with outdoor use. In an effort to meet increasing demands for services and maintenance of existing facilities, routes and trails, and provide enhanced recreation services and opportunities, the BLM proposes to implement a fee program for the SJRG SRMA which qualifies as a site wherein visitors can be charged a "Standard Amenity Fee" authorized under Section 803(f) of REA, 16 U.S.C. 6801 *et seq.* In accordance with REA and implementing regulations at 43 CFR 2930, visitors would purchase a Recreation Use Permit (RUP) to cover the standard amenity day use fee to recreate within the SRMA. The driver of each vehicle operating within the recreation area would be required to purchase and display the permit. Permits would expire at the end of the calendar day. Annual passes could also be purchased from the SJRG or Bakersfield Field Office, or at 3-Forests Interpretive Association sales outlets on the Sierra National Forest. Holders of the America the Beautiful Federal Lands Recreation Pass do not have to pay the standard amenity fee and are also entitled to discounts on expanded amenity fees such as camping. Valid Golden Age or Golden Access or Volunteer passes would also be accepted. Campers would be exempt from the standard amenity fee as long as the camping fee has been paid and a permit is displayed on the primary vehicle. Additional vehicles per site would pay the standard amenity (day use) fee, but would not have to pay the campsite fee unless the capacity of the campsite is exceeded. If site capacity is exceeded, the party would be required to purchase an additional campsite and they would be exempt from the standard amenity fee. Recreationists who are traveling into or through the area via foot, horse, or bicycle without using the facilities or services would be exempt from the standard amenity fee.

Suggested fees for use of a walk-in campsite at the campground are $10 single and $15 for double and triple sites. Fees for the use of the group campground would be $175 and $25 for non-exclusive use of the horse camp. Interpretive and educational programs would cost $15 per person for up to a half day (4 hours) and $20 per person for a full day (6+ hours). The proposal would also charge a $5 per vehicle day use fee. An annual pass would be available for $40.

The BLM's goal for the SJRG SRMA fee program is to ensure that funding is available to maintain and enhance existing facilities and recreational opportunities, to provide for increased law enforcement presence, to develop additional services such as expanding interpretive/educational programming, and to protect resources. All fees collected would be used for expenses within the SJRG SRMA.

In April 2010, the BLM published the SJRG Business Plan which outlines operational goals of the area and the purpose of the fee program. This Business Plan provides management direction for public access to a variety of recreational opportunities and landscapes while minimizing the potential for resource damage from authorized uses. The Plan also provides a market analysis of local recreation sites and sets the basis for the fee proposal. The plan is available on line at: *http://www.blm.gov/ca/st/en/fo/bakersfield/Programs/Recreation_opportunities/SJRG_SRMA.*

The SJRG Business Plan addresses recreation opportunities, the issuance of use permits, and the charging of fees for each primary vehicle for use of the Management Area. This Plan, prepared pursuant to REA and BLM recreation fee program policy, also addresses the establishment of a permit process and the collection of user fees. This Business Plan establishes the rationale for charging recreation fees. In accordance with the BLM recreation fee program policy, the Business Plan explains the fee collection process and outlines how the fees would be used at the SJRG SRMA. The BLM has notified and involved the public at each stage of the planning process, including the proposal to collect fees, through notifications on-site and several public meetings to present and gather ideas concerning fees within the SRMA. The Pacific Southwest Region Recreation Resource Advisory Committee (RRAC) recommended approval of the fee proposal at its June 24, 2010, meeting in Mammoth Lakes, California. Future adjustments in the fee amount would be modified in accordance with the SJRG Business Plan, and through consultation with the Pacific Southwest Region RRAC and the public prior to a fee increase. Fee amounts will be posted on-site and online at the Bakersfield Field Office Web site at: *http://www.ca.blm.gov/bakersfield.* Copies of the Business Plan will be available at the Bakersfield Field Office, at the San Joaquin River Gorge office, the BLM California State Office and online at Bakersfield Field Office Web site.

The BLM welcomes public comments on this proposal. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to

withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Authority:** 16 U.S.C. 6803(b) and 43 CFR 2932.13.

**Kathryn D. Hardy,**

*Central California District Manager.*

[FR Doc. 2011–14088 Filed 6–8–11; 8:45 am]

**BILLING CODE 4310–40–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[2253–665]**

### Extension of Time for Inventory

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

The Native American Graves Protection and Repatriation Act (NAGPRA) requires museums and Federal agencies that receive Federal funds to complete item-by-item inventories of Native American human remains and associated funerary objects in their possession or control. Recent regulations (43 CFR 10.13) provide deadlines for completing inventories of human remains and associated funerary objects received after the initial 1995 deadline, as well as for situations in which human remains and associated funerary objects are culturally affiliated with a newly Federally recognized Indian Tribe or an institution receives Federal funds for the first time.

Section 5 of the statute (25 U.S.C. 3003(c)) authorizes the Secretary of the Interior to extend the inventory time requirements for museums that have made a good faith effort to complete their inventories by the regulatory deadline. The deadline for inventory completion has been extended for The Colorado Historical Society. The requested extension is granted to November 2, 2011.

Dated: April 19, 2011.

**Will Shafroth,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 2011–13396 Filed 6–8–11; 8:45 am]

**BILLING CODE 4312–50–M**

## DEPARTMENT OF THE INTERIOR

### Office of Natural Resources Revenue

**[Docket No. ONRR–2011–0003]**

### Assessments for Mismatched Payments or Inadequate Payment Information for Geothermal, Solid Minerals, and Indian Oil and Gas Leases

**AGENCY:** Office of Natural Resources Revenue, Interior.

**ACTION:** Notice.

**SUMMARY:** Regulations for geothermal, solid minerals, and Indian oil and gas leases authorize the Office of Natural Resources Revenue (ONRR) to assess payors for failure to submit payments of the same amount as the royalty or bill document, or to provide adequate information. The amount assessed for each mismatched or inadequately identified payment will be $214.00, effective on the date stated below.

**DATES:** *Effective Date:* July 11, 2011.

**FOR FURTHER INFORMATION CONTACT:** Paul Knueven, Financial Management (FM), ONRR; telephone (303) 231–3316; e-mail *paul.knueven@onrr.gov;* or Joseph Muniz, FM, ONRR, telephone (303) 231–3103; e-mail *joseph.muniz@onrr.gov.* Fax: (303) 231–3711. Mailing address: Department of the Interior, Office of Natural Resources Revenue, P.O. Box 25165, MS 61211B, Denver, Colorado 80225–0165.

**SUPPLEMENTARY INFORMATION:** On March 26, 2008, ONRR (formerly Minerals Management Service's Minerals Revenue Management) published a final rule titled "Reporting Amendments" (73 FR 15885), with effective date April 25, 2008. This rule revised 30 CFR 1218.41 to comply with the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996. The regulations authorize ONRR to assess payors for failure to submit payments of the same amount as the royalty or bill document, or to provide adequate information. Section 1218.41(f) requires ONRR to publish the assessment amount and the effective date in the **Federal Register**.

The ONRR bases the amount of the assessment on ONRR's cost experience with improper payment and identification. The assessment allows ONRR to recover the associated costs and provides industry with incentives to improve the efficiency of payment processing.

Dated: May 31, 2011.

**Gregory J. Gould,**

*Director for Office of Natural Resources Revenue.*

[FR Doc. 2011–14276 Filed 6–8–11; 8:45 am]

**BILLING CODE 4310–MR–P**

## INTERNATIONAL TRADE COMMISSION

### Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *In Re Certain Light-Emitting Diodes and Products Containing the Same,* DN 2812; the Commission is soliciting comments on any public interest issues raised by the complaint.

**FOR FURTHER INFORMATION CONTACT:** James R. Holbein, Secretary to the Commission, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission has received a complaint filed on behalf of OSRAM GmbH on June 3, 2011. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain light-emitting diodes and products containing the same. The complaint names as respondents LG Electronics Inc. of Seoul, South Korea; LG Innotek Co., Ltd of Seoul, South Korea; LG Electronics U.S.A., Inc. of

Englewood Cliffs, NJ and LG Innotek U.S.A., Inc. of San Diego, CA.

The complainant, proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five pages in length, on any public interest issues raised by the complaint. Comments should address whether issuance of an exclusion order and/or a cease and desist order in this investigation would negatively affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the potential orders;

(iii) indicate the extent to which like or directly competitive articles are produced in the United States or are otherwise available in the United States, with respect to the articles potentially subject to the orders; and

(iv) indicate whether Complainant, Complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to an exclusion order and a cease and desist order within a commercially reasonable time.

Written submissions must be filed no later than by close of business, five business days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Submissions should refer to the docket number ("Docket No. 2812") in a prominent place on the cover page and/or the first page. The Commission's rules authorize filing submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf*). Persons with questions regarding electronic filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.50(a)(4) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.50(a)(4)).

By order of the Commission.

Issued: June 3, 2011.

**James R. Holbein,**

*Secretary to the Commission.*

[FR Doc. 2011–14224 Filed 6–8–11; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

### Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *In Re Certain Light-Emitting Diodes and Products Containing Same,* DN 2813; the Commission is soliciting comments on any public interest issues raised by the complaint.

**FOR FURTHER INFORMATION CONTACT:** James R. Holbein, Secretary to the Commission, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission has received a complaint filed on behalf of OSRAM GmbH on June 3, 2011. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain light-emitting diodes and products containing same. The complaint names as respondents Samsung Electronics Co., Ltd of Korea; Samsung Electronics America, Inc. of Ridgefield Park, NJ; Samsung LED Co., Ltd. of Korea and Samsung LED America, Inc. of Atlanta, GA.

The complainant, proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five pages in length, on any public interest issues raised by the complaint. Comments should address whether issuance of an exclusion order and/or a cease and desist order in this investigation would negatively affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the potential orders;

(iii) Indicate the extent to which like or directly competitive articles are produced in the United States or are otherwise available in the United States, with respect to the articles potentially subject to the orders; and

(iv) Indicate whether Complainant, Complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to an exclusion order and a cease and desist order within a commercially reasonable time.

Written submissions must be filed no later than by close of business, five business days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any

final initial determination in this investigation.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Submissions should refer to the docket number ("Docket No. 2813") in a prominent place on the cover page and/or the first page. The Commission's rules authorize filing submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf*). Persons with questions regarding electronic filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.50(a)(4) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.50(a)(4)).

By order of the Commission.

Issued: June 3, 2011.

**James R. Holbein,**

*Secretary to the Commission.*

[FR Doc. 2011–14225 Filed 6–8–11; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 701–TA–476 and 731–TA–1179 Final]**

## Multilayered Wood Flooring From China; Scheduling of the Final Phase of Countervailing Duty and Antidumping Investigations

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission hereby gives notice of the scheduling of the final phase of countervailing duty investigation No. 701–TA–476 (Final) under section 705(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)) (the Act) and the final phase of antidumping investigation No. 731–TA–1179 (Final) under section 735(b) of the Act (19 U.S.C. 1673d(b)) to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of subsidized and less-than-fair-value imports from China of multilayered wood flooring ("MLWF"), provided for in subheadings 4409.10, 4409.29, 4412.31, 4412.32, 4412.39, 4412.94, 4412.99, 4418.71, 4418.72, 4418.79.00, and 4418.90 of the Harmonized Tariff Schedule of the United States.[1]

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

**DATES:** *Effective Date:* May 20, 2011.

**FOR FURTHER INFORMATION CONTACT:** Fred Ruggles (202–205–3187 or *fred.ruggles@usitc.gov*), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

**SUPPLEMENTARY INFORMATION:**

*Background.*—The final phase of these investigations is being scheduled as a result of affirmative preliminary determinations by the Department of Commerce that certain benefits which constitute subsidies within the meaning of section 703 of the Act (19 U.S.C. 1671b) are being provided to manufacturers, producers, or exporters in China of MLWF, and that such products are being sold in the United States at less than fair value within the meaning of section 733 of the Act (19 U.S.C. 1673b). The investigations were requested in a petition filed on October 21, 2010, on behalf of the Coalition for American Hardwood Parity ("CAHP"), an ad hoc association of U.S. manufacturers of multilayered wood flooring. The following companies are members of the CAHP: Anderson Hardwood Floors, LLC, Fountain Inn, SC; Award Hardwood Floors, Wausau, WI; Baker's Creek Wood Floors, Inc., Edwards, MS; From the Forest, Weston, WI; Howell Hardwood Flooring, Dothan, AL; Mannington Mills, Inc., Salem, NJ; Nydree Flooring, Forest, VA; and Shaw Industries Group, Inc., Dalton, GA.

*Participation in the investigations and public service list.*—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigations need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

*Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.*—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

[1] For purposes of these investigations, the Department of Commerce has defined the subject merchandise as "* * * multilayered wood flooring, composed of an assembly of two or more layers or plies of wood veneers in combination with a core. The core may be composed of hardwood or softwood veneer, particleboard, medium-density fiberboard, high density fiberboard, stone and/or plastic composite, or strips of lumber placed edge-to-edge. Multilayered wood flooring is typically manufactured with a "tongue-and-groove" construction. These products are generally used as the floor in residential or commercial building, as well as in schools, showrooms, gymnasiums and other constructions." 76 FR 30656, May 26, 2011.

*Staff report.*—The prehearing staff report in the final phase of these investigations will be placed in the nonpublic record on September 26, 2011, and a public version will be issued thereafter, pursuant to section 207.22 of the Commission's rules.

*Hearing.*—The Commission will hold a hearing in connection with the final phase of these investigations beginning at 9:30 a.m. on October 12, 2011, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before October 5, 2011. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on October 7, 2011, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *incamera* no later than 7 business days prior to the date of the hearing.

*Written submissions.*—Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.23 of the Commission's rules; the deadline for filing is October 4, 2011. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.25 of the Commission's rules. The deadline for filing posthearing briefs is October 19, 2011; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations, including statements of support or opposition to the petition, on or before October 19, 2011. On November 2, 2011, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before November 4, 2011, but such final comments must not contain new factual information and must otherwise comply with section 207.30 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II (C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68168, 68173 (November 8, 2002).

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

**Authority:** These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

By order of the Commission.

Issued: June 6, 2011.

**James R. Holbein,**

*Secretary to the Commission.*

[FR Doc. 2011–14303 Filed 6–8–11; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

### Public Availability of the U.S. International Trade Commission's FY 2010 Service Contract Inventory; Public Availability of FY 2010 Service Contract Inventory

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** In accordance with Section 743 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111–117), the U.S. International Trade Commission is publishing this notice to advise the public of the availability of the FY 2010 Service Contract Inventory. This inventory provides information on service contract actions over $25,000 that were made in FY 2010. The information is organized by function to show how contracted resources are distributed throughout the agency. The inventory has been developed in accordance with guidance issued on November 5, 2010 by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). OFPP's guidance is available at *http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf.* The U.S. International Trade Commission has posted its inventory on its homepage at the following link: *http://www.usitc.gov/procurement/index.htm.*

**FOR FURTHER INFORMATION CONTACT:** Questions regarding the service contract inventory should be directed to Stephen A. McLaughlin in the Office of Administration at 202–205–3131 or *Stephen.McLaughlin@usitc.gov.*

By order to the Commission.

Dated: June 6, 2011.

**James R. Holbein,**

*Secretary to the Commission.*

[FR Doc. 2011–14302 Filed 6–8–11; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[USITC SE–11–014]**

### Government in the Sunshine Act Meeting Notice

**AGENCY HOLDING THE MEETING:** United States International Trade Commission.

**TIME AND DATE:** June 13, 2011 at 1 p.m.

**PLACE:** Room 110, 500 E Street, SW., Washington, DC 20436. Telephone: (202) 205–2000.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:**

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote in Inv. No. 731–TA–669 (Third Review) (Cased Pencils from China). The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before June 24, 2011.
5. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the

following meeting. Earlier announcement of this meeting was not possible.

By order of the Commission:

Issued: June 7, 2011.

**James R. Holbein,**

*Secretary to the Commission.*

[FR Doc. 2011–14471 Filed 6–7–11; 4:15 pm]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

Pursuant to Section 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. 9622, notice is hereby given that on May 31, 2011, a proposed Consent Decree in *United States* v. *United Nuclear Corporation,* No. CV 11–01060–PHX–NVW (D. Ariz.), was lodged with the United States District Court for the District of Arizona with respect to the Pine Mountain Mine Site ("Site") located in the Tonto National Forest in Arizona.

On May 27, 2011, the United States, on behalf of the U.S. Department of Agriculture, Forest Service ("Forest Service"), filed a Complaint in this matter against defendant United Nuclear Corporation ("UNC") pursuant to CERCLA Section 107, 42 U.S.C. 9607, for environmental response costs incurred or to be incurred by the Forest Service to address releases or threatened releases of hazardous substances at the Site. The proposed Consent Decree resolves the claims in the Complaint. Under the Consent Decree, UNC will pay the Forest Service $800,000 in reimbursement of response costs. In return, UNC and certain of its corporate affiliates receive a covenant not to sue or to take administrative action pursuant to Sections 106 and 107 of CERCLA, 42 U.S.C. 9606 and 9607, from the United States with respect to certain response costs and response actions, including the costs of, and performance by, the Forest Service of a removal action at the Site to address the mercury and other hazardous substances present in the mining wastes and sediments at the Site.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Settlement Agreement. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *United Nuclear Corporation,* No. CV 11–01060–PHX–NVW (D. Ariz.), D.J. Ref. 90–11–3–07803/1.

During the public comment period, the proposed Consent Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.*

A copy of the proposed Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax 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 $6.25 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

**Henry Friedman,**

*Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2011–14323 Filed 6–8–11; 8:45 am]

**BILLING CODE 4410–15–P**

## DEPARTMENT OF JUSTICE

### Notice of Lodging Proposed Consent Decree

In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given that a proposed Consent Decree in *United States* v. *Candle Development, LLC,* Case No. 08–4086, was lodged with the United States District Court for the District of South Dakota, Southern Division, on June 3, 2011.

This proposed Consent Decree concerns a complaint filed by the United States against Candle Development, LLC, pursuant to Sections 301, 309, and 404 of the Clean Water Act, 33 U.S.C. 1311, 1319, and 1344, to obtain injunctive relief from and impose civil penalties against the Defendants for violating the Clean Water Act by, among other things, discharging pollutants without a permit into waters of the United States. The proposed Consent Decree resolves these allegations by requiring the Defendants to restore the impacted areas and/or mitigate the damages and to pay a civil penalty.

The Department of Justice will accept written comments relating to this proposed Consent Decree for thirty (30) days from the date of publication of this Notice. Please address comments to David A. Carson, United States Department of Justice, Environment and Natural Resources Division, 999 18th Street, South Terrace, Suite 370, Denver, Colorado, 80202, and refer to *United States* v. *Candle Development, LLC,* DJ# 90–5–1–1–17957.

The proposed Consent Decree may be examined at the Clerk's Office, United States District Court for the District of South Dakota, Southern Division. In addition, the proposed Consent Decree may be viewed at *http://www.usdoj.gov/enrd/Consent_Decrees.html.*

**Cherie Rogers,**

*Assistant Section Chief, Environmental Defense Section, Environment & Natural Resources Division.*

[FR Doc. 2011–14234 Filed 6–8–11; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in Schedule I or II, and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with 21 CFR 1301.34(a), this is notice that on March 25, 2011, AllTech Associates Inc., 2051 Waukegan Road, Deerfield, Illinois 60015, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the following basic classes of controlled substances:

| Drug | Schedule |
|---|---|
| Gamma Hydroxybutyric Acid (2010). | I |
| Lysergic acid diethylamide (7315) | I |
| Heroin (9200) | I |
| Cocaine (9041) | II |
| Codeine (9050) | II |
| Hydrocodone (9193) | II |
| Meperidine (9230) | II |
| Methadone (9250) | II |
| Morphine (9300) | II |

The company plans to import these controlled substances for the manufacture of reference standards.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic classes of controlled substances may file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43, and in such form as prescribed by 21 CFR 1316.47.

Any such written comments or objections should be addressed, in quintuplicate, to Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than July 11, 2011.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, 40 FR 43745–46, all applicants for registration to import a basic class of any controlled substance in Schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: June 1, 2011.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2011–14255 Filed 6–8–11; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a), Title 21 of the Code of Federal Regulations (CFR), this is notice that on March 28, 2011, Alltech Associates Inc., 2051 Waukegan Road, Deerfield, Illinois 60015, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the following basic classes of controlled substances:

| Drug | Schedule |
|---|---|
| Methcathinone (1237) | I |
| N-ethylamphetamine (1475) | I |
| N,N-dimethylamphetamine (1480) | I |
| 4-methylaminorex (cis isomer) (1590). | I |
| Alpha-ethyltryptamine (7249) | I |
| Lysergic acid diethylamide (7315) | I |
| 2,5-dimethoxy-4-(n)-propylthiophenethylamine. (7348) | I |
| Tetrahydrocannabinols (7370) | I |
| Mescaline (7381) | I |
| 4-bromo-2,5-dimethoxy-amphetamine (7391). | I |
| 4–Bromo-2,5-dimethoxyphenethylamine (7392). | I |
| 4-methyl-2,5-dimethoxy-amphetamine (7395). | I |
| 2,5-dimethoxyamphetamine (7396). | I |
| 2,5-dimethoxy-4-ethylamphetamine (7399). | I |
| 3,4-methylenedioxy amphetamine (7400). | I |
| N-hydroxy-3,4-methylenedioxyamphetamine (7402). | I |
| 3,4-methylenedioxy-N-ethylamphetamine (7404). | I |
| 3,4-methylenedioxymethamphetamine (MDMA) (7405). | I |
| 4-methoxyamphetamine (7411) | I |
| Alpha-methyltryptamine (7432) | I |
| Bufotenine (7433) | I |
| Diethyltryptamine (7434) | I |
| Dimethyltryptamine (7435) | I |
| Psilocybin (7437) | I |
| Psilocyn (7438) | I |
| 5-methoxy-N,N-diisopropyltryptamine (7439). | I |
| N-ethyl-1-phenylcyclohexylamine (7455). | I |
| 1-(1-phenylcyclohexyl)-pyrrolidine (7458). | I |
| 1-[1-(2-thienyl)-cyclohexyl]-piperidine (7470). | I |
| Dihydromorphine (9145) | I |
| Normorphine (9313) | I |
| Methamphetamine (1105) | II |
| 1-phenylcyclohexylamine (7460) | II |
| Phencyclidine (7471) | II |
| Phenylacetone (8501) | II |
| 1-piperidinocyclohexane-carbonitrile (8603). | II |
| Cocaine (9041) | II |
| Codeine (9050) | II |
| Dihydrocodeine (9120) | II |
| Ecgonine (9180) | II |
| Meperidine intermediate-B (9233) | II |
| Noroxymorphone (9668) | II |

The company plans to manufacture high purity drug standards used for analytical applications only in clinical, toxicological, and forensic laboratories.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR § 1301.33(a).

Any such comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than August 8, 2011.

Dated: June 1, 2011.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. 2011–14253 Filed 6–8–11; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF JUSTICE

### Federal Bureau of Investigation

### Notice of Charter Reestablishment

In accordance with the provisions of the Federal Advisory Committee Act, Title 5, United States Code, Appendix, and Title 41, Code of Federal Regulations, Section 101–6.1015, with the concurrence of the Attorney General, I have determined that the reestablishment of the Criminal Justice Information Services (CJIS) Advisory Policy Board (APB) is in the public interest. In connection with the performance of duties imposed upon the FBI by law, I hereby give notice of the reestablishment of the APB Charter.

The APB provides me with general policy recommendations with respect to the philosophy, concept, and operational principles of the various criminal justice information systems managed by the FBI's CJIS Division.

The APB includes representatives from local and state criminal justice agencies; Tribal law enforcement representatives; members of the judicial, prosecutorial, and correctional sectors of the criminal justice community, as well as one individual representing a national security agency; a representative of Federal agencies participating in the CJIS Division Systems; and representatives of criminal justice professional associations (*i.e.,* the American Probation and Parole Association; American Society of Crime Laboratory Directors, Inc.; International Association of Chiefs of Police; National District Attorneys' Association; National Sheriffs' Association; Major Cities Chiefs' Association; Major County Sheriffs' Association; and a representative from a national professional association representing the courts or court administrators nominated by the Conference of Chief Justices). The Attorney General has

granted me the authority to appoint all members to the APB.

The APB functions solely as an advisory body in compliance with the provisions of the Federal Advisory Committee Act. The Charter has been filed in accordance with the provisions of the Act.

Dated: May 25, 2011.

**Robert S. Mueller, III,**

*Director.*

[FR Doc. 2011–14110 Filed 6–8–11; 8:45 am]

**BILLING CODE 4410–02–M**

## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Steel Erection

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the Occupational Safety and Health Administration (OSHA) sponsored information collection request (ICR) titled, "Steel Erection (29 CFR part 1926, subpart R)," to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

**DATES:** Submit comments on or before July 11, 2011.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by sending an e-mail to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor, Occupational Safety and Health Administration (OSHA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–4816/Fax: 202–395–6881 (these are not toll-free numbers), e-mail: *OIRA_submission@omb.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** Contact the DOL Information Management Team by e-mail at *DOL_PRA_PUBLIC@dol.gov.*

**SUPPLEMENTARY INFORMATION:** The Standard on Steel Erection requires that workers exposed to fall hazards receive specified training in the recognition and control of these hazards and that they are notified that building materials, components, steel structures, and fall protection equipment are safe for specific uses.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid OMB control number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under OMB Control Number 1218–0241. The current OMB approval is scheduled to expire on June 30, 2011; however, it should be noted that information collections submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on March 2, 2011 (76 FR 11516).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should reference OMB Control Number 1218–0241. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

*Agency:* Occupational Safety and Health Administration (OSHA).

*Title of Collection:* Steel Erection (29 CFR part 1926, subpart R).

*OMB Control Number:* 1218–0241.

*Affected Public:* Business or other for-profits.

*Total Estimated Number of Respondents:* 15,758.

*Total Estimated Number of Responses:* 91,852.

*Total Estimated Annual Burden Hours:* 23,602.

*Total Estimated Annual Other Costs Burden:* $0.

**Linda Watts-Thomas,**

*Acting Departmental Clearance Officer.*

[FR Doc. 2011–14336 Filed 6–8–11; 8:45 am]

**BILLING CODE 4510–26–P**

## DEPARTMENT OF LABOR

### Mine Safety and Health Administration

### Affirmative Decisions on Petitions for Modification Granted in Whole or in Part

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Notice.

**SUMMARY:** Section 101(c) of the Federal Mine Safety and Health Act of 1977 and 30 CFR part 44 govern the application, processing, and disposition of petitions for modification. This **Federal Register** Notice notifies the public that it has investigated and issued a final decision on certain mine operator petitions to modify a safety standard.

**ADDRESSES:** Copies of the final decisions are posted on MSHA's Web Site at *http://www.msha.gov/indexes/petition.htm.* The public may inspect the petitions and final decisions during normal business hours in MSHA's Office of Standards, Regulations and Variances, 1100 Wilson Boulevard, Room 2349, Arlington, Virginia 22209. All visitors must first stop at the receptionist desk on the 21st Floor to sign-in.

**FOR FURTHER INFORMATION CONTACT:** Roslyn B. Fontaine, Acting Director, Office of Standards, Regulations and Variances at 202–693–9475 (Voice), *fontaine.roslyn@dol.gov* (E-mail), or 202–693–9441 (Telefax), or Barbara Barron at 202–693–9447 (Voice), *barron.barbara@dol.gov* (E-mail), or 202–693–9441 (Telefax). [These are not toll-free numbers].

**SUPPLEMENTARY INFORMATION:**

#### I. Introduction

Under section 101 of the Federal Mine Safety and Health Act of 1977, a mine

operator may petition and the Secretary of Labor (Secretary) may modify the application of a mandatory safety standard to that mine if the Secretary determines that: (1) An alternative method exists that will guarantee no less protection for the miners affected than that provided by the standard; or (2) that the application of the standard will result in a diminution of safety to the affected miners.

MSHA bases the final decision on the petitioner's statements, any comments and information submitted by interested persons, and a field investigation of the conditions at the mine. In some instances, MSHA may approve a petition for modification on the condition that the mine operator complies with other requirements noted in the decision.

**II. Granted Petitions for Modification**

On the basis of the findings of MSHA's investigation, and as designee of the Secretary, MSHA has granted or partially granted the following petitions for modification:

• *Docket Number:* M–2008–021–C.
*FR Notice:* 73 FR 31147 (May 30, 2008).
*Petitioner:* Rosebud Mining Company, 301 Market Street, Kittanning, Pennsylvania 16201.
*Mine:* Rossmoyne No. 1 Mine, MSHA I.D. No. 36–09075, located in Indiana County, Pennsylvania.
*Regulation Affected:* 30 CFR 75.500(b), (c), and (d) (Permissible electric equipment).

• *Docket Number:* M–2008–022–C.
*FR Notice:* 73 FR 31148 (May 30, 2008).
*Petitioner:* Rosebud Mining Company, 301 Market Street, Kittanning, Pennsylvania 16201.
*Mine:* Darmac No. 2 Mine, MSHA I.D. No. 36–08135, located in Armstrong County, Pennsylvania.
*Regulation Affected:* 30 CFR 75.500(b), (c), and (d) (Permissible electric equipment).

• *Docket Number:* M–2008–024–C.
*FR Notice:* 73 FR 31149 (May 30, 2008).
*Petitioner:* Rosebud Mining Company, 301 Market Street, Kittanning, Pennsylvania 16201.
*Mine:* T.J.S. No. 6 Mine, MSHA I.D. No. 36–09464, located in Armstrong County, Pennsylvania.
*Regulation Affected:* 30 CFR 75.500(b), (c), and (d) (Permissible electric equipment).

• *Docket Number:* M–2009–004–C.
*FR Notice:* 74 FR 23747 (May 20, 2009.)
*Petitioner:* Cumberland Coal Resource LP, Three Gateway Center, 401 Liberty Avenue, Suite 1340, Pittsburgh, Pennsylvania 15222.
*Mine:* Cumberland Mine, MSHA I.D. No. 36–05018, located in Greene County, Pennsylvania.
*Regulation Affected:* 30 CFR 75.1700 (Oil and gas wells).

• *Docket Number:* M–2009–010–C.
*FR Notice:* 74 FR 23746 (May 20, 2009).
*Petitioner:* Frasure Creek Mining, LLC, P.O. Box 142, Justice, West Virginia 24851.
*Mine:* Deep Mine No. 15, MSHA I.D. No. 46–09209, located in Fayette County, West Virginia.
*Regulation Affected:* 30 CFR 75.1101–1(b) (Deluge-type water spray systems).

• *Docket Number:* M–2009–020–C.
*FR Notice:* 74 FR 67913 (December 21, 2009).
*Petitioner:* Consolidation Coal Company, 1800 Washington Road, Pittsburgh, Pennsylvania 15241.
*Mine:* Blacksville No. 2 Mine, MSHA I.D. No. 46–01968, located in Monongalia County, West Virginia.
*Regulation Affected:* 30 CFR 75.1700 (Oil and gas wells).

• *Docket Number:* M–2009–023–C.
*FR Notice:* 74 FR 67915 (December 21, 2009).
*Petitioner:* Blue Mountain Energy, Inc., 3607 County Road #65, Rangely, Colorado 81648.
*Mine:* Deserado Mine, MSHA I.D. No. 05–03505, located in Rio Blanco County, Colorado.
*Regulation Affected:* 30 CFR 75.380(d)(4)(iv) (Escapeway; bituminous and lignite mines).

• *Docket Number:* M–2009–037–C.
*FR Notice:* 74 FR 63413 (December 3, 2009).
*Petitioner:* Signal Peak Energy, 100 Portal Drive, Roundup, Montana 59072.
*Mine:* Bull Mountain Mine No. 1, Mine No. 1, MSHA I.D. No. 24–01950, located in Musselshell County, Montana.
*Regulation Affected:* 30 CFR 75.1909(b)(6) (Nonpermissible diesel-powered equipment; design and performance requirements).

• *Docket Number:* M–2009–041–C.
*FR Notice:* 74 FR 63415 (December 3, 2009).
*Petitioner:* ICG Illinois, LLC, 8100 East Main Street, Williamsville, Illinois 62693.
*Mine:* Viper Mine, MSHA I.D. No. 11–02664, located in Sangamon County, Illinois.
*Regulation Affected:* 30 CFR 75.1101–1(b) (Deluge-type water spray systems).

• *Docket Number:* M–2009–043–C.
*FR Notice:* 74 FR 67923 (December 21, 2009).
*Petitioner:* Nelson Brothers, LLC, 707 Virginia Street, East, 901 Chase Tower, P.O. Box 913, Charleston, West Virginia 25323.
*Mine:* Alex Energy, Inc., Edwight Surface Mine, MSHA I.D. No. 46–08977, located in Raleigh County, West Virginia; Alex Energy, Inc., No. 1 Surface Mine, MSHA I.D. No. 46–06870, located in Nicholas County, West Virginia; Elk Run Coal Company, Republic Energy Mine, MSHA I.D. No. 46–07938, located in Fayette County, West Virginia; Elk Run Coal Company, Black Castle Mining Company Mine, MSHA I.D. No. 46–07938 and Progress Coal, Twilight Mtr. Surface Mine, MSHA I.D. No. 46–08645, located in Boone County, West Virginia.
*Regulation Affected:* 30 CFR 77.1302(k) (Vehicles used to transport explosives).

• *Docket Number:* M–2009–055–C.
*FR Notice:* 75 FR 3259 (January 10, 2010).
*Petitioner:* Prairie State Generating Company, LLC, 4274 County Highway 12, Marissa, Illinois 62257.
*Mine:* Lively Grove Mine, MSHA I.D. No. 11–03193, located in Washington County, Illinois.
*Regulation Affected:* 30 CFR 75.503 (Permissible electric face equipment; maintenance) and 30 CFR 18.35 (Portable (trailing) cables and cords).

• *Docket Number:* M–2010–001–C.
*FR Notice:* 75 FR 12797 (March 17, 2010).
*Petitioner:* Lone Mountain Processing, Inc., Drawer C, St. Charles, Virginia 24282.
*Mine:* Huff Creek No. 1 Mine, MSHA I.D. No. 15–17234, located in Harlan County, Kentucky.
*Regulation Affected:* 30 CFR 75.364(b)(1) (Weekly examination).

• *Docket Number:* M–2010–002–C.
*FR Notice:* 75 FR 12797 (March 17, 2010).
*Petitioner:* Bridger Coal Company, P.O. Box 68, Point of Rocks, Wyoming 82942
*Mine:* Bridger Underground Coal Mine, MSHA I.D. No. 48–01646, located in Sweetwater County, Wyoming.
*Regulation Affected:* 30 CFR 75.1700 (Oil and gas wells).

• *Docket Number:* M–2010–013–C.
*FR Notice:* 75 FR 16187 (March 31, 2010).
*Petitioner:* RoxCoal, Inc., 1576 Stoystown Road, P.O. Box 149, Friedens, Pennsylvania 15541.
*Mine:* Roytown Deep Mine, MSHA I.D. No. 36–09260 and Quecreek #1 Mine, MSHA I.D. No. 36–08746, located in Somerset County, Pennsylvania.
*Regulation Affected:* 30 CFR 75.1101–1(b) (Deluge-type water spray systems).

• *Docket Number:* M–2010–015–C.
*FR Notice:* 75 FR 16188 (March 31, 2010).
*Petitioner:* Sunrise Coal, LLC, 1183 East Canvasback Drive, Terre Haute, Indiana 47802
*Mine:* Carlisle Mine, MSHA I.D. No. 12–02349, located in Sullivan County, Indiana.
*Regulation Affected:* 30 CFR 75.1700 (Oil and gas wells).

• *Docket Number:* M–2010–016–C.
*FR Notice:* 75 FR 16188 (March 31, 2010).
*Petitioner:* Lone Mountain Processing, Inc., Drawer C, St. Charles, Virginia 24282.
*Mine:* Darby Fork No. 1 Mine, MSHA I.D. No. 15–02263, Huff Creek No. 1 Mine, MSHA I.D. No. 15–17234, and Clover Fork No. 1 Mine, MSHA I.D. No. 15–18647, located in Harlan County, Kentucky.
*Regulation Affected:* 30 CFR 75.208 (Warning devices).

• *Docket Number:* M–2010–020–C.
*FR Notice:* 75 FR 29784 (May 27, 2010).
*Petitioner:* Wolf Run Mining Company, Route 3, Box 146, Philippi, West Virginia 26416.
*Mine:* Sentinel Mine, MSHA I.D. No. 46–04168, located in Barbour County, West Virginia.
*Regulation Affected:* 30 CFR 75.1909(b)(6) (Nonpermissible diesel-powered equipment; design and performance requirements).

• *Docket Number:* M–2010–023–C.
*FR Notice:* 75 FR 29784 (May 27, 2010).
*Petitioner:* Rosebud Mining Company, 301 Market Street, Kittanning, Pennsylvania 16201.
*Mine:* Tracy Lynne Mine, MSHA I.D. No. 36–08603 and Clementine Mine, MSHA I.D. No. 36–08862, located in Armstrong County, Pennsylvania; Penfield Mine, MSHA I.D. No. 36–09355, located in Clearfield County, Pennsylvania; Mine 78, MSHA I.D. No. 36–09371, located in Somerset County, Pennsylvania; and Heilwood Mine, MSHA I.D. No. 36–09407, Lowry Mine, MSHA I.D. No. 36–09287, Tom's Run Mine, MSHA I.D. No. 36–08525 and Cherry Tree Mine, MSHA I.D. No. 36–09224, located in Indiana County, Pennsylvania.
*Regulation Affected:* 30 CFR 75.503 (Permissible electric face equipment; maintenance) and 30 CFR 18.35 (Portable (trailing) cables and cords).

• *Docket Number:* M–2010–032–C.
*FR Notice:* 75 FR 49537 (August 13, 2010).
*Petitioner:* M–Class Mining, LLC, P.O. Box 227, Johnston City, Illinois 62951.
*Mine:* MC #1 Mine, MSHA I.D. No. 11–03189, located in Franklin County, Illinois.
*Regulation Affected:* 30 CFR 75.1700 (Oil and gas wells).

Dated: June 3, 2011.

**Patricia W. Silvey,**

*Certifying Officer.*

[FR Doc. 2011–14214 Filed 6–8–11; 8:45 am]

**BILLING CODE 4510–43–P**

## DEPARTMENT OF LABOR

### Veterans' Employment and Training Service

### Homeless Veterans' Reintegration Into Employment

**AGENCY:** Veterans' Employment and Training Service, Department of Labor.

*Announcement Type:* New Notice of Availability of Funds and Solicitation for Grant Applications. The full announcement is posted on *http://www.grants.gov.*

*Funding Opportunity Number:* SGA 11–01.

*Key Dates:* The closing date for receipt of applications is 30 DAYS AFTER PUBLICATION via *http://www.grants.gov* .

**Funding Opportunity Description**

On October 13, 2010, President Barack Obama signed the Veterans' Benefits Act of 2010 (Pub. L. 111–275). Section 201 reauthorizes the Homeless Veterans Reintegration Program through fiscal year (FY) 2011 and indicates: "The Secretary of Labor shall conduct, directly or through grant or contract, such programs as the Secretary determines appropriate to provide job training, counseling, and placement services (including job readiness and literacy and skills training) to expedite the reintegration of homeless veterans into the labor force."

HVRP grants are intended to address two objectives: (1) To provide services to assist in reintegrating homeless veterans into meaningful employment within the labor force, and (2) to stimulate the development of effective service delivery systems that will address the complex problems facing homeless veterans.

The full Solicitation for Grant Application is posted on *http://www.grants.gov* under U.S. Department of Labor/VETS. Applications submitted through *http://www.grants.gov* or hard copy will be accepted. If you need to speak to a person concerning these grants, you may telephone Cassandra Mitchell at 202–693–4570 (not a toll-free number). If you have issues regarding access to the *http://www.grants.gov* Web site, you may telephone the Contact Center Phone at 1–800–518–4726.

Signed at Washington, DC this 3rd day of June, 2011.

**Cassandra R. Mitchell,**

*Grant Officer.*

[FR Doc. 2011–14277 Filed 6–8–11; 8:45 am]

**BILLING CODE 4510–79–P**

## NATIONAL LABOR RELATIONS BOARD

### Sunshine Act Meetings, June 2011

**TIME AND DATES:** All meetings are held at 2:30 p.m. Wednesday, June 1; Thursday, June 2; Tuesday, June 7; Wednesday, June 8; Thursday, June 9; Tuesday, June 14; Wednesday, June 15; Thursday, June 16; Tuesday, June 21; Wednesday, June 22; Thursday, June 23; Tuesday, June 28; Wednesday, June 29; Thursday, June 30.

**PLACE:** Board Agenda Room, No. 11820, 1099 14th St., NW., Washington, DC 20570.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:** Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider "the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition * * * of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto." See also 5 U.S.C. 552b(c)(10).

**CONTACT PERSON FOR MORE INFORMATION:** Lester A. Heltzer, (202) 273–1067.

Dated: June 7, 2011.

**Lester A. Heltzer,**

*Executive Secretary.*

[FR Doc. 2011–14400 Filed 6–7–11; 11:15 am]

**BILLING CODE 7545–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. NRC–2011–0009]**

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of pending NRC action to submit an information collection request to the Office of Management and

Budget (OMB) and solicitation of public comment.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) invites public comment about our intention to request the OMB's approval for renewal of an existing information collection that is summarized below. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* 10 CFR Part 72, Licensing Requirements for the Independent Storage of Spent Nuclear Fuel, High-Level Radioactive Waste and Reactor-Related Greater than Class C Waste.

2. *Current OMB approval number:* 3150–0132.

3. *How often the collection is required:* Required reports are collected and evaluated on a continuing basis as events occur; submittal of reports varies from less than one per year under some rule sections to up to an average of about 80 per year under other rule sections. Applications for new licenses, certificates of compliance (CoCs), and amendments may be submitted at anytime; applications for renewal of licenses are required every 40 years for an Independent Spent Fuel Storage Installation (ISFSI) or CoC effective May 21, 2011, and every 40 years for a Monitored Retrievable Storage (MRS) facility.

4. *Who is required or asked to report:* Certificate holders and applicants for a CoC for spent fuel storage casks; licensees and applicants for a license to possess power reactor spent fuel and other radioactive materials associated with spent fuel storage in an ISFSI; and the Department of Energy for licenses to receive, transfer, package and possess power reactor spent fuel, high-level waste, and other radioactive materials associated with spent fuel and high-level waste storage in an MRS.

5. *The number of annual respondents:* 68.

6. *The number of hours needed annually to complete the requirement or request:* 62,692 hours (26,106 reporting + 33,416 recordkeeping + 3,170 third party disclosure).

7. *Abstract:* 10 CFR part 72 establishes mandatory requirements, procedures, and criteria for the issuance of licenses to receive, transfer, and possess power reactor spent fuel and other radioactive materials associated with spent fuel storage in an ISFSI, as well as requirements for the issuance of licenses to the Department of Energy to receive, transfer, package, and possess power reactor spent fuel and high-level radioactive waste, and other associated radioactive materials in an MRS. The information in the applications, reports, and records is used by NRC to make licensing and other regulatory determinations.

Submit, by August 8, 2011, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

The public may examine and have copied for a fee publicly available documents, including the draft supporting statement, at the NRC's Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. Comments submitted should reference Docket No. NRC–2011–0009. You may submit your comments by any of the following methods. Electronic comments: Go to *http://www.regulations.gov* and search for Docket No. NRC–2011–0009. Mail comments to NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Questions about the information collection requirements may be directed to the NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by telephone at 301–415–6258, or by e-mail to *INFOCOLLECTS.Resource@NRC.GOV.*

Dated at Rockville, Maryland this 3rd day of June, 2011.

For the Nuclear Regulatory Commission.

**Tremaine Donnell,**

*NRC Clearance Officer, Office of Information Services.*

[FR Doc. 2011–14213 Filed 6–8–11; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–335; NRC–2011–0128]**

## Florida Power & Light Company, St. Lucie Plant, Unit 1; Notice of Consideration of Issuance of Amendment to Facility Operating License, and Opportunity for a Hearing and Order Imposing Procedures for Document Access to Sensitive Unclassified Non-Safeguards Information

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of license amendment request, opportunity to request a hearing and to petition for leave to intervene, and Commission order.

**DATES:** A request for a hearing must be filed by August 8, 2011. Any potential party as defined in Title 10 of the Code of Federal Regulations (10 CFR) 2.4 who believes access to sensitive unclassified non-safeguards Information (SUNSI) is necessary to respond to this notice must request document access by June 20, 2011.

**ADDRESSES:** Please include Docket ID NRC–2011–0128 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site, *http://www.regulations.gov.* Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

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

- *Federal rulemaking Web site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2011–0128. Address questions about NRC dockets to Carol Gallagher,

telephone: 301–492–3668; *e-mail: Carol.Gallagher@nrc.gov.*

• *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

• *Fax comments to*: RADB at 301–492–3446.

You can access publicly available documents related to this notice using the following methods:

• *NRC's Public Document Room (PDR):* The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* The application for amendment, dated November 22, 2010, contains proprietary information and, accordingly, those portions are being withheld from public disclosure. A redacted version of the application for amendment, dated December 15, 2010, is available electronically under ADAMS Accession No. ML103560418.

• *Federal rulemaking Web site:* Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2011–0128.

**FOR FURTHER INFORMATION CONTACT:** Tracy J. Orf, Project Manager, Plant Licensing Branch II–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: 301–415–2788; fax number: 301–415–2102; e-mail: *tracy.orf@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering issuance of an amendment to Facility Operating License No. DPR–67 issued to Florida Power & Light Company (the licensee) for operation of the St. Lucie Plant, Unit 1, located in St. Lucie County, Florida.

The proposed amendment would increase the licensed core power level for St. Lucie Plant, Unit 1, from 2700 megawatts thermal (MWt) to 3020 MWt. The increase in core thermal power will be approximately 12 percent, including a 10 percent power uprate and a 1.7 percent measurement uncertainty recapture, over the current licensed core thermal power level and is categorized as an extended power uprate. The proposed amendment would modify the renewed facility operating license and the technical specifications to support operation at the increased core thermal power level.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The amendment will not be issued prior to a hearing unless the staff makes a determination that the amendment involves no significant hazards considerations. If a request for a hearing is received, the Commission's staff may issue the amendment after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its proposed finding of no significant hazards consideration in accordance with 10 CFR 50.91 and 50.92.

## II. Opportunity To Request a Hearing

Requirements for hearing requests and petitions for leave to intervene are found in 10 CFR 2.309, "Hearing requests, petitions to intervene, requirements for standing, and contentions." Interested persons should consult 10 CFR 2.309, which is available at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852 (or call the PDR at 1–800–397–4209 or 301–415–4737). The NRC regulations are also accessible online in the NRC's Library at *http://www.nrc.gov/reading-rm/adams.html.*

## III. Petitions for Leave To Intervene

Any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the requestor/petitioner in the proceeding and how that interest may be affected by the results of the proceeding. The petition must provide the name, address, and telephone number of the requestor or petitioner and specifically explain the reasons why the intervention should be permitted with particular reference to the following factors: (1) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest.

A petition for leave to intervene must also include a specification of the contentions that the petitioner seeks to have litigated in the hearing. For each contention, the requestor/petitioner must provide a specific statement of the issue of law or fact to be raised or controverted, as well as a brief explanation of the basis for the contention. Additionally, the requestor/petitioner must demonstrate that the issue raised by each contention is within the scope of the proceeding and is material to the findings the NRC must make to support the granting of a license amendment in response to the application. The petition must include a concise statement of the alleged facts or expert opinions which support the position of the requestor/petitioner and on which the requestor/petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely. Finally, the petition must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact, including references to specific portions of the application for amendment that the requestor/petitioner disputes and the supporting reasons for each dispute, or, if the requestor/petitioner believes that the application for amendment fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the requestor's/petitioner's belief. Each contention must be one which, if proven, would entitle the requestor/petitioner to relief.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that person's admitted contentions, including the opportunity to present evidence and to submit a cross-examination plan for cross-examination of witnesses, consistent with NRC regulations, policies, and procedures. The Atomic Safety and Licensing Board

(the Licensing Board) will set the time and place for any prehearing conferences and evidentiary hearings, and the appropriate notices will be provided.

Non-timely petitions for leave to intervene and contentions, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission, the Licensing Board or a presiding officer that the petition should be granted and/or the contentions should be admitted based upon a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

A State, county, municipality, Federally-recognized Indian Tribe, or agencies thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(d)(2). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission by August 8, 2011. The petition must be filed in accordance with the filing instructions in Section IV of this document, and should meet the requirements for petitions for leave to intervene set forth in this section, except that State and Federally-recognized Indian Tribes do not need to address the standing requirements in 10 CFR 2.309(d)(1) if the facility is located within its boundaries. The entities listed above could also seek to participate in a hearing as a nonparty pursuant to 10 CFR 2.315(c).

Any person who does not wish, or is not qualified, to become a party to this proceeding may request permission to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of position on the issues, but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to such limits and conditions as may be imposed by the Licensing Board. Persons desiring to make a limited appearance are requested to inform the Secretary of the Commission August 8, 2011.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendment.

**IV. Electronic Submissions (E-Filing)**

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to request (1) A digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in the NRC's "Guidance for Electronic Submission," which is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First-class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, *Attention:* Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/EHD/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as Social Security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed by August 8, 2011. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

*Attorney for licensee:* M.S. Ross, Attorney, Florida Power & Light, P.O. Box 14000, Juno Beach, Florida 33408–0420.

*Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation*

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing sensitive unclassified non-safeguards information (SUNSI).

B. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party as defined in 10 CFR 2.4 who believes access to SUNSI is necessary to respond to this notice may request such access. A "potential party" is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SUNSI submitted later than 10 days after publication will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requestor shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The e-mail address for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *OGCmailcenter@nrc.gov,* respectively.[1] The request must include the following information:

(1) A description of the licensing action with a citation to this **Federal Register** notice;

(2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1); and

(3) The identity of the individual or entity requesting access to SUNSI and the requestor's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly-available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention.

D. Based on an evaluation of the information submitted under paragraph C.(3) the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requestor satisfies both D.(1) and D.(2) above, the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order[2] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

F. Filing of Contentions. Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI must be filed by the requestor no later than 25 days after the requestor is granted access to that information. However, if more than 25 days remain between the date the petitioner is granted access to the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.

G. Review of Denials of Access.

(1) If the request for access to SUNSI is denied by the NRC staff either after a determination on standing and need for access, or after a determination on trustworthiness and reliability, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) The requestor may challenge the NRC staff's adverse determination by filing a challenge within 5 days of receipt of that determination with: (a) the presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief

[1] While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's "E-Filing Rule," the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

[2] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

Administrative Judge, or if he or she is unavailable, another administrative judge, or an administrative law judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

H. Review of Grants of Access. A party other than the requestor may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed with the Chief Administrative Judge within 5 days of the notification by the NRC staff of its grant of access.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[3]

I. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR Part 2.

Attachment 1 to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

*It is so ordered.*

Dated at Rockville, Maryland, this 2nd day of June 2011.

For the Nuclear Regulatory Commission.

**Andrew L. Bates,**

*Acting, Secretary of the Commission.*

**Attachment 1—General Target Schedule for Processing and Resolving Requests for Access to Sensitive Unclassified Non-Safeguards Information in This Proceeding**

| Day | Event/activity |
|---|---|
| 0 | Publication of FEDERAL REGISTER notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests. |
| 10 | Deadline for submitting requests for access to sensitive unclassified non-safeguards information (SUNSI) with information: supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding. |
| 60 | Deadline for submitting petition for intervention containing: (i) Demonstration of standing; (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 requestor/petitioner reply). |
| 20 | Nuclear Regulatory Commission (NRC) staff informs the requestor of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. (NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents). |
| 25 | If NRC staff finds no "need" or no likelihood of standing, the deadline for requestor/petitioner to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds "need" for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access. |
| 30 | Deadline for NRC staff reply to motions to reverse NRC staff determination(s). |
| 40 | (Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI. |
| A | If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff. |
| A + 3 | Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI consistent with decision issuing the protective order. |
| A + 28 | Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline. |
| A + 53 | (Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI. |
| A + 60 | (Answer receipt +7) Petitioner/Intervenor reply to answers. |
| >A + 60 | Decision on contention admission. |

[3] Requestors should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI request submitted to the NRC staff under these procedures.

[FR Doc. 2011–14262 Filed 6–8–11; 8:45 am]
**BILLING CODE 7590–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64597; File No. SR–CHX–2011–10]**

## Self-Regulatory Organizations; Chicago Stock Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Orders That Are Eligible for Entry to the Exchange's Matching System

June 3, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on May 31, 2011, the Chicago Stock Exchange, Incorporated ("Exchange" or "CHX") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend CHX Article 20, Rule 4 which governs orders that are eligible for entry to the Exchange's Matching System. The text of this proposed rule change is available on the Exchange's Web site at (*http://www.chx.com*), at the Exchange's Office of the Secretary, and in the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CHX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange is proposing to amend CHX Article 20, Rule 4, which governs the basic requirements for order eligibility in the CHX Matching System.[5] The rule is essentially broken down into two parts: (i) Basic requirements for an order to be deemed acceptable by the Matching System and (ii) order types and indications that are eligible for entry to and accepted by the Matching System. The Exchange is proposing to amend CHX Article 20, Rule 4 as it pertains to order eligibility by providing the Exchange with the ability to determine on an *order type* by *order type* basis which orders and indications are eligible for entry to the Matching System.[6]

Currently, all orders sent to the Matching System must meet the requirements specified in CHX Article 20, Rule 4(a) and shall be automatically rejected if they do not meet those requirements. In addition, the Matching System will only accept the order types and order indications that are defined in CHX Article 20, Rule 4(b). Currently, by rule the Matching System must accept each and every order type and order indication found in CHX Article 20, Rule 4(b). If the Exchange determines that a certain order type (or order indication) should no longer be eligible for entry into the Matching System, the Exchange would need to submit a formal rule change with the Securities and Exchange Commission ("SEC") pursuant to Section 19(b)(1) of the Act[7] and Rule 19b–4 thereunder,[8] in order to eliminate such order type from the rule.

For purposes of efficiency and flexibility in determining which orders shall be eligible for entry to the Matching System (at any point in time), the Exchange is proposing to amend its rule to give the Exchange the ability to turn an order type under CHX Article 20, Rule 4(b) on or off without having to file a formal rule change with the SEC.[9] By making this change, the Exchange will be able to designate on an *order type* by *order type* basis which orders under CHX Article 20, Rule 4(b) will be eligible for entry to and accepted by the Matching System. Under the proposal, when the Exchange determines to make an order eligible or ineligible under the rule (*e.g.,* turns an order on or off), the Exchange will provide notification of such change to its market participants through the issuance of a regulatory circular and identify which orders under the rule are eligible for entry to the Matching System. Such notification will be provided by the Exchange in a manner which will give reasonable advance notice to its market participants. For example, the Exchange will not designate an order type eligible or ineligible intraday.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act in general,[10] and furthers the objectives of Section 6(b)(5) in particular,[11] in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transaction in securities, to remove impediments and perfect the mechanisms of a free and open market, and, in general, to protect investors and the public interest by giving the Exchange the ability to determine which orders under CHX Article 20, Rule 4(b) are eligible for entry to and accepted by the Exchange's Matching System.

The flexibility to turn certain order types on and off will give the Exchange the ability to accept orders into its Matching System that is consistent with order types that are eligible at other market centers. This flexibility will be especially beneficial when the Exchange implements a routing system that routes unexecuted orders to other market centers. For example, certain CHX order types defined in CHX Article 20, Rule 4(b) may not be acceptable at other exchanges and by being able to turn an order on or off will give the Exchange

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] The CHX Matching System is our core trading facility. *See* CHX Article 20 generally for the operation of the CHX Matching System.

[6] The Chicago Board Options Exchange, Incorporated ("CBOE") has similar rules that give the exchange the authority to determine which orders are eligible for its systems. *See* CBOE Rule 7.4 relating to obligations for orders. Under CBOE Rule 7.4(b)(iii), orders that are eligible to be placed with an Order Book Official or directly into the electronic book include *such orders as may be designated by the Exchange. See also* CBOE Rule 43.2 relating to the types of orders handled on the CBOE's Screen Based Trading System ("SBT System"). Under CBOE Rule 43.2(a), the Exchange has the discretion to determine which orders under the rule may be accommodated on the SBT System.

[7] 15 U.S.C. 78s(b)(1).

[8] 17 CFR 240.19b–4.

[9] The ability to turn an order on or off is only applicable to those orders found in CHX Article 20, Rule 4(b). If the Exchange determines to introduce a new order type not found in the rule, the Exchange will submit such proposal through the rule filing process to the SEC for consideration and approval.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

the ability to address these non-compatibility issues without having to formally remove an order type from its rules. And as previously noted, the proposed process of determining order eligibility for purposes of the CHX Matching System is consistent with CBOE's rules that address order eligibility on its systems. Lastly, the Exchange will also provide sufficient notice of any change in order eligibility through the issuance of a regulatory circular and such notification will be done in a manner which will provide reasonable advance notice to its market participants.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments Regarding the Proposed Rule Change Received From Members, Participants or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[12] and Rule 19b–4(f)(6) thereunder.[13]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal is similar to the rules of another exchange that have been approved by the Commission,[14] and will allow the Exchange to address order compatibility before it implements changes to its routing system. Therefore, the Commission designates the proposal operative upon filing.[15]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CHX–2011–10 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CHX–2011–10. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CHX–2011–10 and should be submitted on or before June 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–14228 Filed 6–8–11; 8:45 am]

**BILLING CODE 8011–01–P**

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied the five-day prefiling requirement.

[14] *See supra* note 6.

[15] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64595; File No. SR–NYSEArca–2011–32]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services To Establish a Gross FOCUS Revenue Fee

June 3, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on May 31, 2011, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange through its wholly-owned subsidiary NYSE Arca Equities, Inc. ("NYSE Arca Equities") proposes to amend the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services (the "Schedule") to establish a new regulatory fee. While changes to the Schedule pursuant to this proposal will be effective on filing, the changes will become operative on June 1, 2011. The text of the proposed rule change is available at the Exchange, at the Commission's Public Reference

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Room, on the Commission's Web site at *http://www.sec.gov,* and at *http://www.nyse.com.*

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

Effective June 1, 2011, the Exchange proposes to amend the Schedule to establish a regulatory fee ("Gross FOCUS Revenue Fee") to be charged to ETP Holders, the purpose of which is to recover the regulatory expenses of the Exchange with respect to ETP Holders, including expenses associated with the regulatory functions performed both by NYSE Regulation, Inc. ("NYSE Regulation") and by the Financial Industry Regulatory Authority ("FINRA") pursuant to a regulatory services agreement, for which FINRA is paid by NYSE Regulation. The Exchange is proposing to set this regulatory fee at a rate of $0.07 per $1,000 of gross revenues as reported by each ETP Holder in its FOCUS report.[3] The fee would be similar to the gross revenue FOCUS Report fee that the New York Stock Exchange ("NYSE") charges its member organizations to partially recover its expenses for performance of regulatory functions.[4] However, the rate will be lower than the $0.105 per $1,000 of FOCUS gross revenues charged by the NYSE, reflecting the fact that the costs of regulating the electronic NYSE Arca market are less than the costs of regulating the NYSE with its trading floor. Moving to a regulatory fee based on FOCUS gross revenues would align the Exchange's equity regulatory fee structure more closely with that of the NYSE. The Exchange believes that the revenue generated from this new regulatory fee, when combined with the Exchange's other regulatory fees with respect to ETP Holders, will be less than or equal to the Exchange's related regulatory costs.

Prior to the initiation of the new Gross FOCUS Revenue Fee on June 1, the Exchange has eliminated, by means of a separate rule filing,[5] the fees assessed on ETP Holders, OTP Holders and OTP Firms[6] that conduct equities and/or options business on the Exchange and that register financial advisors (or registered representatives) ("RR Fees"). Each RR Fee was a fixed amount of money that an ETP Holder, OTP Holder or OTP Firm paid to the Exchange for each registered representative that it registered, and it was based on the action associated with the registration. The Exchange has eliminated the RR Fees because it believes that such fees are no longer the most equitable manner in which to assess regulatory fees. Among other things, sales practice regulation has been allocated to FINRA pursuant to a 17d–2 plan, so tying the Exchange's regulatory fees to the number of registered representatives does not match regulatory revenues to regulatory expenses. The Exchange's regulatory costs are primarily driven by market regulation. Consequently, a fee based on trading activity, such as the proposed Gross FOCUS Revenue Fee, will better match such revenues and expenses.[7] The Exchange believes that the proposed Gross FOCUS Revenue Fee represents the best alternative for replacing the revenue dedicated to covering the costs of the Exchange's regulatory programs with respect to ETP Holders and the equities business of the Exchange that was lost with the elimination of the RR Fees.

The Exchange believes that the realigned regulatory fee structure as proposed herein will allow the Exchange to continue to adequately fund the expenses associated with the performance of its regulatory functions with respect to ETP Holders and the equities business of the Exchange. The Exchange will monitor the amount of revenue collected from the Gross FOCUS Revenue Fee to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. The Exchange expects to monitor regulatory costs and revenues on an annual basis, at a minimum. If the Exchange determines that regulatory revenues exceed regulatory costs, the Exchange would adjust the Gross FOCUS Revenue Fee downward by submitting a fee change filing to the Commission.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[8] in general, and Section 6(b)(4) of the Act,[9] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange believes that the proposal does not constitute an inequitable allocation of fees, as all similarly situated member organizations will be subject to the same fee structure, and access to the Exchange's market is offered on fair and non-discriminatory terms. More specifically, the Exchange believes that the proposed Gross FOCUS Revenue Fee represents a fairer and more equitable allocation of fees than the current fee structure because it would be charged to all members on revenues generated by their equity business instead of how many registered persons a particular ETP Holder employs. The latter standard has become increasingly irrelevant as a measure of regulatory services required due, among other reasons, to the rise of Internet and discount brokerage firms in comparison

[3] FOCUS (Securities Exchange Act Form X–17A–5) is an acronym for Financial and Operational Combined Uniform Single Report. The report is filed periodically with the Commission pursuant to Securities Exchange Act Rule 17a–5.

[4] *See* NYSE Rule 129 (Oversight Services).

[5] *See* Securities Exchange Act Release No. 64399 (May 4, 2011), 76 FR 27114 (May 10, 2011) (File No. SR–NYSEArca–2011–20) (the "Options Regulatory Fee Filing").

[6] The term "ETP Holder" refers to a sole proprietorship, partnership, corporation, limited liability company or other organization in good standing that has been issued an Equity Trading Permit ("ETP") by NYSE Arca Equities for effecting approved securities transactions on the trading facilities of NYSE Arca Equities. *See* NYSE Arca Equities Rule 1.1(n).

The term "OTP Holder" refers to a natural person, in good standing, who has been issued an Options Trading Permit ("OTP") by the Exchange for effecting approved securities transactions on the trading facilities of the Exchange, or has been named as a nominee. *See* Exchange Rule 1.1(q).

The term "OTP Firm" refers to a sole proprietorship, partnership, corporation, limited liability company or other organization in good standing that holds an OTP or upon whom an individual OTP Holder has conferred trading privileges on the Exchange's trading facilities pursuant to and in compliance with the rules of the Exchange. *See* Exchange Rule 1.1(r).

Each ETP Holder, OTP Holder and OTP Firm has status as a "member" of the Exchange as that term is defined in Section 3 of the Act. An ETP Holder or an OTP Firm must be a registered broker or dealer pursuant to Section 15 of the Securities Exchange Act of 1934, as amended (the "Act"). An OTP Holder must be a registered broker or dealer pursuant to Section 15 of the Act, or a nominee or an associated person of a registered broker or dealer that has been approved by the Exchange to conduct business on the trading facilities of the Exchange.

[7] *See* the Options Regulatory Fee Filing for a more complete analysis of the rationale for eliminating RR Fees.

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(4).

to traditional brokerage firms. The Exchange believes the proposed Gross FOCUS Revenue Fee is reasonable because it will raise revenue related to the amount of equity business conducted, which correlates more closely with the amount of Exchange regulatory services required.

The Exchange further believes that the initial level of the Gross FOCUS Revenue Fee is reasonable because it is expected to generate revenues that, when combined with the Exchange's other regulatory fees with respect to ETP Holders, will be less than or equal to the Exchange's costs related to the regulation of its equities business. This is consistent with the Commission's previously stated view that regulatory fees be used for regulatory purposes and not to support the Exchange's business side.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [10] of the Act and subparagraph (f)(2) of Rule 19b–4 [11] thereunder, because it establishes a due, fee, or other charge imposed by NYSE Arca.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2011–32 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2011–32. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2011–32 and should be submitted on or before June 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–14232 Filed 6–8–11; 8:45 am]

**BILLING CODE 8011–01–P**

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(2).

[12] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64596; File No. SR–NYSEArca–2011–36]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Fee Schedule To Adopt a Fee for Qualified Contingent Cross Trades

June 3, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on June 1, 2011, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend its Fee Schedule ("Schedule") to adopt a fee for Qualified Contingent Cross ("QCC") trades. The proposed change will be effective on June 1, 2011. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com*.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

NYSE Arca proposes to amend the Schedule to adopt a fee for QCC trades.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

The Exchange adopted rules permitting QCC trades on March 14, 2011,[3] and intends to activate the functionality on June 1, 2011.

The Exchange proposes to assess all market participants in all issues a fee of $0.10 per contract for participation in a QCC transaction. The Exchange is proposing this separate QCC transaction fee because orders that are part of a QCC trade are entered to the Exchange as a matched trade. Therefore, the trade is not a standard execution, nor can an order that is part of such a trade be described as either taking liquidity or adding liquidity. The proposed fee will apply to each side of the transaction.

The proposed charges will be effective on June 1, 2011.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Securities Exchange Act of 1934 (the "Act"),[4] in general, and Section 6(b)(4) of the Act,[5] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. In addition, the Exchange believes that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act in that it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed change to the fee schedule is equitable and reasonable in that it applies uniformly to all market participants and is within the range of fees assessed by other exchanges for similar transactions. The proposed fee is not discriminatory because the same rate is assessed to all market participants.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

[3] *See* Securities Exchange Act Release No. 64086 (March 17, 2011), 76 FR 16021 (March 22, 2011) (File No. SR–NYSEArca–2011–09).

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(4).

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[6] of the Act and subparagraph (f)(2) of Rule 19b–4[7] thereunder, because it establishes a due, fee, or other charge imposed by NYSE Arca.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2011–36 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2011–36. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov.* Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2011–36 and should be submitted on or before June 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–14233 Filed 6–8–11; 8:45 am]

**BILLING CODE 8011–01–P**

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(2).

[8] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64599; File No. SR–C2–2011–008]**

## Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Allow the Listing and Trading of a P.M.-Settled S&P 500 Index Option Product

June 3, 2011.

**I. Introduction**

On February 28, 2011, C2 Options Exchange, Incorporated ("C2" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to permit the listing and trading of p.m.-settled options on the Standard & Poor's 500 ("S&P 500") index on C2. The proposed rule change was published for comment in the **Federal Register** on March 8, 2011.[3] The Commission received 7 comments on the proposal.[4]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 64011 (March 2, 2011), 76 FR 12775 ("Notice").

[4] *See* Letters to Elizabeth M. Murphy, Secretary, Commission, from Randall Mayne, Blue Capital

C2 submitted a response to comments on April 20, 2011.[5] The Commission extended the time period in which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change, to June 6, 2011.[6] This order institutes proceedings to determine whether to approve or disapprove the proposed rule change.

Institution of these proceedings, however, does not indicate that the Commission has reached any conclusions with respect to the proposed rule change, nor does it mean that the Commission will ultimately disapprove the proposed rule change. Rather, as addressed below, the Commission desires to solicit additional input from interested parties, including relevant data and analysis, on the issues presented by the proposed rule change. In particular, the Commission is interested in receiving additional data and analysis relating to the potential effect that proposed p.m.-settled index options could have on the underlying cash equities markets.

## II. Description of the Proposal

In its filing, C2 proposed to permit the listing and trading of S&P 500 index options with third-Friday-of-the-month ("Expiration Friday") expiration dates for which the exercise settlement value would be based on the index value derived from the closing prices of component securities ("p.m.-settled"). The proposed contract would use a $100 multiplier, and the minimum trading increment would be $0.05 for options trading below $3.00 and $0.10 for all other series. Strike price intervals would be set no less than 5 points apart. Consistent with existing rules for index options, the Exchange would allow up to twelve near-term expiration months, as well as LEAPS. Expiration processing would occur on the Saturday following Expiration Friday. The product would have European-style exercise, and, as proposed, would not be subject to position limits, though trading would be subject to C2's enhanced surveillance and reporting requirements for index options.

The Exchange proposed that the proposed rule change be approved on a pilot basis for a period of 14 months. As part of a pilot program, the Exchange would submit a pilot program report to the Commission at least 2 months prior to the expiration date of the program (the "annual report"). The annual report would contain an analysis of volume, open interest, and trading patterns. The analysis would examine trading in the proposed option product as well as trading in the securities that comprise the S&P 500 index. In addition, for series that exceed certain minimum open interest parameters, the annual report would provide analysis of index price volatility and share trading activity. The annual report would be provided to the Commission on a confidential basis. In addition to the annual report, the Exchange would provide the Commission with periodic interim reports while the pilot is in effect.

## III. Comment Letters

The Commission received 7 comment letters on this proposal addressing several issues, including the reintroduction of p.m. settlement; similarity with the Chicago Board Options Exchange's ("CBOE") options on the S&P 500 index that are a.m.-settled ("SPX options"); position limits; and exclusive product licensing.[7]

### *A. Reintroduction of P.M. Settlement*

Two commenters raise concerns over the reintroduction of p.m. settlement on a potentially popular index derivative and the possible impact that doing so could have on the underlying cash equities markets.[8] One commenter urges the Commission to consider why markets went to a.m. settlement in the early 1990s and opines that hindsight supports the conclusion that a.m. settlement has been good for the markets.[9] While acknowledging that the answer is not clear, the commenter asks the Commission to consider whether it is now safe to return to the dominance of p.m.-settled index options and futures.[10] However, this commenter submitted a subsequent letter in which he agrees with the Exchange that "conditions today are vastly different" from those that drove the transition to a.m. settlement.[11] The commenter concludes that C2's proposal should be approved on a pilot basis, which will allow the Commission to collect data to closely analyze the impact of the proposal.[12]

The other commenter raised concerns and described the history behind the transition to a.m. settlement and criticized C2 for trivializing that history.[13] This commenter states that a mainstream return to "discredited" p.m. settlement for index options would "risk undermining the operation of fair and orderly financial markets."[14] In particular, the commenter notes that experience with the market events of May 6, 2010 demonstrates that the current market structure struggles to find price equilibriums, and that participants flock to the same liquidity centers in time of stress.[15] The commenter believes that C2's proposal would exacerbate liquidity strains and concludes that allowing S&P 500 index options to be based on closing settlement prices, even on a pilot basis, would threaten to undermine the Commission's efforts to bolster national market structure and would re-introduce the potential for additional market volatility at expiration.[16]

Taking the opposite view, two commenters urge the Commission to approve the proposal on a pilot basis.[17] One commenter asserts its belief that C2's proposal will not cause greater volatility in the underlying securities of the S&P 500 index.[18] This commenter opines that whether an options contract is p.m.-settled as opposed to a.m.-settled is not a contributing factor to volatility and noted that there is more liquidity in the securities underlying the S&P 500 index at the close compared to the opening.[19] The commenter believes that exchanges are well equipped to handle end-of-day volume and that existing p.m.-settled products (*e.g.,* OEX) do not, in and of themselves, contribute to increased volatility.[20] The other commenter states that the reintroduction of p.m. settlement is long overdue and would attract liquidity from dark pools, crossing mechanisms, and the over-the-counter markets.[21]

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Group, dated March 18, 2011 and April 28, 2011 ("Mayne Letter 1" and "Mayne Letter 2"); Michael J. Simon, Secretary, International Securities Exchange, LLC ("ISE"), dated March 29, 2011 and May 11, 2011 ("ISE Letter 1" and "ISE Letter 2"); Andrew Stevens, Legal Counsel, IMC Financial Markets, dated March 24, 2011 ("IMC Letter"); John Trader, dated April 20, 2011 ("Trader Letter"); and JP, dated April 30, 2011 ("JP Letter").

[5] *See* Letter to Elizabeth M. Murphy, Secretary, Commission, from Joanne Moffic-Silver, Secretary, C2, dated April 20, 2011 ("C2 Letter").

[6] *See* Securities Exchange Act Release No. 64266 (April 8, 2011), 76 FR 20757 (April 13, 2011).

[7] *See supra* note 4.

[8] *See* ISE Letter 1, *supra* note 4, at 4–5; ISE Letter 2, *supra* note 4, at 2–3; and Mayne Letter 1, *supra* note 4, at 1–2.

[9] *See* Mayne Letter 1, *supra* note 4, at 1.

[10] *See id.* at 2.

[11] *See* Mayne Letter 2, *supra* note 4, at 1.

[12] *See id.*

[13] *See* ISE Letter 1, *supra* note 4, at 4.

[14] *Id.*

[15] *See id.*

[16] *See id.* at 5. The commenter also noted that recently-imposed circuit breakers in the cash equities markets do not apply in the final 25 minutes of trading.

[17] *See* IMC Letter, *supra* note 4, at 1–2 and JP Letter, *supra* note 4.

[18] *See* IMC Letter, *supra* note 4, at 1.

[19] *See id.*

[20] *See id.* at 2.

[21] *See* JP Letter, *supra* note 4.

C2 submitted a response to comments.[22] In its response, C2 argues that the concerns from 18 years ago that led to the transition to a.m. settlement for index derivatives have been largely mitigated.[23] C2 argues that expiration pressure in the underlying cash markets at the close has been greatly reduced with the advent of multiple primary listing and unlisted trading privilege markets, and that trading is now widely dispersed among many market centers.[24] In particular, C2 argues that opening procedures in the 1990s were deemed acceptable to mitigate one-sided order flow driven by index option expiration and so today's more sophisticated automated closing procedures should afford a similar, if not greater, level of comfort.[25] Specifically, C2 notes that many markets, notably the Nasdaq Stock Market and the New York Stock Exchange ("NYSE"), now utilize automated closing cross procedures and have closing order types that facilitate orderly closings, and that these closing procedures are well-equipped to mitigate imbalance pressure at the close.[26] In addition, C2 believes that after-hours trading now provides market participants with an alternative to help offset market-on-close imbalances.[27]

C2 also notes that for roughly 5 years (1987–1992) CBOE listed both a.m. and p.m.-settled options on the S&P 500 index and did not observe any related market disruptions during that period in connection with the dual a.m.-p.m. settlement.[28] Finally, C2 believes that p.m.-settled options predominate in the over-the-counter ("OTC") market, and C2 is not aware of any adverse effects in the underlying cash markets attributable to the considerable volume of OTC trading.[29]

*B. Similarity With SPX*

One commenter believes that separate a.m. and p.m.-settled S&P 500 index options could potentially bifurcate the market for CBOE's existing a.m.-settled SPX contract.[30] This commenter notes that the SPX, which trades only on CBOE, accounts for 60% of all index options trading, and argued that the sole difference in settlement between SPX on CBOE and the proposed S&P 500 index options on C2 (*i.e.,* a.m. vs. p.m. settlement) is a "sham" that is intended to "keep them non-fungible," which would "make a mockery of Section 11A of the Act."[31] The commenter states that the objectives of Section 11A are reflected in a national market system plan for options that requires exchanges to prevent trading through better priced quotations displayed on other options exchanges, and that making a p.m.-settled S&P 500 index option non-fungible with CBOE's SPX would allow the CBOE group to establish two "monopolies" in S&P 500 options, one floor-based (CBOE) and one electronic (C2).[32] The commenter also contends that the proposal is designed to protect CBOE's floor-based SPX trading without having to accommodate the more narrow quotes that it believes would be likely to occur on C2 in an electronically-traded p.m.-settled product.[33]

Another commenter offers a similar opinion and asserts that CBOE and C2 should trade a fungible S&P 500 index option in order to address what the commenter describes as "huge customer-unfriendly spreads" in SPX.[34] The commenter also argues that if the CBOE group really believes p.m. settlement is superior to a.m. settlement, then CBOE should file to change SPX to p.m. settlement so that the product traded on CBOE would be fungible with that proposed to be traded on C2.[35]

In response, C2 argues that the difference between a.m.-settled and p.m.-settled S&P 500 index optiona would be a material term and that it is indisputable that C2's proposed S&P 500 index option could not be fungible with, nor could it be linked with, CBOE's SPX option.[36]

*C. Position Limits*

Under C2's proposal, position limits would not apply to S&P 500 index options traded on its market. One commenter argues that position limits should apply to C2's proposed p.m.-settled S&P 500 index options.[37] The commenter notes that, since 2001 when the Commission approved a CBOE rule filing to remove all position limits for SPX options,[38] the Commission has generally expected exchanges to apply a model, typically the Dutt-Harris model, to determine the appropriate position limits for new index options products.[39] Because C2 claims that the product is new and non-fungible, the commenter argues that the Commission should apply the Dutt-Harris model to require C2 to impose position limits on p.m.-settled S&P 500 index options.[40]

In its response to comments, C2 notes that the Dutt-Harris paper acknowledges that S&P 500 options have, and should have, extraordinarily large position limits and Dutt-Harris observes that position limits are most useful when market surveillance is inadequate.[41] C2 argues that position limits suggested by the Dutt-Harris model for an S&P 500 index option would be so large as to be irrelevant and that positions of such magnitude would attract scrutiny from surveillance systems that would, as a consequence, serve as an effective substitute for position limits.[42] Further, C2 notes the circumstances and considerations relied upon by the Commission when it approved the elimination of position limits on SPX, including the enormous capitalization of the index and enhanced reporting and surveillance for the product.[43] Thus, C2 argues that the absence of position limits on its proposed p.m.-settled S&P 500 index options would not be inconsistent with the Dutt-Harris paper.[44]

*D. CBOE's Exclusive License With S&P*

CBOE has an exclusive license agreement with S&P to list and trade index options on the S&P 500 index as

[22] *See* C2 Letter, *supra* note 5.

[23] *See id.* at 4.

[24] *See id.*

[25] *See id.*

[26] *See id.*

[27] *See id.* at 2.

[28] *See* Notice, *supra* note 3, at 12776.

[29] *See id.*

[30] *See* ISE Letter 1, *supra* note 4, at 4. In its comment letter, ISE also noted that, in 2010, the Division opposed an ISE proposal to list index options on both a full-size DAX and a mini-DAX, which could have created parallel markets for the same product. *See id.* at 3.

[31] *See id.* at 2. *See also* ISE Letter 2, *supra* note 4, at 3–4.

[32] *See* ISE Letter 1, *supra* note 4, at 3.

[33] *See id.*

[34] *See* Trader Letter, *supra* note 4, at 1; *see also* JP Letter, *supra* note 4, at 1.

[35] *See* Trader Letter, *supra* note 4, at 1.

[36] *See* C2 Letter, *supra* note 5, at 3.

[37] *See* ISE Letter 1, *supra* note 4, at 6.

[38] *See* Securities Exchange Act Release No. 44994 (October 26, 2002), 66 FR 55722 (November 2, 2001) (SR–CBOE–2001–22).

[39] *See* ISE Letter 1, *supra* note 4, at 6. In a 2005 paper from Hans Dutt and Lawrence Harris, titled "Position Limits for Cash-Settled Derivative Contracts," the authors developed a model to determine appropriate position limits for cash-settled index derivatives. The authors concluded that the then-prevailing position limits were lower than the model suggested and would be appropriate for many derivative contracts. The authors also concluded, however, that position limits are not as important for broad-based index derivative contracts that are cash settled because they are composed of highly liquid and well-followed securities. As such, it would require very high trading volumes to manipulate the underlying securities and, consequently, any attempted manipulation would be more easily detectable and prosecutable.

[40] *See* ISE Letter 1, *supra* note 4, at 6.

[41] *See* C2 Letter, *supra* note 5, at 5.

[42] *See id.*

[43] *See id.* at 5–6. C2 represents in its response letter that it would monitor trading in p.m. settled S&P 500 index options in the same manner as CBOE does for other broad-based index options with no position limits. *See id.* at 6.

[44] *See id.*

well as the Dow Jones Industrial Average. One commenter reiterates its long-standing concern with CBOE's exclusive licensing agreement for S&P 500 index options.[45] This commenter argues that ending exclusive licenses would spur competition, increase volume, and lower costs.[46] C2 responded by arguing that restricting the ability to license an index would hurt innovation and disincentivize the development of new indexes in the future.[47] C2 also believes that this issue is best addressed by intellectual property law, not Federal securities law.[48]

## IV. Proceedings To Determine Whether To Approve or Disapprove SR–C2–2010–008 and Grounds for Disapproval Under Consideration

In view of the issues raised by the proposal, the Commission has determined to institute proceedings pursuant to Section 19(b)(2) of the Act to determine whether to approve or disapprove C2's proposed rule change.[49] Institution of such proceedings appears appropriate at this time in view of the legal and policy issues raised by the proposal. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to comment on the proposed rule change and provide the Commission with data to support the Commission's analysis as to whether to approve or disapprove the proposal.

Pursuant to Section 19(b)(2)(B) of the Act,[50] the Commission is providing notice of the grounds for disapproval under consideration. In particular, Section 6(b)(5) of the Act[51] requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

C2's proposal would reintroduce p.m. settlement for a cash-settled derivatives contract based on a broad-based index. When cash-settled index options were first introduced in the 1980s, they generally utilized p.m. settlement. However, as effects on the underlying cash equities markets became associated with the expiration of p.m.-settled index derivatives, concern was expressed with the potential impact of p.m.-settled index derivatives on the underlying cash equities markets. In particular, concentrated trading interest became associated with the potential for sharp price movements on Expiration Friday, particularly during the "triple-witching" hour on the third Friday of March, June, September and December when index options, index futures, and options on index futures expired concurrently.[52] To mitigate these concerns, the Commission concluded that it was in the best of investors and the markets to require, generally, that cash-settled index options be a.m.-settled in order to ameliorate the price effects associated with expirations of S&P 500 index options.[53]

To address this concern, the Commission coordinated with the Commodity Futures Trading Commission ("CFTC"). In 1987, the CFTC approved a rule change by the Chicago Mercantile Exchange to provide for a.m. settlement for index futures, including futures on the S&P 500 index.[54] CBOE soon followed by offering a.m. settlement for S&P 500 index options[55] and subsequently transitioned all European-style SPX options to a.m. settlement in 1992.[56]

The Commission believes that the proposal to allow p.m. settlement of an option on the S&P 500 index raises questions as to the potential effects on the underlying cash equities markets, and thus as to whether it is consistent with the requirements of Section 6(b)(5) of the Act, including whether the proposal is designed to prevent manipulation, promote just and equitable principles of trade, perfect the mechanism of a free and open market and the national market system, and protect investors and the public interest.

Accordingly, the Commission solicits additional analysis and data concerning whether the Exchange's proposal is consistent with the Act. Specifically, the Commission now seeks additional input to inform its evaluation of whether reintroducing p.m. settlement for C2's proposed options on the S&P 500 index and establishing a precedent that could lead to the reintroduction of p.m. settlement on index futures, could impact volume and volatility on the underlying cash equities markets at the close of the trading day, and the potential consequences this might have for investors and the overall stability of the markets.[57]

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[45] *See* ISE Letter 1, *supra* note 4, p. 6–7.

[46] *See id.*

[47] *See* C2 Letter, *supra* note 5, at 6–7.

[48] *See id.*

[49] 15 U.S.C. 78s(b)(2). Section 19(b)(2)(B) of the Act provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. The time for conclusion of the proceedings may be extended for up to an additional 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding or if the self-regulatory organization consents to the extension.

[50] 15 U.S.C. 78s(b)(2)(B).

[51] 15 U.S.C. 78f(b)(5).

[52] *See* Securities Exchange Act Release No. 45956 (May 17, 2002), 67 FR 36740, 36742 (File No. S7–15–01) (concerning comments on final settlement prices for futures and options in the 1980s).

[53] *See* Securities Exchange Act Release Nos. 24367 (April 17, 1987), 52 FR 13890 (April 27, 1987) (SR–CBOE–87–11) (order approving a proposal for S&P 500 index options with an exercise settlement value based on an index value derived from opening, rather than closing, prices) and 30944 (July 21, 1992), 57 FR 33376 (July 28, 1992) (SR–CBOE–92–09) (order approving CBOE's proposal relating to position limits for SPX index options based on the opening price of component securities). In the 1992 order, the Commission identified several benefits to a.m. settlement for SPX index options. First, the Commission noted that a.m. settlement can help facilitate the development of contra-side interest to alleviate order imbalances. The Commission explained that, in contrast, with regard to p.m. settled options, firms providing contra-side interest will not necessarily assume overnight or weekend position risks because they have the rest of the day to liquidate or trade out of their positions. Second, the Commission explained that with regard to a.m. settled options, even if the opening price settlement results in a significant change in underlying stock prices, participants in the markets for those stocks have the remainder of the day to adjust to those price movements and to determine whether those movements reflect changes in fundamental values or short-term supply and demand conditions. Third, the Commission stated that a.m.-settled options allow corresponding stock positions associated with expiring SPX contracts to be subject to NYSE's opening process, which provides for the orderly entry, dissemination, and matching of orders. *See also* Securities Exchange Act Release No. 45956 (May 17, 2002), 67 FR 36740, 36742–43 (File No. S7–15–01) (adopting release concerning cash settlement and regulatory halt requirements for security futures products) (reaffirming the Commission's view of the advantages of a.m. settlement).

[54] *See* Proposed Amendments Relating to the Standard and Poor's 500, the Standard and Poor's 100 and the Standard Poor's OTC Stock Price Index Futures Contract, 51 FR 47053 (December 30, 1987) (notice of proposed rule change from the Chicago Mercantile Exchange). *See also* Securities Exchange Act Release No. 24367 (April 17, 1987), 52 FR 13890 (April 27, 1987) (SR–CBOE–87–11) (noting that the Chicago Mercantile Exchange moved the S&P 500 futures contract's settlement value to opening prices on the delivery date).

[55] *See* Securities Exchange Act Release No. 24367 (April 17, 1987), 52 FR 13890 (April 27, 1987) (SR–CBOE–87–11).

[56] *See* Securities Exchange Act Release No. 30944 (July 21, 1992), 57 FR 33376 (July 28, 1992) (SR–CBOE–92–09).

[57] Data and analysis on p.m. settlement of index derivatives is somewhat dated since index derivatives, with few exceptions, have primarily been a.m. settled for some time. Despite its general preference for a.m. settlement for cash-settled index options, the Commission has, over the past few years, approved limited requests, initially on a pilot basis, for p.m. settlement for some cash-settled options. *See, e.g.,* Securities Exchange Act Release No. 61439 (January 28, 2010), 75 FR 5831 (February 4, 2010) (SR–CBOE–2009–087) (order approving a

Continued

The Commission is asking that commenters address the merits of C2's statements in support of its proposal as well as the comments received on the proposal, in addition to any other comments they may wish to submit about the proposed rule change. Specifically, the Commission is considering and requesting comment on the following issues:

1. What are commenters' views with respect to the operation and structure of the markets today in comparison to the operation and structure at the time of the shift to a.m. settlement of cash-settled index options, and whether the current operation and structure of the markets support, or do not support, allowing S&P 500 index options on C2 to be p.m.-settled? Please be specific in your response.

2. In particular, what are commenters' views on the ability of the closing procedures currently in place on national securities exchanges to manage a potential increase in volume, and potentially an increase in one-sided volume, at the close on Expiration Fridays if derivatives on the S&P 500 index were p.m.-settled?

3. Even if commenters believe that the current closing procedures would be sufficient, what are commenters' views as to the incentives or inclination of market participants to offset liquidity imbalances at the close of trading on Expiration Friday?

4. What are commenters' views on whether volatility or the potential for market disruptions would be more likely to be caused by or connected with p.m. settlement of cash-settled index derivatives compared to a.m. settlement?

5. What are commenters' views on the potential impact, if any, on the underlying cash equities markets, particularly at the close, if the futures markets introduce a p.m.-settled future subsequent to C2 introducing a p.m.-settled S&P 500 index option? If commenters think there may be an impact, do changes in market structure mitigate or exacerbate that impact relative to the experience pre-1987 when p.m. settlement was standard? Please provide data in support of your conclusion.

6. How has trading and volatility on Expiration Fridays, in particular during the open and during the close, and particularly on the quarterly expiration cycle (*i.e.,* December, March, June, and September) changed over the last 30 years? Please provide data to support your answer. How much of the change do commenters think is attributable to the transition to a.m. settlement for cash-settled index options?

7. If given the opportunity to trade both an a.m. and a p.m.-settled S&P 500 index option, how would market participants react and what might trading in each product look like?

8. To what extent do market participants currently trade S&P 500 index options OTC with p.m. settlement? To what extent would market participants currently trading S&P 500 index options in the OTC market consider switching to a p.m.-settled standardized option on the S&P 500 index?

9. Finally, the Commission requests any addition data or analysis that commenters think may be relevant to the Commission's consideration of C2's proposal for p.m.-settled options on the S&P 500 index.

## V. Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any others they may have identified with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is inconsistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[58]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by July 11, 2011. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by July 25, 2011. 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–C2–2011–008 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–C2–2011–008. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–C2–2011–008 and should be submitted on or before July 11, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[59]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–14223 Filed 6–8–11; 8:45 am]

**BILLING CODE 8011–01–P**

pilot program to modify FLEX option exercise settlement values and minimum value sizes). In addition, index options based on the Standard & Poor's 100 index ("OEX") have been p.m.-settled since 1983, though no futures on that index trade at this time.

[58] Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94–29, 89 Stat. 97 (1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[59] 17 CFR 200.30–3(a)(57).

## SECURITIES AND EXCHANGE COMMISSION

**[File No. 500–1]**

### Order of Suspension of Trading

June 7, 2011.

IN THE MATTER OF AMERICAN PACIFIC RIM COMMERCE GROUP; ANYWHERE MD, INC.; CALYPSO WIRELESS, INC.; CASCADIA INVESTMENTS, INC.; CYTOGENIX, INC.; EMERGING HEALTHCARE SOLUTIONS, INC.; EVOLUTION SOLAR CORPORATION; GLOBAL RESOURCE CORPORATION; GO SOLAR USA, INC.; KORE NUTRITION, INC.; LAIDLAW ENERGY GROUP, INC.; MIND TECHNOLOGIES, INC.; MONTVALE TECHNOLOGIES, INC.; MSGI TECHNOLOGY SOLUTIONS, INC. (F/K/A MGSI SECURITY SOLUTIONS, INC.); PRIME STAR GROUP, INC.; SOLAR PARK INITIATIVES, INC.; UNITED STATES OIL & GAS CORPORATION

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of the issuers listed below. As set forth below for each issuer, questions have arisen regarding the accuracy of publicly disseminated information, concerning, among other things: (1) The company's assets; (2) the company's business operations; (3) the company's current financial condition; and/or (4) issuances of shares in company stock.

1. American Pacific Rim Commerce Group is a California corporation based in Florida. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's revenues.

2. Anywhere MD, Inc. is a Nevada corporation with its principal place of business in California. Questions have arisen concerning the adequacy and accuracy of publicly available information about the company.

3. Calypso Wireless, Inc. is a Delaware corporation based in Texas. Questions have arisen concerning the adequacy of publicly available information about the company.

4. Cascadia Investments, Inc. is a Nevada corporation based in Washington State. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations and assets.

5. CytoGenix, Inc. is a Nevada corporation based in Texas. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations and financing transactions.

6. Emerging Healthcare Solutions, Inc. is a Wyoming corporation based in Texas. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations and assets.

7. Evolution Solar Corporation is a Colorado corporation based in Arizona. Questions have arisen concerning the adequacy and accuracy of the company's Web site and press releases concerning the company's operations and revenues.

8. Global Resource Corporation is a Nevada corporation based in North Carolina. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations and the adequacy of publicly available information about the company.

9. Go Solar USA, Inc. is a Nevada corporation based in Louisiana. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's products and operations.

10. Kore Nutrition, Inc. is a Nevada corporation based in Nevada. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations.

11. Laidlaw Energy Group, Inc. is a New York corporation based in New York. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations, the accuracy of its financial statements, and stock promoting activity by the company.

12. Mind Technologies, Inc. is a Nevada corporation based in California. Questions have arisen concerning the accuracy of its financial statements.

13. Montvale Technologies, Inc. is a New Jersey corporation based in New Jersey. Questions have arisen concerning the adequacy and accuracy of publicly available information about the company.

14. MSGI Technology Solutions, Inc. (f/k/a MSGI Security Solutions, Inc.) is a Nevada corporation based in New York. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations and financing transactions.

15. Prime Star Group, Inc. is a Nevada corporation based in Nevada. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations.

16. Solar Park Initiatives, Inc. is a Nevada corporation based in Florida. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations and revenues.

17. United States Oil & Gas Corporation is a Delaware corporation based in Texas. Questions have arisen concerning the adequacy and accuracy of press releases concerning the company's operations and stock promoting activity by the company.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies.

*Therefore, it is ordered,* pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. E.D.T., on June 7, 2011 through 11:59 p.m. E.D.T., on June 20, 2011.

By the Commission.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2011–14408 Filed 6–7–11; 11:15 am]

**BILLING CODE 8011–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12586 and #12587]**

### North Dakota Disaster Number ND–00025

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 1.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of North Dakota (FEMA–1981–DR), dated 05/10/2011.

*Incident:* Flooding.

*Incident Period:* 02/14/2011 and continuing.

*Effective Date:* 06/02/2011.

*Physical Loan Application Deadline Date:* 07/11/2011.

*Economic Injury (EIDL) Loan Application Deadline Date:* 02/10/2012.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of North Dakota, dated 05/10/2011, is hereby amended to include the following areas as adversely affected by the disaster.

*Primary Counties:* Burleigh.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2011–14263 Filed 6–8–11; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12609 and #12610]**

### Ohio Disaster #OH–00027

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** This is a notice of an Administrative declaration of a disaster for the State of Ohio dated 06/02/2011.

*Incident:* Severe Storms and Flooding.

*Incident Period:* 05/10/2011 through 05/11/2011.

*Effective Date:* 06/02/2011.

*Physical Loan Application Deadline Date:* 08/01/2011.

*Economic Injury (EIDL) Loan Application Deadline Da*te: 03/02/2012.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

*Primary Counties:* Jackson, Lawrence.

*Contiguous Counties:*

Ohio: Gallia, Pike, Ross, Scioto, Vinton.

Kentucky: Boyd, Greenup.

West Virginia: Cabell, Wayne.

The Interest Rates are:

| | Percent |
|---|---|
| For Physical Damage: | |
| Homeowners With Credit Available Elsewhere | 5.375 |
| Homeowners Without Credit Available Elsewhere | 2.688 |
| Businesses With Credit Available Elsewhere | 6.000 |
| Businesses Without Credit Available Elsewhere | 4.000 |
| Non-Profit Organizations With Credit Available Elsewhere | 3.250 |
| Non-Profit Organizations Without Credit Available Elsewhere | 3.000 |
| For Economic Injury: | |
| Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere | 4.000 |
| Non-Profit Organizations Without Credit Available Elsewhere | 3.000 |

The number assigned to this disaster for physical damage is 12609 6 and for economic injury is 12610 0.

The States which received an EIDL Declaration # are Ohio, Kentucky, West Virginia.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

June 2, 2011.

**Karen G. Mills,**

*Administrator.*

[FR Doc. 2011–14260 Filed 6–8–11; 845 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12613 and #12614]**

### Louisiana Disaster #LA–00038

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** This is a notice of an Administrative declaration of a disaster for the State of Louisiana dated 06/02/2011.

*Incident:* Severe Weather, Flash Flooding and Tornadoes.

*Incident Period:* 04/27/2011 through 04/29/2011.

*Effective Date:* 06/02/2011.

*Physical Loan Application Deadline Date:* 08/01/2011.

*Economic Injury (EIDL) Loan Application Deadline Date:* 03/02/2012.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

*Primary Parishes:* Natchitoches, Ouachita.

*Contiguous Parishes:*

Louisiana: Bienville, Caldwell, De Soto, Grant, Jackson, Lincoln, Morehouse, Rapides, Red River, Richland, Sabine, Union, Vernon, Winn.

The Interest Rates are:

| | Percent |
|---|---|
| For Physical Damage: | |
| Homeowners with Credit Available Elsewhere | 5.375 |
| Homeowners without Credit Available Elsewhere | 2.688 |
| Businesses with Credit Available Elsewhere | 6.000 |
| Businesses without Credit Available Elsewhere | 4.000 |
| Non-Profit Organizations with Credit Available Elsewhere | 3.250 |
| Non-Profit Organizations without Credit Available Elsewhere | 3.000 |
| For Economic Injury: | |
| Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere | 4.000 |
| Non-Profit Organizations without Credit Available Elsewhere | 3.000 |

The number assigned to this disaster for physical damage is 12613 B and for economic injury is 12614 0.

The State which received an EIDL Declaration # is Louisiana.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: June 2, 2011.

**Karen G. Mills,**

*Administrator.*

[FR Doc. 2011–14258 Filed 6–8–11; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12566 and #12567]**

### Kentucky Disaster Number KY–00039

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 5.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Kentucky (FEMA–1976–DR), dated 05/04/2011.

*Incident:* Severe Storms, Tornadoes, and Flooding.

*Incident Period:* 04/22/2011 through 05/20/2011.

*Effective Date:* 06/01/2011.

*Physical Loan Application Deadline Date:* 07/05/2011.

*Economic Injury (EIDL) Loan Application Deadline Date:* 02/06/2012.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of KENTUCKY, dated 05/04/2011, is hereby amended to include the following areas as adversely affected by the disaster.

*Primary Counties:* Christian, Hopkins, Menifee, Nelson, Rowan, McCracken.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2011–14257 Filed 6–8–11; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12584 and #12585]**

### Alabama Disaster Number AL–00037

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 3.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Alabama (FEMA–1971–DR), dated 04/28/2011.

*Incident:* Severe Storms, Tornadoes, Straight-line Winds, and Flooding.

*Incident Period:* 04/15/2011 and continuing.

*Effective Date:* 06/01/2011.

*Physical Loan Application Deadline Date:* 06/27/2011.

*Economic Injury (EIDL) Loan Application Deadline Date:* 01/24/2012.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Alabama, dated 04/28/2011, is hereby amended to include the following areas as adversely affected by the disaster.

*Primary Counties:* Greene, Perry.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2011–14254 Filed 6–8–11; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12545 and #12546]**

### Alabama Disaster Number AL–00036

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 8.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for the State ofAlabama (FEMA–1971–DR), dated 04/28/2011.

*Incident:* Severe Storms, Tornadoes, Straight-line Winds, and Flooding.

*Incident Period:* 04/15/2011 and continuing through 05/31/2011.

*Effective Date:* 05/31/2011.

*Physical Loan Application Deadline Date*: 06/27/2011.

*EIDL Loan Application Deadline Date:* 01/30/2012.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center,14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for theState of Alabama, dated 04/28/2011 is hereby amended to establish the incident period for this disaster as beginning 04/15/2011 and continuing through 05/31/2011.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2011–14250 Filed 6–8–11; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12558 and #12559]**

### Tennessee Disaster Number TN–00052

**AGENCY:** U.S. Small Business Administration .

**ACTION:** Amendment 2.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Tennessee (FEMA–1974–DR), dated 05/01/2011.

*Incident:* Severe Storms, Tornadoes, Straight-line Winds, and Associated Flooding.

*Incident Period:* 04/25/2011 through 04/28/2011.

*Effective Date:* 06/02/2011.

*Physical Loan Application Deadline Date:* 06/30/2011.

*Economic Injury (Eidl) Loan Application Deadline Date:* 02/01/2012.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Tennessee, dated 05/01/2011, is hereby amended to include the following areas as adversely affected by the disaster.

*Primary Counties:* Fentress, Franklin, Giles, Hickman, Houston, Jackson, Knox, Lawrence, Lewis, Lincoln, Loudon, Marshall, Montgomery, Moore, Perry, Pickett, Polk, Scott, Sequatchie, Smith, Sullivan, Wayne, Blount, Campbell, Humphreys.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2011–14265 Filed 6–8–11; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12574 and #12575]**

### Tennessee Disaster Number TN–00055

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 1.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Tennessee (FEMA–1979–DR), dated 05/09/2011.

*Incident:* Severe Storms, Tornadoes, Straight-line, Winds, and Flooding.

*Incident Period:* 04/19/2011 and continuing.

**EFFECTIVE DATE:** 06/01/2011.

*Physical Loan Application Deadline Date:* 07/08/2011.

*Economic Injury (EIDL) Loan Application Deadline Date:* 02/09/2012.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Tennessee, dated 05/09/2011, is hereby amended to include the following areas as adversely affected by the disaster.

*Primary Counties:* Tipton.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2011–14275 Filed 6–8–11; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12572 and #12573]**

### Tennessee Disaster Number TN–00053

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 2.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for the State of Tennessee (FEMA–1979–DR), dated 05/09/2011.

*Incident:* Severe Storms, Tornadoes, Straight-line Winds, and Flooding.

*Incident Period:* 04/19/2011 and continuing.

**EFFECTIVE DATE:** 06/01/2011.

*Physical Loan Application Deadline Date:* 07/08/2011.

*EIDL Loan Application Deadline Date:* 02/09/2012.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the Presidential disaster declaration for the State of Tennessee, dated 05/09/2011 is hereby amended to include the following areas as adversely affected by the disaster:

*Primary Counties: (Physical Damage and Economic Injury Loans):* Lincoln, Tipton.

*Contiguous Counties: (Economic Injury Loans Only):*

Alabama: Limestone, Madison.

Tennessee: Bedford, Franklin, Giles, Marshall, Moore.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2011–14274 Filed 6–8–11; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration # 12556 and # 12557]**

### Tennessee Disaster Number TN–00051

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 3.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for the State of Tennessee (FEMA–1974–DR), dated 05/01/2011.

*Incident:* Severe Storms, Tornadoes, Straight-line Winds, and Associated Flooding.

*Incident Period:* 04/25/2011 through 04/28/2011.

*Effective Date:* 06/02/2011.

*Physical Loan Application Deadline Date:* 06/30/2011.

*EIDL Loan Application Deadline Date:* 02/01/2012.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the Presidential disaster declaration for the State of Tennessee, dated 05/01/2011 is hereby amended to include the following areas as adversely affected by the disaster:

*Primary Counties (Physical Damage and Economic Injury Loans):* Knox, Montgomery.

*Contiguous Counties (Economic Injury Loans Only):*

Kentucky: Christian, Todd.

Tennessee: Anderson, Cheatham, Dickson, Grainger, Houston, Robertson, Union.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2011–14269 Filed 6–8–11; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12578 and #12579]**

### Missouri Disaster Number MO–00049

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 2.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Missouri (FEMA–1980–DR), dated 05/09/2011.

*Incident:* Severe Storms, Tornadoes, and Flooding.

*Incident Period:* 04/19/2011 and Continuing.

*Effective Date:* 06/01/2011.

*Physical Loan Application Deadline Date:* 07/08/2011.

*Economic Injury (Eidl) Loan Application Deadline Date:* 02/09/2012.

**ADDRESSES:** *Submit completed loan applications to:* U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Missouri, dated 05/09/2011, is hereby amended to include the following areas as adversely affected by the disaster.

*Primary Counties:* Barry, Carter, Christian, Douglas, Oregon, Ozark, Polk, Shannon, Texas, Washington,

Webster, Wright Cape, Girardeau, Dunklin, Mississippi, New Madrid, Pemiscot, Ripley, Saint Francois, Stone, Jasper, Newton.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2011–14268 Filed 6–8–11; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #12562 and #12563]**

### Arkansas Disaster Number AR–00049

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 3.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Arkansas (FEMA–1975–DR), dated 05/02/2011.

*Incident:* Severe Storms, Tornadoes, and Associated Flooding.

*Incident Period:* 04/23/2011 and continuing.

**EFFECTIVE DATE:** 06/02/2011.

*Physical Loan Application Deadline Date:* 07/01/2011.

*Economic Injury (EIDL) Loan Application Deadline Date:* 02/02/2012.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of ARKANSAS, dated 05/02/2011, is hereby amended to include the following areas as adversely affected by the disaster.

*Primary Counties:* Bradley, Jackson, Lee, Lonoke, Mississippi, Prairie, Saint Francis, Woodruff.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2011–14266 Filed 6–8–11; 8:45 am]

**BILLING CODE 8025–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Summary Notice No. PE–2011–26]**

### Petition for Exemption; Summary of Petition Received

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

**ACTION:** Notice of petition for exemption received.

**SUMMARY:** This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

**DATES:** Comments on this petition must identify the petition docket number involved and must be received on or before June 29, 2011.

**ADDRESSES:** You may send comments identified by Docket Number FAA–2011–0494 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Privacy:* We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

*Docket:* To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Keira Jones (202) 267–4024, Tyneka Thomas (202) 267–7626, or David Staples (202) 267–4058, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on June 3, 2011.

**Dennis R. Pratte,**

*Acting Director, Office of Rulemaking.*

### Petition for Exemption

*Docket No.:* FAA–2011–0494.

*Petitioner:* Robert E. Hart.

*Section of 14 CFR Affected:* 14 CFR 61.35(a)(2)(iii).

*Description of Relief Sought:* Mr. Hart requests relief of the minimum age requirement to allow his two daughters, ages 9 and 14, to take the knowledge test for a private pilot certificate. The petitioner is a flight instructor and has encouraged his daughters' interest in aviation, and feels this would be an incentive for them to continue developing their leadership skills, confidence and discipline.

[FR Doc. 2011–14346 Filed 6–8–11; 8:45 am]

**BILLING CODE 4910–13–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 March 14, 2011, and comments were due by May 13, 2011. No comments were received.

**DATES:** Comments must be submitted on or before July 11, 2011.

**FOR FURTHER INFORMATION CONTACT:** Robert Bouchard, Maritime Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone: 202–366–5076; or e-mail *robert.bouchard@dot.gov.* Copies of this collection also can be obtained from that office.

**SUPPLEMENTARY INFORMATION:** Maritime Administration (MARAD).

*Title:* U.S. Port and Terminal Inventory Survey.

*OMB Control Number:* 2133–0539.

*Type of Request:* Extension of currently approved collection.

*Affected Public:* U.S. Ports and Terminals.

*Form(s):* MA–1049.

*Abstract:* This biennial survey will assist MARAD in determining the number and type of facilities available for moving cargo. Emphasis will be on throughput capacity and the adequacy of the number and type of terminals available to move cargo efficiently through the U.S. global freight transportation system. The survey will also provide an overview of ownership of marine terminals in the United States. The survey results will serve as an indicator of the type of investment funds needed to meet future infrastructure requirements.

*Annual Estimated Burden Hours:* 954 hours.

*Addressee:* 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.

**Christine Gurland,**

*Secretary, Maritime Administration.*

[FR Doc. 2011–14288 Filed 6–8–11; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

**[Docket No. PHMSA–2011–0136]**

### Pipeline Safety: Information Collection Activities

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, PHMSA invites comments on an information collection under Office of Management and Budget (OMB) Control No. 2137–0622, titled "Pipeline Safety: Public Awareness Program." PHMSA is preparing to request approval from OMB for a renewal of the current information collection.

**DATES:** Interested persons are invited to submit comments on or before August 8, 2011.

**ADDRESSES:** Comments may be submitted in the following ways:

*E–Gov Web Site: http://www.regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency.

*Fax:* 1–202–493–2251.

*Mail:* Docket Management Facility; U.S. DOT, 1200 New Jersey Avenue, SE., West Building, Room W12–140, Washington, DC 20590–0001.

*Hand Delivery:* Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Instructions:* Identify the docket number, PHMSA–2011–0136, at the beginning of your comments. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. You should know that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). Therefore, you may want to review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or visit *http://www.regulations.gov* before submitting any such comments.

*Docket:* For access to the docket or to read background documents or comments, go to *http://www.regulations.gov* at any time or to Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. If you wish to receive confirmation of receipt of your written comments, please include a self-addressed, stamped postcard with the following statement: "Comments on PHMSA–2011–0136." The Docket Clerk will date stamp the postcard prior to returning it to you via the U.S. mail. Please note that due to delays in the delivery of U.S. mail to Federal offices in Washington, DC, we recommend that persons consider an alternative method (Internet, fax, or professional delivery service) of submitting comments to the docket and ensuring their timely receipt at DOT.

**FOR FURTHER INFORMATION CONTACT:** Cameron Satterthwaite by telephone at 202–366–1319, by fax at 202–366–4566, or by mail at U.S. DOT, PHMSA, 1200 New Jersey Avenue, SE., PHP–30, Washington, DC 20590–0001.

**SUPPLEMENTARY INFORMATION:** Section 1320.8(d), Title 5, Code of Federal Regulations, requires PHMSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies an information collection request that PHMSA will be submitting to OMB for renewal and extension. The information collection expires October 31, 2011, and is identified under Control No. 2137–0622, titled: "Pipeline Safety: Public Awareness Program." The following information is provided for this information collection: (1) Title of the information collection; (2) OMB control number; (3) Type of request; (4) Abstract of the information collection activity; (5) Description of affected public; (6) Estimate of total annual reporting and recordkeeping burden; and (7) Frequency of collection. PHMSA will request a three-year term of approval for this information collection activity. PHMSA requests comments on the following information collection:

*Title:* Pipeline Safety: Public Awareness Program.

*OMB Control Number:* 2137–0622.

*Type of Request:* Renewal of a currently approved information collection.

*Abstract:* The Federal Pipeline Safety Regulations require each operator to develop and implement a written continuing public education program that follows the guidance provided in the American Petroleum Institute's Recommended Practice RP 1162. Upon request, operators must submit their completed programs to PHMSA or, in the case of an intrastate pipeline facility operator, the appropriate state agency. The operator's program documentation and evaluation results must also be available for periodic review by appropriate regulatory agencies (49 CFR 192.616 and 195.440).

*Affected Public:* Operators of Natural Gas and Hazardous Liquid pipelines.

*Estimated number of responses:* 22,500.

*Estimated annual burden hours:* 517,480 hours.

*Frequency of collection:* Annual.

Comments are invited on:

(a) The need for the proposed collection of information for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Issued in Washington, DC on June 3, 2011.

**Linda Daugherty,**

*Deputy Associate Administrator for Policy and Programs.*

[FR Doc. 2011–14289 Filed 6–8–11; 8:45 am]

**BILLING CODE 4910–60–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[Docket No. FD 35520; Docket No. FD 35518; Docket No. FD 35519]**

### The New Brunswick Railway Company; Notices of Exemptions

**AGENCY:** Surface Transportation Board, DOT.

**ACTION:** Notices of exemptions.

[Docket No. FD 35520]

The New Brunswick Railway Company—Continuance in Control Exemption—Maine Northern Railway Company

[Docket No. FD 35518]

Maine Northern Railway Company—Trackage Rights Exemption—Montreal, Maine & Atlantic Railway, Ltd.

[Docket No. FD 35519]

Maine Northern Railway Company—Trackage Rights Exemption—Montreal, Maine & Atlantic Railway, Ltd.

**SUMMARY:** In Docket No. 35520, the Board grants an exemption, under 49 U.S.C. 10502, from the prior approval requirements of 49 U.S.C. 11323–25 for The New Brunswick Railway Company (NBRC) to continue in control of Maine Northern Railway Company (MNRC) and Eastern Maine Railway once MNRC becomes a Class III carrier. The Board makes the exemption effective on June 15, 2011. Additionally, in related Docket Nos. FD 35518 and FD 35519, the Board makes MNRC's authority to exercise trackage rights granted by the Montreal, Maine & Atlantic Railway, Ltd. effective on June 15, 2011.

**DATES:** These exemptions will be effective on June 15, 2011. Petitions for stay must be filed by June 10, 2011, and petitions for reconsideration in Docket No. FD 35520 must be filed by June 10, 2011.

**ADDRESSES:** An original and 10 copies of all pleadings, referring to Docket Nos. 35518, 35519, and 35520 must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on the parties' representative: Karyn A. Booth, Thompson Hine LLP, Suite 800, 1920 N Street, NW., Washington, DC 20036.

**FOR FURTHER INFORMATION CONTACT:** Joseph H. Dettmar, (202) 245–0395. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

**SUPPLEMENTARY INFORMATION:** Additional information is contained in the Board's decision. Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: June 3, 2011.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

**Andrea Pope-Matheson,**

*Clearance Clerk.*

[FR Doc. 2011–14215 Filed 6–8–11; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF THE TREASURY

### Amendment and Update to the Entry for an Individual Named in the Annex to Executive Order 13219, as Amended by Executive Order 13304

**AGENCY:** Office of Foreign Assets Control, Department of the Treasury.

**ACTION:** Notice.

**SUMMARY:** The Department of Treasury's Office of Foreign Assets Control ("OFAC") is announcing an update to the entry of an individual on OFAC's list of Specially Designated Nationals and Blocked Persons ("SDN List"). The individual's date of birth has been amended and two addresses and an alternate place of birth have been added to the SDN List entry. The individual was listed in the Annex to Executive Order 13219 ("E.O. 13219") of June 26, 2001, "Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans," as amended by Executive Order 13304 ("E.O. 13304") of May 28, 2003, "Termination of Emergencies With Respect to Yugoslavia and Modification of Executive Order 13219 of June 26, 2001."

**DATES:** The update to the entry of this individual on the SDN List is effective May 26, 2011.

**FOR FURTHER INFORMATION CONTACT:** Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, Tel.: 202/622–2490.

**SUPPLEMENTARY INFORMATION:**

#### Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treasury.gov/ofac*) or via facsimile through a 24-hour fax-on-demand service, Tel.: 202/622–0077.

#### Background

On June 26, 2001, the President, invoking the authority of, *inter alia,* the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) ("IEEPA"), issued E.O. 13219. In E.O. 13219, the President declared a national emergency to deal with the threat to stability and security in the Western Balkans region. On May 28, 2003, the President, invoking the authority of, *inter alia,* IEEPA, issued E.O. 13304, in order to, *inter alia,* take additional steps with respect to the national emergency declared in E.O. 13219. Section 1 of E.O. 13219, as amended by E.O. 13304, blocks, with certain exceptions, all property and interests in property that

are in the United States, or that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons of:

(i) The persons listed in the Annex to E.O. 13304; and

(ii) Persons designated by the Secretary of the Treasury, in consultation with the Secretary of State, because they are determined:

(A) To be under open indictment by the International Criminal Tribunal for the former Yugoslavia, unless circumstances warrant otherwise; or

(B) To have committed, or to pose a significant risk of committing, acts of violence that have the purpose or effect of threatening the peace in or diminishing the stability or security of any area or state in the Western Balkans region, undermining the authority, efforts, or objectives of international organizations or entities present in the region, or endangering the safety of persons participating in or providing support to the activities of those international organizations or entities; or

(C) To have actively obstructed, or pose a significant risk of actively obstructing, the Ohrid Framework Agreement of 2001 relating to Macedonia, United Nations Security Council Resolution 1244 relating to Kosovo, or the Dayton Accords or the Conclusions of the Peace Implementation Conference held in London on December 8–9, 1995, including the decisions or conclusions of the High Representative, the Peace Implementation Council or its Steering Board, relating to Bosnia and Herzegovina; or

(D) To have materially assisted in, sponsored, or provided financial, material, or technological support for, or goods or services in support of, such acts of violence or obstructionism or any person listed in or designated pursuant to this order; or

(E) To be owned or controlled by, or acting or purporting to act directly or indirectly for or on behalf of, any of the foregoing persons.

On May 26, 2011, the Director of OFAC determined that the entry on the SDN List for the individual listed below, who was listed in the Annex to E.O. 13219, as amended by E.O. 13304, should be amended:

Karadzic, Luka; DOB 31 April 1951; POB Savnik, Serbia and Montenegro (individual) [BALKANS].

The proposed modification to that entry is as follows:

Karadzic, Luka; Dubrovacka Street No 14, Belgrade, Serbia; Janka Vukotica Street No 24, Rastoci, Municipality of Niksic, Montenegro; DOB 31 July 1951; alt. DOB 1 July 1951; POB Savnik, Serbia and Montenegro; alt. POB Petnic, Serbia and Montenegro (individual) [BALKANS]

Dated: June 1, 2011.

**Adam J. Szubin,**

*Director, Office of Foreign Assets Control.*

[FR Doc. 2011–14301 Filed 6–8–11; 8:45 am]

**BILLING CODE 4810–AL–P**

## DEPARTMENT OF THE TREASURY

### Unblocking of Blocked Persons Pursuant to Executive Order 13067 and Executive Order 13412

**AGENCY:** Office of Foreign Assets Control, Department of the Treasury.

**ACTION:** Notice.

**SUMMARY:** The Department of Treasury's Office of Foreign Assets Control ("OFAC") is publishing the names of two entities whose property and interests in property have been unblocked pursuant to Executive Order 13067 of November 3, 1997, "Blocking Sudanese Government Property and Prohibiting Transactions With Sudan," and Executive Order 13412 of October 13, 2006, "Blocking Property of and Prohibiting Transactions With the Government of Sudan."

**DATES:** The unblocking and removal from the list of Specially Designated Nationals and Blocked Persons ("SDN List") of the entities identified in this notice whose property and interests in property were blocked pursuant to Executive Order 13067 of November 3, 1997, and Executive Order 13412 of October 13, 2006, is effective April 28, 2011 for the Bank of Khartoum and May 26, 2011 for National Export-Import Bank.

**FOR FURTHER INFORMATION CONTACT:** Assistant Director for Sanctions Compliance and Evaluation, tel.: 202/622–2490.

**SUPPLEMENTARY INFORMATION:**

#### Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*). Certain general information pertaining to OFAC's sanctions programs also is available via facsimile through a 24-hour fax-on-demand service, tel.: (202) 622–0077.

#### Background

On November 3, 1997 the President, invoking the authority of, inter alia, the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) ("IEEPA"), issued Executive Order 13067 ("E.O. 13067"). In E.O. 13067, the President declared a national emergency to deal with the Government of Sudan's continued support of international terrorism; ongoing efforts to destabilize neighboring governments; and the prevalence there of human rights violations, including slavery and the denial of religious freedom. Section 1 of E.O. 13067 blocks, with certain exceptions, all property and interests in property of the Government of Sudan that are in the United States, that hereafter come within the United States, or that hereafter come within the possession or control of United States persons, including their overseas branches. Section 4 defines the term "Government of Sudan" to include the Government of Sudan, its agencies, instrumentalities and controlled entities, and the Central Bank of Sudan.

On October 13, 2006, the President, invoking the authority of, *inter alia,* IEEPA, issued Executive Order 13412 ("E.O. 13412"), in order to take additional steps with respect to the national emergency declared in E.O. 13067. Section 1 of E.O. 13412 restates the blocking of the Government of Sudan imposed by E.O. 13067. Section 6 excludes the regional government of Southern Sudan from the definition of the Government of Sudan.

On April 28, 2011, OFAC removed the entity listed below, whose property and interests in property were blocked pursuant to E.O. 13067 and E.O. 13412 from the SDN List:

BANK OF KHARTOUM (a.k.a. BANK OF KHARTOUM GROUP), P.O. Box 1008, Khartoum, Sudan; P.O. Box 312, Khartoum, Sudan; P.O. Box 880, Khartoum, Sudan; P.O. Box 2732, Khartoum, Sudan; P.O. Box 408, Barlaman Avenue, Khartoum, Sudan; P.O. Box 67, Omdurman, Sudan; P.O. Box 241, Port Sudan, Sudan; P.O. Box 131, Wad Medani, Sudan; Abu Hammad, Sudan; Abugaouta, Sudan; Assalaya, Sudan; P.O. Box 89, Atbara, Sudan; Berber, Sudan; Dongola, Sudan; El Daba, Sudan; El Dain, Sudan; El Damazeen, Sudan; El Damer, Sudan; El Dilling, Sudan; El Dinder, Sudan; El Fashir, Sudan; El Fow, Sudan; El Gadarit, Sudan; El Garia, Sudan; El Ghadder, Sudan; El Managil, Sudan; El Mazmoum, Sudan; P.O. Box 220, El Obeid, Sudan; El Rahad, Sudan; El Roseirs, Sudan; El Suk el Shabi, Sudan; Halfa el Gadida, Sudan; Karima, Sudan; Karkoug, Sudan; Kassala, Sudan; Omdurman P.O. Square, P.O. Box 341, Khartoum, Sudan; Sharia el Barlaman, P.O. Box 922, Khartoum, Sudan; Sharia el Gama'a, P.O. Box 880, Khartoum, Sudan; Sharia el Gamhoria, P.O. Box 312, Khartoum, Sudan; Sharia el Murada, Khartoum, Sudan; Tayar Murad, P.O. Box 922, Khartoum, Sudan; Suk el Arabi, P.O. Box 4160, Khartoum, Sudan; University of Khartoum, Khartoum, Sudan; P.O. Box 12, Kosti, Sudan; P.O. Box 135, Nyala, Sudan; Rabak, Sudan; Rufaa, Sudan;

Sawakin, Sudan; Shendi, Sudan; Singa, Sudan; Tamboul, Sudan; Tandalti, Sudan; Tokar, Sudan; Wadi Halfa, Sudan [SUDAN]

On May 26, 2011, OFAC removed from the SDN List the entity listed below, whose property and interests in property were blocked pursuant to E.O. 13067 and E.O. 13412:

NATIONAL EXPORT–IMPORT BANK (n.k.a. BANK OF KHARTOUM GROUP), Sudanese Kuwait Commercial Centre, Nile Street, P.O. Box 2732, Khartoum, Sudan [SUDAN]

Dated: May 26, 2011.

**Adam J. Szubin,**

*Director, Office of Foreign Assets Control.*

[FR Doc. 2011–14287 Filed 6–8–11; 8:45 am]

**BILLING CODE 4810–AL–P**

## DEPARTMENT OF THE TREASURY

### Alcohol and Tobacco Tax and Trade Bureau

### Proposed Information Collections; Comment Request

**AGENCY:** Alcohol and Tobacco Tax and Trade Bureau; Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of our continuing effort to reduce paperwork and respondent burden, and as required by the Paperwork Reduction Act of 1995, we invite comments on the proposed or continuing information collections listed below in this notice.

**DATES:** We must receive your written comments on or before August 8, 2011.

**ADDRESSES:** You may send comments to Mary A. Wood, Alcohol and Tobacco Tax and Trade Bureau, at any of these addresses:

- P.O. Box 14412, Washington, DC 20044–4412;
- 202–453–2686 (facsimile); or
- *formcomments@ttb.gov* (e-mail).

Please send separate comments for each specific information collection listed below. You must reference the information collection's title, form or recordkeeping requirement number, and OMB number (if any) in your comment. If you submit your comment via facsimile, send no more than five 8.5 x 11 inch pages in order to ensure electronic access to our equipment.

**FOR FURTHER INFORMATION CONTACT:** To obtain additional information, copies of the information collection and its instructions, or copies of any comments received, contact Mary A. Wood, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412; or telephone 202–453–2265.

**SUPPLEMENTARY INFORMATION:**

**Request for Comments**

The Department of the Treasury and its Alcohol and Tobacco Tax and Trade Bureau (TTB), as part of their continuing effort to reduce paperwork and respondent burden, invite the general public and other Federal agencies to comment on the proposed or continuing information collections listed below in this notice, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Comments submitted in response to this notice will be included or summarized in our request for Office of Management and Budget (OMB) approval of the relevant information collection. All comments are part of the public record and subject to disclosure. Please not do include any confidential or inappropriate material in your comments.

*We invite comments on:* (a) Whether this information collection is necessary for the proper performance of the agency's functions, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the information collection's burden; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the information collection's burden 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 the requested information.

**Information Collections Open for Comment**

Currently, we are seeking comments on the following forms and recordkeeping requirements:

*Title:* Collection Information Statement for Individuals, and Collection Information Statement for Businesses.

*OMB Control Number:* 1513–XXXX (To be assigned).

*TTB Form Numbers:* 5600.17 and 5600.18, respectively.

*Abstract:* TTB F 5600.17 is used to collect financial information from individuals, and TTB F 5600.18 is used to collect financial information from businesses. When an industry member cannot pay their assessed Federal excise tax all at one time, they complete the applicable form(s) to identify their income, taxes, and other expenses necessary to run their home and/or business. TTB uses this information to determine how much the industry member can afford to pay over time until the taxes are paid in full and to set up an installment agreement.

*Current Actions:* TTB F 5600.17 and TTB F 5600.18 are presently issued under OMB control number 1513–0054. TTB plans to improve the format of these forms and make them easier to follow by allowing more space to enter responses and grouping like information together. Also, we plan to add instructions to clarify when certain signatures are required and make other minor revisions. Once the revisions are complete, we are asking that OMB approve the revised forms and assign them a different control number. We will submit a request to delete these forms from OMB control number 1513–0054 to alleviate duplication. We are submitting this information collection as a new collection.

*Type of Review:* New collection.

*Affected Public:* Individuals or households, Business or other for-profit.

*Estimated Number of Respondents:* 20.

*Estimated Total Annual Burden Hours:* 60.

*Title:* Applications—Volatile Fruit-Flavor Concentrate Plants, TTB REC 5520/2.

*OMB Control Number:* 1513–0006.

*TTB Form Number:* 5520.3.

*TTB Recordkeeping Requirement Number:* 5520/2.

*Abstract:* Persons who wish to establish premises to manufacture volatile fruit-flavor concentrates are required to file an application to do so using TTB F 5520.3. TTB uses the application information to identify persons responsible for such manufacture since these products contain ethyl alcohol and have potential for use as alcoholic beverages with consequent loss of revenue. The application constitutes registry of a still, a statutory requirement. The record retention requirement for this information collection is 3 years.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 80.

*Estimated Total Annual Burden Hours:* 160.

*Title:* Formula and Process for Nonbeverage Product.

*OMB Number:* 1513–0021.

*TTB Form Number:* 5154.1.

*Abstract:* Businesses using taxpaid distilled spirits to manufacture

nonbeverage products may receive drawback (*i.e.,* a refund or remittance) of tax, if they can show that the spirits were used in the manufacture of products unfit for beverage use. This showing is based on the formula for the product, which is submitted on TTB F 5154.1.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 611.

*Estimated Total Annual Burden Hours:* 2,444.

*Title:* Annual Report of Concentrate Manufacturers, and Usual and Customary Business Records—Volatile Fruit-Flavor Concentrate, TTB REC 5520/1.

*OMB Number:* 1513–0022.

*TTB Form Number:* 5520.2.

*TTB Recordkeeping Requirement Number:* 5520/1.

*Abstract:* Manufacturers of volatile fruit-flavor concentrate must provide reports as necessary to ensure the protection of the revenue. The report accounts for all concentrates manufactured, removed, or treated so as to be unfit for beverage use. The information is required to verify that alcohol is not being diverted, thereby jeopardizing tax revenues.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 80.

*Estimated Total Annual Burden Hours:* 27.

*Title:* Claim—Alcohol, Tobacco, and Firearms Taxes.

*OMB Control Number:* 1513–0030.

*TTB Form Number:* 5620.8.

*Abstract:* This form, along with other supporting documents, is used to obtain credit, remission, and allowance of Federal excise tax on taxable articles (alcohol, beer, tobacco products, firearms, and ammunition) that have been lost, and to obtain refund of overpaid taxes and abatement of over assessed taxes. It is also used to request a drawback of tax paid on distilled spirits used in the production of nonbeverage products.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit, Individuals or households, Not-for-profit institutions.

*Estimated Number of Respondents:* 10,000.

*Estimated Total Annual Burden Hours:* 10,000.

*Title:* Report of Wine Premises Operations.

*OMB Control Number:* 1513–0053.

*TTB Form Number:* 5120.17.

*Abstract:* TTB F 5120.17 is used to monitor wine operations, to ensure collection of the Federal excise tax on wine, and to ensure wine is produced in accordance with Federal law and regulations. This report also provides raw data on wine premises activity.

*Current Actions:* We are amending this form to provide for quarterly reporting. The regulatory requirement for quarterly reporting already exists, and we are updating the form to provide a place for that reporting. We are allowing quarterly reporting to be entered in the space provided for monthly reporting until the form is amended. We are submitting this information collection as a revision.

*Type of Review:* Revision of a currently approved collection.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 3,329.

*Estimated Total Annual Burden Hours:* 29,616.

*Title:* Offer in Compromise of Liability Incurred under the Provisions of Title 26 U.S.C. Enforced and Administered by the Alcohol and Tobacco Tax and Trade Bureau, Collection Information Statement for Individuals, and Collection Information Statement for Businesses.

*OMB Control Number:* 1513–0054.

*TTB Form Numbers:* 5640.1, 5600.17, and 5600.18, respectively.

*Abstract:* TTB F 5640.1 is used by persons who wish to compromise criminal and/or civil penalties for violations of the Internal Revenue Code. If accepted, the offer in compromise is a settlement between the Government and the party in violation, in lieu of legal proceedings or prosecution. TTB F 5640.1 identifies the party making the offer, the violation(s), the amount of the offer, and the circumstances concerning the violation(s). TTB F 5600.17 is used to collect financial information from individuals and TTB F 5600.18 is used to collect financial information from businesses. When an industry member cannot pay their assessed tax all at one time, they complete the applicable form(s) to identify their income, taxes, and other expenses necessary to run their home and/or business. TTB uses this information to determine how much the industry member can afford to pay over time until the taxes are paid in full and to set up an installment agreement.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Individuals or households, Business or other for-profit.

*Estimated Number of Respondents:* 60.

*Estimated Total Annual Burden Hours:* 140.

*Title:* Offer in Compromise of Liability Incurred under the Federal Alcohol Administration Act, as amended.

*OMB Control Number:* 1513–0055.

*TTB Form Number:* 5640.2.

*Abstract:* Persons who have committed violations of the Federal Alcohol Administration Act may submit an offer in compromise. The offer is a request by the party in violation to compromise penalties for the violations in lieu of civil or criminal action. TTB F 5640.2 identifies the violation(s) to be compromised by the person committing them, amount of offer, plus justification for acceptance.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 12.

*Estimated Total Annual Burden Hours:* 24.

*Title:* Wholesale Dealers Records of Receipt of Alcoholic Beverages, Disposition of Distilled Spirits, and Monthly Summary Report, TTB REC 5170/2.

*OMB Number:* 1513–0065.

*TTB Recordkeeping Requirement Number:* 5170/2.

*Abstract:* TTB uses these records and reports as an accounting tool to ensure

protection of the revenue. Records of receipt and disposition are the basic documents that describe the activities of wholesale dealers, and they provide an audit trail of taxable commodities from point of production to point of sale. Records of disposition are required only for distilled spirits. TTB requires the monthly report only in exceptional circumstances to ensure that a particular wholesale dealer is maintaining the required records. The records retention requirement is 3 years.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 50.

*Estimated Total Annual Burden Hours:* 1,200.

*Title:* Marks on Wine Containers, TTB REC 5120/3.

*OMB Number:* 1513–0092.

*TTB Recordkeeping Requirement Number:* 5120/3.

*Abstract:* TTB requires that wine on wine premises be identified by statements of information included on labels and tanks. TTB uses this information to validate the receipt of excise tax revenue by the Federal government. TTB believes that affected wine industry members do not expend any effort in marking wine containers. Manufacturers place this information on their containers even in the absence of marking requirements. The record retention period is only required as long as the container is used for storing wine.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 1,560.

*Estimated Total Annual Burden Hours:* 1 (one).

*Title:* Firearms and Ammunition Excise Tax Return.

*OMB Number:* 1513–0094.

*TTB Form Number:* 5300.26.

*Abstract:* This information is needed to determine how much Federal excise tax is owed for firearms and ammunition. TTB uses this information to verify that a taxpayer has correctly determined and paid tax liability on the sale or use of firearms and ammunition. Businesses, including small to large, and individuals may be required to use this form.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit; Individuals or households.

*Estimated Number of Respondents:* 965.

*Estimated Total Annual Burden Hours:* 27,020.

*Title:* Administrative Remedies—Closing Agreements.

*OMB Number:* 1513–0099.

*Abstract:* This is a written agreement between TTB and regulated taxpayers used to finalize and resolve certain tax related issues. Once an agreement is approved, it will not be reopened unless fraud or misrepresentation of material facts is proven.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 1 (one).

*Estimated Total Annual Burden Hours:* 1 (one).

*Title:* Marks and Notices on Packages of Tobacco Products, TTB REC 5210/13.

*OMB Control Number:* 1513–0101.

*TTB Recordkeeping Requirement Number:* 5210/13.

*Abstract:* TTB requires that manufacturers or exporters place a mark and notice indicating a product's tax classification and quantity on packages, cases, or containers. TTB uses this information to validate the receipt of Federal excise tax revenue, to determine tax liability, and to verify claims. TTB believes that affected tobacco industry members do not expend any effort in marking their containers.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 120.

*Estimated Total Annual Burden Hours:* 1 (one).

*Title:* Tobacco Bond—Collateral, and Tobacco Bond—Surety.

*OMB Number:* 1513–0103.

*TTB Form Numbers:* 5200.25 and 5200.26, respectively.

*Abstract:* TTB requires a corporate surety bond or a collateral bond to ensure payment of the Federal excise tax on tobacco products and cigarette papers and tubes removed from the factory or warehouse. TTB F 5200.25 and TTB F 5300.26 identify the agreement to pay and the persons from which TTB will attempt to collect any unpaid excise tax. Manufacturers of tobacco products or cigarette papers and tubes and proprietors of export warehouses, along with corporate sureties, if applicable, are the respondents for these TTB forms. These forms are filed with collateral sufficient to cover the excise tax on tobacco products and cigarette paper and tubes.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 15.

*Estimated Total Annual Burden Hours:* 25.

*Title:* Certification of Proper Cellar Treatment for Imported Natural Wine.

*OMB Number:* 1513–0119.

*Abstract:* TTB requires importers of natural wine to certify compliance with proper cellar treatment standards. This certification is necessary to comply with statutory requirements.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 4,000.

*Estimated Total Annual Burden Hours:* 6,600.

Dated: June 3, 2011.

**Angela M. Jeffries,**

*Deputy Director, Regulations and Rulings Division.*

[FR Doc. 2011–14284 Filed 6–8–11; 8:45 am]

**BILLING CODE 4810–31–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Regulation Project

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

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)). The IRS is soliciting comments concerning information collection requirements related to Additional First Year Depreciation Deduction.

**DATES:** Written comments should be received on or before August 8, 2011 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for copies of regulation should be directed to Joel Goldberger, at the Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, by phone at (202) 927–9368, or on the Internet at *Joel.P.Goldberger@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Additional First Year Depreciation Deduction.

*OMB Number:* 1545–2207.

*Regulation Project Number:* Revenue Procedure 2011–26.

*Abstract:* This revenue procedure provides guidance under § 2022(a) of the Small Business Jobs Act of 2010, Public Law 111–240, 124 Stat. 2504 (September 27, 2010) (SBJA), and § 401(a) and (b) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Public Law 111–312, 124 Stat. 3296 (December 17, 2010) (TRUIRJCA). Sections 2022(a) of the SBJA and 401(a) of the TRUIRJCA amend § 168(k)(2) of the Internal Revenue Code by extending the placed-in-service date for property to qualify for the 50-percent additional first year depreciation deduction. Section 401(b) of the TRUIRJCA amends § 168(k) by adding § 168(k)(5), which temporarily allows a 100-percent additional first year depreciation deduction for certain new property.

*Current Actions:* There is no change to this existing regulation.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit; individuals or households.

*Estimated Number of Respondents:* 250,000.

*Estimated Time per Respondent:* 30 minutes.

*Estimated Total Annual Burden Hours:* 125,000.

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: May 19, 2011.

**Yvette B. Lawrence,**

*IRS Reports Clearance Officer.*

[FR Doc. 2011–14286 Filed 6–8–11; 8:45 am]

**BILLING CODE 4830–01–P**

## U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

### Notice of Open Public Hearing

**AGENCY:** U.S.-China Economic and Security Review Commission.

**ACTION:** Notice of open public hearing—June 15, 2011 Washington, DC.

**SUMMARY:** Notice is hereby given of the following hearing of the U.S.-China Economic and Security Review Commission.

*Name:* William A. Reinsch, Chairman of the U.S.-China Economic and Security Review Commission.

The Commission is mandated by Congress to investigate, assess, and report to Congress annually on "the national security implications of the economic relationship between the United States and the People's Republic of China."

Pursuant to this mandate, the Commission will hold a public hearing in Washington, DC on June 15, 2011, to address "China's Five Year Plan, Indigenous Innovation and Technology Transfers, and Outsourcing."

*Background:* This is the eighth public hearing the Commission will hold during its 2011 report cycle to collect input from leading academic, industry, and government experts on national security implications of the U.S. bilateral trade and economic relationship with China. The hearing will examine China's 12th Five-Year Plan, its "Indigenous Innovation" and industrial policies, and technology development and transfers to China. The hearing will be co-chaired by Vice Chairman Daniel Slane and Commissioner Patrick Mulloy.

Any interested party may file a written statement by June 15, 2011, by mailing to the contact below. A portion of each panel will include a question and answer period between the Commissioners and the witnesses.

Transcripts of past Commission public hearings may be obtained from the USCC Web Site *http://www.uscc.gov.*

*Date and Time:* Wednesday, June 15, 2011, 9 a.m.–3:15 p.m. Eastern Standard Time. A detailed agenda for the hearing will be posted to the Commission's Web Site at *http://www.uscc.gov* as soon as available. Please check the Web site for possible changes to the hearing schedule.

**ADDRESSES:** The hearing will be held in Room 216 of the Hart Senate Office Building, located at Constitution Avenue and 2nd Street, NE. in Washington, DC 20002.

**FOR FURTHER INFORMATION CONTACT:** Any member of the public seeking further information concerning the hearing should contact Michael Danis, Executive Director for the U.S.-China Economic and Security Review Commission, 444 North Capitol Street, NW., Suite 602, Washington, DC 20001; phone: 202–624–1407, or via e-mail at *contact@uscc.gov.*

**Authority:** Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense Authorization Act (Pub. L. 106–398), as amended by Division P of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108–7), as amended by Public Law 109–108 (November 22, 2005).

Date: June 1, 2011.

**Michael Danis,**

*Executive Director, U.S.-China Economic and Security Review Commission.*

[FR Doc. 2011–14334 Filed 6–8–11; 8:45 am]

**BILLING CODE 1137–00–P**

## UNITED STATES INSTITUTE OF PEACE

### Notice of Meeting

**DATE/TIME:** Thursday, June 23, 2011 (11 a.m.–5:30 p.m.).

Friday, June 24, 2011 (9 a.m.–3:30 p.m.).

**LOCATION:** 2301 Constitution Avenue, NW., Washington, DC 20037.

**STATUS:** Open Session—Portions may be closed pursuant to Subsection (c) of Section 552(b) of Title 5, United States Code, as provided in subsection 1706(h)(3) of the United States Institute of Peace Act, Public Law 98–525.

**AGENDA:** June 2011 Board Meeting; Approval of Minutes of the One Hundred Thirty-Ninth Meeting (January 20, 2011) of the Board of Directors; Chairman's Report; President's Report; Executive Vice President Update; Q & A with Senior Vice Presidents; Updates on Budget; Board Executive Session; Other General Issues.

**CONTACT:** Tessie F. Higgs, Executive Office, Telephone: (202) 429–3836.

Dated: May 26, 2011.

**Michael Graham,**

*Senior Vice President for Management and CFO, United States Institute of Peace.*

[FR Doc. 2011–13860 Filed 6–8–11; 8:45 am]

**BILLING CODE 6820–AR–M**




# FEDERAL REGISTER

Vol. 76 Thursday,
No. 111 June 9, 2011

Part II

## Commodity Futures Trading Commission

17 CFR Parts 22 and 190
Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions; Proposed Rule

**COMMODITY FUTURES TRADING COMMISSION**

**17 CFR Parts 22 and 190**

**RIN 3038–AC99**

## Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (the "Commission") hereby proposes rules to implement new statutory provisions enacted by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). Specifically, the proposed rules contained herein impose requirements on futures commission merchants ("FCMs") and derivatives clearing organizations ("DCOs") regarding the treatment of cleared swaps customer contracts (and related collateral), and make conforming amendments to bankruptcy provisions applicable to commodity brokers under the Commodity Exchange Act (the "CEA").

**DATES:** Comments must be received on or before August 8, 2011.

**ADDRESSES:** You may submit comments, identified by RIN number 3038–AC99, by any of the following methods:

- The agency's Web site, at *http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

**FOR FURTHER INFORMATION CONTACT:** Robert B. Wasserman, Associate Director, Division of Clearing and Intermediary Oversight (DCIO), at 202–418–5092 or *rwasserman@cftc.gov;* Jon DeBord, Attorney-Advisor, DCIO, at 202–418–5478 or *jdebord@cftc.gov;* Martin White, Assistant General Counsel, at 202–418–5129 or *mwhite@cftc.gov;* David Reiffen, Senior Economist, Office of the Chief Economist, at 202–418–5602 or *dreiffen@cftc.gov;* or Todd Prono, Financial Economist, Office of the Chief Economist, at 202–418–5460 or *tprono@cftc.gov,* in each case, also at the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

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[1] 17 CFR 145.9.

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## I. Introduction

The Dodd-Frank Act [2] mandates that each FCM and DCO "segregate" customer collateral supporting cleared swaps. In other words, the FCM and the DCO (i) must hold such customer collateral in an account (or location) that is separate from the property belonging to the FCM or DCO, and (ii) must not use the collateral of one customer to (A) cover the obligations of another customer or (B) the obligations of the FCM or DCO.[3]

In order to implement the segregation requirements in the Dodd-Frank Act, the Commission has determined to propose that each FCM and DCO be required to enter (or "segregate"), in its books and records, the cleared swaps of each individual customer and relevant collateral. The Commission also proposes to permit each FCM and DCO to operationally hold (or "commingle") all relevant collateral in one account. The Commission further proposes that, in the event that an FCM defaults simultaneously with one or more cleared swaps customers, the DCO may access the collateral of the FCM's defaulting cleared swaps customers to cure the default, but not the collateral of the FCM's non-defaulting cleared swaps customers. However, the Commission is continuing to assess the benefits and costs of the proposal, and is considering whether to permit the DCO to access the collateral of non-defaulting cleared swaps customers, after the DCO attempts to cure the default by applying its own capital and the guaranty fund contributions of its non-defaulting FCM members. Moreover, the Commission is also continuing to assess the feasibility of permitting each DCO to choose the level of protection that it would accord to the cleared swaps customer collateral of its FCM members.

In deciding to propose the above requirements, the Commission looked to current practices for the protection of uncleared swaps collateral, as well as current practices for the protection of collateral supporting futures customer contracts. The Commission, through its staff, sought comment from a wide variety of stakeholders (*i.e.,* swaps customers, FCMs, and DCOs), through external meetings [4] and a public roundtable.[5] Further, the Commission issued an advanced notice of proposed rulemaking (the "ANPR").[6] After carefully considering all comments, the Commission has reached the conclusion that this proposal (i) protects cleared swaps customer collateral in the manner mandated by the Dodd-Frank Act, and (ii) provides the best balance between (A) the benefits of mitigating Fellow-Customer Risk, Investment Risk (as such terms are defined below) and systemic risk, inducing changes in behavior, and enhancing portability as well as potentially facilitating portfolio margining, and (B) the operational and

[2] *See* Dodd-Frank Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.*

[3] *See* section 724 of the Dodd-Frank Act. There is some controversy with respect to section 4d(f)(6) of the CEA as applied to a DCO. *See* section II(C) herein.

[4] A list of external meetings is available at: *http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_6_SegBankruptcy/index.htm.*

[5] A transcript of the Staff Roundtable on Individual Customer Collateral Protection (the "Roundtable") is available at: *http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission6_102210-transcrip.pdf.*

[6] *See* Advance Notice of Proposed Rulemaking for Protection of Cleared Swaps Customers Before and After Commodity Broker Bankruptcies, 75 FR 75162, Dec. 2, 2010.

risk costs [7] associated with implementation. This notice of proposed rulemaking (the "NPRM") sets forth the rationale for such conclusion. The Commission requests comment on each element of its rationale, its conclusion, and any alternatives to the proposal that it is considering (such as, whether to permit the DCO to access the collateral of non-defaulting cleared swaps customers and whether to permit each DCO to choose the level of protection for such collateral).

## II. Background

### *A. Segregation Requirements*

On July 21, 2010, President Obama signed the Dodd-Frank Act. Title VII of the Dodd-Frank Act [8] amended the CEA [9] to establish a comprehensive new regulatory framework for swaps and certain security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (i) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; [10] (ii) imposing mandatory clearing and trade execution requirements on clearable swap contracts; (iii) creating robust recordkeeping and real-time reporting regimes; and (iv) enhancing the rulemaking and enforcement authorities of the Commission with respect to, among others, all registered entities and intermediaries subject to the oversight of the Commission.

Section 724 of the Dodd-Frank Act prescribes the manner in which cleared swaps (and related collateral) [11] must be treated prior to and after bankruptcy. Section 724(a) of the Dodd-Frank Act amends section 4d of the CEA to add a new paragraph (f). New section 4d(f) imposes the following requirements on an FCM, as well as any depository thereof (including, without limitation, a DCO):

1. The FCM must treat and deal with all collateral (including accruals thereon) deposited by a customer [12] to margin its cleared swaps as belonging to such customer;

2. The FCM may not commingle such collateral with its own property and may not, with certain exceptions, use such collateral to margin the cleared swaps of any person other than the customer depositing such collateral;

3. A DCO may not hold or dispose of the collateral that an FCM receives from a customer to margin cleared swaps as belonging to the FCM or any person other than the customer; and

4. The FCM and the DCO may only invest such collateral in enumerated investments.

Section 724(b) of the Dodd-Frank Act governs bankruptcy treatment of cleared swaps by clarifying that cleared swaps are "commodity contracts" within the meaning of section 761(4)(F) of the Bankruptcy Code.[13] Therefore, in the event of an FCM or DCO insolvency, cleared swaps customers may invoke the protections of Subchapter IV of Chapter 7 of the Bankruptcy Code ("Subchapter IV"). Such protections include: (i) Protected transfers of cleared swaps and related collateral; [14] and (ii) if cleared swaps are subject to liquidation, preferential distribution of remaining collateral.[15]

### *B. Implementation Alternatives*

The Commission considered several alternatives for implementing new section 4d(f) of the CEA. The first alternative that the Commission explored was legal segregation with operational commingling (the "Legal Segregation Model"). Under the Legal Segregation Model, each FCM and DCO would enter (or "segregate"), in its books and records, the cleared swaps of each individual customer and relevant collateral. Each FCM and DCO would ensure that such entries are separate from entries indicating (i) FCM or DCO obligations or (ii) the obligations of non-cleared swaps customers. Operationally, however, each FCM and DCO would be permitted to hold (or "commingle") the relevant collateral in one account. Each FCM and DCO would ensure that such account is separate from any account holding FCM or DCO property or holding property belonging to non-cleared swaps customers.

Under the Legal Segregation Model, the FCM, prior to default, would ensure that the DCO does not use the collateral of one cleared swaps customer to support the obligations of another customer by making certain that the value of the cleared swaps collateral that the DCO holds equals or exceeds the value of all cleared swaps collateral that it has received to secure the contracts of the FCM's customers. The Commission considered two possible scenarios after a simultaneous default of the FCM and of one or more cleared swaps customers. First, the Commission contemplated permitting the DCO to access the collateral of the defaulting cleared swaps customers, but not the collateral of the non-defaulting cleared swaps customers (the "Complete Legal Segregation Model").[16] Second, the Commission contemplated permitting the DCO to access the collateral of the non-defaulting cleared swaps customers, after the DCO applies its own capital to cure the default, as well as the guaranty fund contributions of its non-defaulting FCM members (the "Legal Segregation with Recourse Model").[17]

As its second alternative, the Commission explored full physical segregation (the "Physical Segregation Model").[18] Prior to FCM default, the Physical Segregation Model differs from the Legal Segregation Model only operationally. Like the Legal Segregation Model, each FCM and DCO would enter (or "segregate"), in its books and records, the cleared swaps of each individual customer and relevant collateral. However, unlike the Legal Segregation Model, each FCM and DCO would maintain separate individual accounts for the relevant collateral. Hence, prior to default, the FCM would ensure that the DCO does not use the collateral of one cleared swaps customer to support the obligations of another customer by making certain that the DCO does not mistakenly transfer collateral in (i) the account belonging to the former to (ii) the account belonging to the latter. After a simultaneous default of the FCM and of one or more cleared swaps customers, the Physical Segregation Model leads to the same result as the Complete Legal Segregation Model. Specifically, the DCO would be permitted to access the collateral of the defaulting cleared swaps customers, but not the collateral of the non-defaulting customers.

As its third alternative, the Commission explored replicating the

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[7] *See* section II(C)(3) below.

[8] Pursuant to section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

[9] 7 U.S.C. 1 *et seq.*

[10] In this release, the terms "swap dealer" and "major swap participant" shall have the meanings set forth in section 721(a) of the Dodd-Frank Act, which added sections 1a(49) and (33) of the CEA. However, section 721(c) of the Dodd-Frank Act directs the Commission to promulgate rules to further define, among other terms, "swap dealer" and "major swap participant." The Commission is in the process of this rulemaking. *See* 75 FR 80173, Dec. 21, 2010.

[11] Proposed regulation 22.1 defines "Cleared Swap" and "Cleared Swaps Customer Collateral."

[12] Proposed regulation 22.1 defines "Cleared Swaps Customer."

[13] 11 U.S.C. 761(4)(F).

[14] *See, e.g.,* 11 U.S.C. 764.

[15] *See, e.g.,* 11 U.S.C. 766(h) and (i).

[16] The Complete Legal Segregation Model was referred to as the Legal Segregation with Commingling model in the ANPR.

[17] The Legal Segregation with Recourse Model was known as the Moving Customers to the Back of the Waterfall model in the ANPR.

[18] In the ANPR, the Commission referred to this model as Full Physical Segregation.

segregation requirement currently applicable to futures (the "Futures Model").[19] Prior to default, the Futures Model shares certain similarities with the Legal Segregation Model. Specifically, each FCM would enter (or "segregate"), in its books and records, the cleared swaps of each individual customer and relevant collateral. Each DCO, however, would recognize, in its books and records, the cleared swaps that an FCM intermediates on a collective (or "omnibus") basis. Each FCM and DCO would be permitted to hold (or "commingle") all cleared swaps collateral in one account. After default, the Futures Model shares certain similarities with the Legal Segregation with Recourse Model. Specifically, the DCO would be permitted to access the collateral of the non-defaulting cleared swaps customers. However, under the Futures Model, the DCO would be permitted to access such collateral before applying its own capital or the guaranty fund contributions of non-defaulting FCM members.

Finally, the Commission explored permitting a DCO to choose between (i) the Legal Segregation Model (whether Complete or with Recourse), (ii) the Physical Segregation Model, and (iii) the Futures Model, rather than mandating any particular alternative.

*C. Solicitation of Public Input Regarding the Alternatives*

Throughout the fall and winter of 2010, the Commission sought public comment on the alternatives mentioned above, and on the advisability of permitting the DCO to choose between alternatives. First, the Commission, through its staff, held extensive external meetings with three segments of stakeholders (*i.e.,* DCOs, FCMs, and swaps customers).[20] Second, on October 22, 2010, the Commission, through its staff, held the Roundtable. Third, on November 19, 2010, the Commission issued the ANPR.

1. Roundtable

As the ANPR describes, the Roundtable revealed that stakeholders had countervailing concerns regarding the alternatives that the Commission set forth. On the one hand, a number of swaps customers argued that the Commission should focus on effectively eliminating fellow-customer risk[21] and investment risk.[22] Such swaps customers emphasized that (i) they currently transact in uncleared swaps, (ii) they are able to negotiate for individual segregation at independent third parties for collateral supporting such uncleared swaps, and therefore (iii) they are currently subject to neither Fellow-Customer Risk nor Investment Risk. Such customers found it inappropriate that, under certain alternatives that the Commission set forth, they should be subject to Fellow-Customer Risk and Investment Risk when they transact in cleared swaps. As the ANPR noted, pension funds were specifically concerned about whether Fellow-Customer Risk and Investment Risk would be incompatible with their obligations under the Employee Retirement Income Security Act.[23]

On the other hand, a number of FCMs and DCOs argued that the benefits of effectively eliminating Fellow-Customer Risk and Investment Risk are outweighed by the costs. With respect to benefits, these FCMs and DCOs noted that the Futures Model has served the futures industry well for many decades. With respect to costs, these FCMs and DCOs described two potential sources. First, FCMs and DCOs stated that, depending on the manner in which the Commission proposes to eliminate or mitigate Fellow-Customer Risk and Investment Risk, they may experience substantial increases to operational costs. Second, and more significantly, FCMs and DCOs stated that they may incur additional risk costs due to proposed financial resources requirements.[24] Specifically, the Commission has proposed to require each DCO to maintain a package of financial resources sufficient, at a minimum, to:

> [e]nable the derivatives clearing organization to meet its financial obligations to its clearing members notwithstanding a default by the clearing member creating the largest financial exposure for the derivatives clearing organization in extreme but plausible market conditions.[25]

Some DCOs may have anticipated including collateral from non-defaulting cleared swaps customers as an element in their financial resources packages. If DCOs no longer have access to such collateral, then those DCOs would need to obtain additional financial resources to meet proposed Commission requirements. As the ANPR noted, DCOs stated that they could obtain such financial resources in two ways (or a combination thereof). They can increase the amount of collateral that each cleared swaps customer must provide to margin its cleared swaps. Alternatively, they can increase the amount of capital that each FCM must contribute to the relevant DCO guaranty funds. Both FCMs and DCOs averred that the costs associated with obtaining such additional financial resources may be

[19] *See* sections 4d(a) and (b) of the CEA, as well as regulations 1.20 to 1.30. The Futures Model was referred to as the Baseline model in the ANPR.

[20] A list of external meetings is available at: *http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_6_SegBankruptcy/index.htm.*

[21] "Fellow-Customer Risk" is the risk that a DCO would access the collateral of non-defaulting cleared swaps customers to cure an FCM default. Basically, among other things, an FCM functions as a guarantor of customer transactions with a DCO. Section 4d(f) of the CEA prohibits an FCM from using the collateral deposited by one cleared swaps customer to support the transactions of another customer. Therefore, if one cleared swaps customer owes money to the FCM (*i.e.,* the customer has a debit balance), the FCM, acting as guarantor, must deposit its own capital with the DCO to settle obligations attributable to such customer. If such customer defaults to the FCM, and the obligations attributable to such customer are so significant that the FCM does not have sufficient capital to meet such obligations, then the FCM would default to the DCO.

In general, DCOs maintain packages of financial resources to cure the default. The first element of such packages is the property of the defaulting FCM (*i.e.,* collateral deposited to support FCM proprietary transactions and contributions to the DCO guaranty fund). As mentioned above, other elements of such packages may include: (i) The collateral that the FCM deposited to support the transactions of non-defaulting cleared swaps customers; (ii) a portion of the capital of the DCO; and (iii) contributions to the guaranty fund from other DCO members. Typically, a DCO would exhaust one element before moving onto the next element. Therefore, the risk that the DCO would use any one element depends on the position of that element in the package.

[22] "Investment Risk" is the risk that each cleared swaps customer would share *pro rata* in any decline in the value of FCM or DCO investments of cleared swaps customer collateral. Section 4d(f) of the CEA permits an FCM to invest cleared swaps customer collateral in certain enumerated instruments. The Commission is proposing to expand such instruments to include those referenced in regulation 1.25 (as it may be amended from time to time). Even though (i) such investments are "consistent with the objectives of preserving principal and maintaining liquidity," and (ii) both the FCM, as well as the DCO, value such investments conservatively (by, *e.g.,* applying haircuts), the value of such investments may decline to less than the value of the collateral originally deposited. *See* regulation 1.25(b) (as proposed to be amended in *Investment of Customer Funds and Funds Held in an Account for Foreign Futures and Foreign Options Transactions,* 75 FR 67642, Nov. 3, 2011). In such a situation, all customers would share in the decline *pro rata,* even if the invested collateral belonged to certain customers and not others.

[23] 75 FR at 75163.

[24] For a more detailed discussion regarding risk costs, see section II(C)(3)(b) infra.

[25] *Financial Resources Requirements for Derivatives Clearing Organizations,* 75 FR 63113, 63118, Oct. 14, 2010 (proposed regulation 39.11(a)(1)).

The Commission has proposed to require systemically-important DCOs to maintain a financial resources package sufficient to cover a default by the two clearing members creating the largest combined financial exposure in extreme but plausible market conditions. *Id.* at 63119 (proposed regulation 39.29(a)).

substantial, and would ultimately be borne by cleared swaps customers.[26]

2. ANPR

a. Questions

Given the countervailing concerns that stakeholders expressed at the Roundtable, the Commission decided to seek further comment through the ANPR on the potential benefits and costs of (i) the Legal Segregation Model (whether Complete or with Recourse), (ii) the Physical Segregation Model, and (iii) the Futures Model. As the ANPR explicitly stated, "[t]he Commission [was] seeking to achieve two basic goals: Protection of customers and their collateral, and minimization of costs imposed on customers and on the industry as a whole."[27]

Although the ANPR sought comment on the abovementioned models from the general public, it addressed specific questions to the three segments of stakeholders (*i.e.,* DCOs, FCMs, and swaps customers). The Commission asked all three segments to identify the benefits of each model relative to the others. The Commission then asked all three segments to estimate the costs of implementing each model from their perspective. Specifically, for FCMs, the Commission asked for estimates of (i) FCM compliance costs for each model (other than the Futures Model) and (ii) FCM costs resulting from DCOs seeking additional financial resources to meet proposed Commission requirements. For DCOs, the Commission asked for estimates of: (i) DCO, as well as FCM, compliance costs for each model (other than the Futures Model); and (ii) DCO, as well as FCM, costs resulting from DCOs seeking additional financial resources to meet proposed Commission requirements. In addition to the above, the Commission requested comment on the impact of each model on behavior, as well as whether Congress evinced intent for the Commission to adopt any one or more of these models.

b. Comments: Background

The Commission received thirty-one comments from twenty-nine commenters.[28] Of the commenters, fifteen represented current or potential cleared swaps customers (*i.e.,* buy-side firms or groups),[29] eight represented FCMs or investment firms (or organizations thereof),[30] four were DCOs,[31] one was the National Futures Association ("NFA"), and one was from a legal practitioner.[32] The Commission invites further comment on any of the issues raised and the factual and analytical points made in the comments received in response to the ANPR.

The comments were generally divided by the nature of the commenter: most (though not all) of the buy-side commenters favored either the Legal Segregation Model (whether Complete or with Recourse) or the Physical Segregation Model, manifesting a willingness to bear the added costs. Most of the FCMs and DCOs favored the Futures Model. LCH favored the Complete Legal Segregation Model. Finally, ISDA, in its supplemental comment, opined that the most important factor that the Commission should consider is the extent to which a model fostered the portability[33] of cleared swaps belonging to non-defaulting customers. ISDA noted that the Physical Segregation Model and what is now referred to as the Complete Legal Segregation Model were most conducive to that goal.

c. Comments: Discussion

In general, comments to the ANPR addressed the following major issues: (i) Concerns with statutory interpretation; (ii) the appropriate basis for comparison of benefits and costs for each model; (iii) estimates of costs, and the assumptions underlying such estimates; (iv) the benefits of individual collateral protection (*e.g.,* on Fellow-Customer Risk, Investment Risk, systemic risk, induced changes in behavior, and portfolio margining); and (v) the appropriateness of optional models.

1. Statutory Issues

Section 4d(f)(6) of the CEA prohibits "any person, including any derivatives clearing organization * * *" from holding, disposing, or using cleared swaps customer collateral "for deposit in a separate account or accounts * * * as belonging to * * * any person other than the swaps customer of the futures commission merchant." The emphasis on "separate account or accounts" and the use of "customer" in the singular contrasts with section 4d(b) of the CEA (applicable to futures customer contracts and related collateral). In the ANPR, the Commission asked for comment as to whether Congress evinced intent to create a segregation regime that protects cleared swaps (and related customer collateral) on a more individualized basis than futures (and related customer collateral). In general, commenters presented opposing views. For example, one commenter viewed use of the singular term "customer" in section 4d(f)(6) of the CEA as a "critical difference."[34] Similarly, another commenter viewed such use "as direction to the * * * Commission to ensure that customer initial margin [for cleared swaps] is not put at risk on account of actions of other customers."[35] In contrast, a third commenter expressed doubt as to whether Congress would "adopt such a subtle method of moving away from [omnibus customer protection] and directing the use of individually segregated accounts for cleared swaps."[36] The commenter further observed that it would be anomalous to afford greater protection to cleared

[26] 75 FR at 75163. For example, one DCO estimated that it would have to increase the amount of collateral that each cleared swaps customer must provide by 60 percent, if it could no longer access the collateral of non-defaulting cleared swaps customers to cure certain defaults.

[27] *Id.*

[28] Federated Investors submitted two comments, both of which focused on the investment of cleared swaps customer collateral. ISDA submitted two comments, an original comment (the "ISDA Original") and, later, a supplemental comment (the "ISDA Supplemental").

[29] Buy-side firms or groups (collectively, the "buy-side") included the following: (i) Alternative Investment Management Association ("AIMA"); (ii) BlackRock, Inc. ("BlackRock"); (iii) California Public Employees Retirement System ("CALPERS"); (iv) Coalition for Derivatives End Users (by Gibson, Dunn & Crutcher); (v) Coalition for Energy End Users; (vi) Committee on Investment of Employee Benefit Assets ("CIEBA"); (vii) Federal Farm Credit Banks Funding Corp.; (viii) Federal Home Loan Banks ("FHLB"); (ix) Fidelity Investments ("Fidelity"); (x) Freddie Mac; (xi) Investment Company Institute; (xii) Managed Funds Association; (xiii) Securities Industry and Financial Markets Association Asset Management Group ("SIFMA–AMG"); (xiv) Tudor Investment Corporation; and (xv) Vanguard.

[30] FCMs or investment firms (or organizations thereof) (collectively, the "FCMs") included the following: (i) Citigroup Global Markets, Inc. ("Citigroup Capital Markets"); (ii) Federated Investors, Inc. (Freeman and Hawke); (iii) Futures Industry Association; (iv) International Swaps and Derivatives Association ("ISDA") (Original and Supplemental); (v) Newedge USA, LLC ("Newedge"); (vi) Norges Bank Investment Management; (vii) Securities Industry and Financial Markets Association ("SIFMA"); and (viii) State Street Corporation.

[31] DCOs (collectively, the "DCOs") included the following: (i) CME Group ("CME"); (ii) IntercontinentalExchange, Inc. ("ICE"); (iii) LCH Clearnet Group ("LCH"); and (iv) Minneapolis Grain Exchange, Inc.

[32] Jerrold Salzman.

[33] Portability refers to the ability to reliably transfer the swaps (and related collateral) of a non-defaulting customer from an insolvent FCM to a solvent FCM, without the necessity of liquidating and re-establishing the swaps.

[34] CIEBA at 4 at note 2.

[35] FHLB at 3 at note 3.

Additionally, some commenters maintained that the Futures Model depends on an interpretive statement issued by the Office of the General Counsel, which they describe as "dated and questionable" in relation to cleared swaps. *See* FHLB at 4, Federal Farm Credit Banks Funding Corporation at 3. *See also* Interpretative Statement, No. 85–3, *Regarding the Use of Segregated Funds by Clearing Organizations Upon Default by Member Firms* (OGC Aug. 12, 1985).

[36] CME at 5.

swaps customers, many of which are large and presumed to be sophisticated, than futures customers, some of whom might be individual or "retail" customers.[37]

2. What is the appropriate starting point?

In general, commenters presented opposing views on whether the Commission should consider the benefits and costs of each model in light of current swaps practice or current futures practice. Most buy-side commenters stated that benefits and costs of each model should be informed by current swaps practice. First, these commenters emphasized that they are currently able to negotiate for individual collateral protection at independent third parties, and are therefore exposed to neither Fellow-Customer Risk nor Investment Risk. Second, these commenters stated that they are accustomed to the costs associated with individual collateral protection and note that their counterparties enjoy profit from this business model. Finally, these commenters maintained that the Futures Model forms an inappropriate basis for the consideration of benefits and costs because:

(i) The Commission is contemplating the appropriate segregation regime for cleared swaps and related customer collateral; (ii) the Futures Model references industry conventions for futures contracts and related collateral; and (iii) the market for cleared swaps has developed and may continue to develop in a different manner than the market for futures contracts.[38]

In contrast, a number of commenters, primarily the FCMs and the DCOs, suggested that the benefits and costs of each model should be informed by current futures practice. In support of this position, these commenters note that the futures segregation requirement has served the futures industry well for many decades.

3. Costs

In general, commenters estimated the costs of implementing each model in light of the basis for consideration that they viewed most appropriate. For example, those commenters that argued that current swaps practice should inform the benefits and costs of each model emphasized that they have been willing to bear the costs for individual collateral protection. In contrast, those commenters that argued that current futures practice should inform the benefits and costs of each model emphasized that implementing either the Legal Segregation Model (whether Complete or with Recourse) or the Physical Segregation Model would lead to substantial costs. As mentioned above, they described two major sources for such costs: (i) Operational costs; and (ii) costs associated with obtaining additional financial resources to meet proposed Commission requirements (assuming that the Commission prohibits a DCO from accessing the collateral of non-defaulting cleared swaps customers to cure an FCM default) (the "Risk Costs").[39] Certain other commenters disagreed with the assumptions underlying estimates of Risk Costs, but not those underlying estimates of operational costs.

a. Operational Costs[40]

For the Physical Segregation Model, one commenter estimates that an FCM would incur upfront operational costs of $33 million and ongoing operational costs of $136 million.[41] Another commenter estimates that a DCO would incur upfront operational costs of $7.5 million and ongoing operational costs of $40 million.[42] In contrast, for the Legal Segregation Model (whether Complete or with Recourse), commenters have suggested that the operational costs would be more modest. For example, commenters estimate that an FCM would incur upfront operational costs of $1 million and ongoing operational costs of $700,000.[43]

b. The Risk Costs

i. The physical segregation model and the complete legal segregation model.

Both the Physical Segregation Model and the Complete Legal Segregation Model would result in Risk Costs,[44] because they both prohibit a DCO from accessing the collateral of non-defaulting cleared swaps customers. As mentioned above, a DCO may seek to cover Risk Costs in two different ways (or a combination thereof). First, the DCO may increase the amount of collateral that each cleared swaps customer must provide to margin its cleared swaps. One commenter estimated that this increase may equal 69.75 percent (*i.e.,* a total increase of $581 billion). Second, a DCO may increase the amount of resources that each FCM must contribute to the guaranty fund. The same commenter estimated that a DCO may double such contributions (*i.e.,* a total increase of $128 billion).[45] Another commenter—a DCO—agrees with such estimate, stating that it would double FCM contributions to its guaranty fund (*i.e.,* the guaranty fund would increase from $50 billion to $100 billion).[46]

ii. The legal segregation with recourse model and the futures model.

Based on the rationale articulated above, neither the Legal Segregation with Recourse Model nor the Futures Model would result in a need to obtain

[37] *See* CME at 5–6.

[38] For example, the swaps markets have historically been bespoke, whereas the futures markets have historically been more standardized. Such historical differences may persist while the swaps markets transition from the over-the-counter environment to a cleared and transparent environment. Specifically, while the swaps market "dwarf[s]" the futures market, "the tremendous diversity in products and trade parameters" in the swaps market "effectively results in a lower liquidity," thereby resulting in the risks that omnibus clearing poses for swaps customers to be significantly greater than they are for futures customers. *See* Fidelity at 6, Vanguard at 2–5.

[39] Additionally, induced changes in behavior may create a systemic cost. Such costs have been addressed under the rubric of moral hazard below.

[40] Some commenters claim that it may be difficult for FCMs and DCOs to maintain separate models for futures customer collateral and cleared swaps customer collateral.

[41] ISDA Original at 10.

[42] *See generally* ICE at 10–12.

As mentioned above, the Physical Segregation Model would require that each FCM and DCO maintain a separate account for each cleared swaps customer. Therefore, the costs that commenters identify include, among other things, (i) the costs to establish and maintain such accounts, (ii) the costs to effect separate fund transfers between such accounts, (iii) the costs of account reconciliation, and (iv) the costs to establish the information technology infrastructure for such accounts.

[43] *See* ISDA Supplemental at 7. This modifies the ongoing figure in ISDA Original at 10 (the upfront figure there is correct).

In contrast to the Physical Segregation Model, the Legal Segregation Model (whether Complete or with Recourse) would permit an FCM and a DCO to continue maintaining omnibus accounts, while requiring enhanced reporting. Therefore, the costs that commenters identify pertain mostly to such reporting.

[44] One should note that the dollar figures for Risk Costs presented by commenters and described in the text represent increased use of capital, not actual costs. The cost associated with these figures would reflect the opportunity cost of forgoing possible higher return from alternative uses of the capital in question.

[45] *See* ISDA Original at 12–13. One should note that this amount represents increased use of capital, and thus does not represent hundreds of billions in costs.

[46] *See* CME at 8–9. This commenter also would consider the use of "concentration margin" to cover such Risk Costs. According to such commenter, charging concentration margin would constitute a "more targeted approach," because a DCO would charge extra margin "to the customer cleared-swap accounts in the clearing system with the largest potential shortfalls," rather than increasing the overall size of the guaranty fund. The commenter acknowledges that it "currently lack[s] sufficient information to precisely assess an appropriate methodology to incorporate concentration margin in a potential financial-safeguards regime," but does state that "likely concentration charges would fall in the range of $50 billion to $250 billion." The commenter anticipates that customers using "cleared swaps to hedge exposures in other markets may bear the brunt of a concentration margin approach." The Commission notes that such an approach may arguably provide for better alignment of risk-creation and risk-assumption, which commenters from the buy-side have requested.

additional financial resources to meet proposed Commission requirements, since under these models DCOs would have access to the collateral of non-defaulting customers in the event of a simultaneous default by an FCM and one or more customers.[47] However, one commenter observed that the Legal Segregation with Recourse Model increases the likelihood that a DCO would access (i) its own contribution and (ii) the guaranty fund contributions of non-defaulting FCM members, in each case, to cure a default. The commenter stated that "[t]he increased risk to which the DCO and clearing members would be exposed represents a real wealth transfer from the clearing infrastructure (DCOs and clearing members), upon which systemic safety is to depend, to clients."[48]

c. Assumptions Underlying Risk Costs

Certain commenters disagreed with the assumptions underlying the estimates of Risk Costs for the Complete Legal Segregation Model and the Physical Segregation Model. Specifically, they questioned whether, upon an FCM default, a DCO would have any collateral of non-defaulting cleared swaps customers left to access. These commenters noted that, if an FCM declines over time, customers may begin transferring their cleared swaps collateral to more creditworthy FCMs.[49] Therefore, a DCO may choose not to rely on the collateral of non-defaulting cleared swaps customers for risk management reasons. If the DCO makes such a choice, it would incur no Risk Costs in adopting either the Complete Legal Segregation Model or the Physical Segregation Model. These commenters observed that certain DCOs experienced in clearing swaps have already made such a choice.[50]

4. Benefits

a. Fellow-Customer Risk and Investment Risk

In general, commenters agreed that the Physical Segregation Model would eliminate Investment Risk, and that such model, along with the Legal Segregation Model (whether Complete or with Recourse), would mitigate Fellow-Customer Risk. As mentioned above, commenters disagreed on whether such benefits would outweigh the operational costs and Risk Costs, as applicable, which would be incurred to implement such models.[51]

b. Portability

One commenter emphasized that the most important factor that the Commission should consider in deciding which model to propose is the effect of that model on the portability of the cleared swaps of non-defaulting customers in the event of an FCM default. The commenter stated that the Physical Segregation Model and the Complete Legal Segregation Model would most facilitate portability.[52]

c. Systemic Risk

A number of commenters described ways in which the Legal Segregation Model (whether Complete or with Recourse) or the Physical Segregation Model may mitigate systemic risk. The commenter that emphasized the importance of portability stated that the Complete Legal Segregation Model or the Physical Segregation Model would mitigate systemic risk by enhancing portability of the cleared swaps of non-defaulting customers in the event of FCM default.[53] However, this commenter did not believe that the Legal Segregation with Recourse Model would mitigate systemic risk to the same extent since it would not facilitate portability to the same extent as the Complete Legal Segregation Model.[54] Second, certain commenters suggested that the Legal Segregation Model (whether Complete or with Recourse) or the Physical Segregation Model may ameliorate certain pro-cyclical incentives under the Futures Model for bank-style "runs" on FCMs that are perceived to be weakening.[55]

d. Induced Changes in Behavior

In general, commenters offered different opinions on the appropriate focus of induced changes in behavior analysis. For example, certain commenters focused on the effects of the Futures Model on the motivations of the DCO. As mentioned above, under the Futures Model, a DCO may access the collateral of non-defaulting cleared swaps customers prior to its own capital in the event of an FCM default. Therefore, the above-mentioned commenters argued that under the Futures Model a DCO may be less motivated to ensure that each FCM member is managing the risks posed by cleared swaps customers properly than under Legal Segregation or Physical Segregation models.[56]

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[47] *See* ISDA Original at 12–13. *See* ISDA Supplemental at 5–6. For a sense of scale, ISDA estimated that, under the Futures Model and the Legal Segregation with Recourse Model, industry-wide initial margin for cleared swaps customer contracts would total $833 billion, and DCO guaranty funds would total $128 billion.

[48] *See* ISDA Supplemental at 6.

[49] *See, e.g.,* Citigroup Capital Markets at 1–2 ("customers of a deteriorating, non-defaulted FCM have the ability pursuant to CFTC regulation and clearing house rules to move their positions to an alternative FCM"), Federal Farm Credit Banks Funding Corp. at 4 ("when faced with a clearing member's potential deterioration in credit * * * a customer [may] transfer its positions to another clearing member which could have the unintended effect of accelerating a clearing member's credit problems"), LCH at 2–3 (stating that while in a "shock event," a DCO may access collateral from non-defaulting cleared swaps customers, in the contrasting case of an FCM default following a gradual decline, "the assumption of access to non-defaulting client Initial Margin does not hold").

[50] For example, LCH stated that, in order for DCOs [to be] managed prudently * * * their risk waterfalls must cater for all events, not just 'shock' events. This requires that DCOs clearing swaps must always assume that no client Initial Margin is available at the point of a default, as this is the most conservative assumption from a risk management standpoint.

*Id.*

[51] Compare CME at 4 (" * * * adopting an individual segregation model for customer cleared swaps * * * would impose significantly higher costs on customers and clearing members * * * the increased costs may decrease participation in the CFTC-regulated cleared swaps market * * * .") with BlackRock at 2 ("We fail to understand why protecting collateral for segregation for the OTC Derivative Account Class when done at an FCM is associated with high costs when the OTC derivatives market has been able to function as a profitable business with collateral segregation as part of this business model").

[52] *See* ISDA Supplemental at 4.

[53] *See id.* at 4, 7. ISDA also noted that "[f]ellow customer risk, properly conceived, includes the cost incurred by non-defaulting clients as the result of a DCO closing out their positions following a client and FCM default." *See also id.* at 2 ("We believe that the client desire for continuance of transactions and the avoidance of systemic risk requires additional focus on the facilitation of trade portability and the re-prioritization of close-out procedures as the option of last resort. From a client point of view, the enforced close-out of positions could lead to significant losses, particularly for a financial entity hedging other rate exposures. The close-out of even a portion of a large derivative book, like that which is currently run by a GSE, for example, may create huge losses for the swap hedger, and ultimately significant costs to the taxpayer. Further, for clients that are subject to regulatory capital requirements, a reduction in the ability to port positions may lead to higher regulatory capital costs").

[54] *See id.* at 5. The commenter further observed that the Legal Segregation with Recourse Model represents a "wealth transfer" from the DCO and its FCM members to cleared swaps customers relative to the Futures Model, which may increase systemic risk to the extent that such transfer weakens the DCO and the FCMs.

[55] *See* FHLB at 7 ("the primary way for customers to manage their fellow-customer risk is to have advance arrangements in place that would allow them to quickly move their cleared trades from a defaulting clearing member to another clearing member * * * [this] may prompt the equivalent of a 'run on the bank' when information becomes available that suggests a clearing member may be facing financial stress" which may not "make[] sense from a systemic risk perspective"). *See also* AIMA at 1 (where "client collateral is inadequately protected, " "lack of confidence in the system * * * can cause customers to seek to avoid losses by liquidating or moving their positions in stressed market conditions, causing 'runs' on futures commission merchants, greatly exacerbating market stress and contributing to wider financial instability").

[56] *See, e.g.,* Freddie Mac at 3, 4; BlackRock at 5; Vanguard at 7.

Other commenters focused on the effect of the Legal Segregation Model (especially Complete) and the Physical Segregation Model on the motivations of cleared swaps customers and FCMs. First, these commenters argued that such models would cause changes in behavior, because cleared swaps customers benefitting from individual collateral protection would be less motivated to create market discipline by clearing thorough less risky firms.[57] Second, these commenters contended that FCMs would be less motivated to maintain substantial excess net capital in order to present a more attractive profile to customers.[58]

Finally, a number of commenters observed that an important consideration in selecting a model is the effect that the model would have on the willingness of cleared swaps customers to maintain excess margin. The more protective of cleared swaps customer collateral a model is, the more likely it is that cleared swaps customers would be willing to maintain excess margin.

e. Portfolio Margining

A number of commenters expressed concern that the use of models other than the Futures Model would create fragmented segregation requirements (whether across securities and commodities accounts, or between different classes of commodities accounts), which in turn would create barriers to the ability of cleared swaps customers to portfolio margin.[59]

5. The Optional Approach[60]

Finally, a number of commenters suggested that the Commission permit DCOs the option of offering different models for protecting cleared swaps customer contracts and related collateral (the "Optional Approach").[61] However, other commenters found the Optional Approach to be impracticable.[62] Still other commenters stated that the Optional Approach may not succeed in reducing costs for those cleared swaps customers that do not opt for greater protection, and that the Optional Approach, depending on the manner in which it is structured, may indeed increase the amount of funds such customers have at risk.[63]

## III. The Proposed Rules

After carefully considering all comments, the Commission has decided to propose the Complete Legal Segregation Model in this NPRM for the following reasons.

First, as discussed in section III(A) herein, the Commission believes that section 4d(f) of the CEA provides it with authority to propose the Complete Legal Segregation Model. Further, the Commission believes that the language of section 4d(f) of the CEA supports strongly considering the current swaps practice.

Second, as discussed in section III(D) herein, the Commission believes that the Complete Legal Segregation Model provides the best balance between benefits and costs in order to protect market participants and the public. Section III(B) herein describes the Commission's evaluation of the costs of each model, whereas section III(C) herein describes the Commission's evaluation of the benefits of each model.

As mentioned in section I (*Introduction*) herein, the Commission is continuing to assess the benefits and costs of the Complete Legal Segregation Model. As part of such assessment, the Commission is considering whether to adopt, in the alternative, the Legal Segregation with Recourse Model. Further, the Commission is continuing to assess the feasibility of the Optional Approach and the Futures Model, and seeks comments thereon.

The Commission requests comments on (i) its proposal, (ii) whether it should adopt, in the alternative, the Legal Segregation with Recourse Model, and (iii) whether it should adopt the Optional Approach or the Futures Model. The Commission has set forth specific questions below.

*A. Statutory Issues and the Appropriate Starting Point*

Section 4d(f) of the CEA provides the Commission with the authority to afford individualized protection to cleared swaps customer collateral. As mentioned above, new section 4d(f)(6) of the CEA prohibits "any person, including any derivatives clearing organization * * *" from holding, disposing, or using customer collateral "for deposit in a separate account or accounts * * * as belonging to * * * any person other than the swaps customer of the futures commission merchant." The reference to "separate account or accounts" and the use of "customer" in the singular contrasts with section 4d(b) of the CEA, which governs the handling of customer collateral by DCOs in the futures market. Section 4d(b) prohibits a DCO from holding, disposing, or using customer collateral "for deposit in a separate account * * * as belonging to * * * any person other than the customers of such futures commission merchant," using the plural form "customers" to refer to the property of customers collectively. The contrast between sections 4d(b) and 4d(f)(6) of the CEA suggests that the Commission need not treat cleared swaps customer collateral in the same manner as futures customer collateral. This is particularly true because the reference to "separate account or accounts" and "customer" in section 4d(f)(6) of the CEA accords with the individual collateral protection currently available in the swaps markets and contrasts with the omnibus approach traditionally used in futures markets. For the same reason, the Commission is persuaded that the costs of and protections provided by current swaps practices are highly relevant to the evaluation of alternative models for implementing the statute.

*B. Costs*[64]

1. Rationale

As mentioned above, the Commission believes that current swaps practices

[57] *See, e.g.,* CME at 4, ISDA Supplemental at 6.

[58] *See, e.g.,* ISDA Supplemental at 6.

[59] *See* SIFMA at 3–4, Investment Company Institute at 5–6, Futures Industry Association at 6.

[60] The Optional Approach may be implemented in two ways. First, the Commission may permit each DCO to offer more than one model for protecting cleared swaps customer contracts and related collateral. For example, certain FCM members may choose the Complete Legal Segregation Model, whereas other FCM members may choose the Legal Segregation with Recourse Model. Second, the Commission may permit each DCO to offer a different model for protecting cleared swaps customer contracts and related collateral. For example, a DCO could choose to offer the Complete Legal Segregation Model to all of its FCM members, whereas another DCO could choose to offer the Futures Model.

[61] *See, e.g.,* Freddie Mac at 3 ("requiring DCOs to provide individual segregation on an optional basis is the best way to achieve the Commission's twin goals of maximizing customer protection and minimizing cost"), NFA at 2 (The "better mousetrap may involve * * * clearing organizations adopting one of the other models discussed by the Commission. The Commission's regulations should ensure that DCOs have the flexibility to offer those alternative structures * * *").

[62] *See, e.g.,* ICE at 12 ("ICE's general sense is that any bifurcated or optional model will further complicate the settlement process and lead to greater uncertainty during times of financial stress"), Investment Company Institute at 6 ("Due to the host of legal, regulatory, operational and other issues which would be presented, ICI does not believe that it would be appropriate to implement individual customer protection on an optional rather than a mandatory basis in connection with this rulemaking proceeding * * *").

[63] *See, e.g.,* ISDA Original at 13 ("if highly credit worthy customers choose the more expensive, higher protection option," pooling may be less effective from the point of view of the DCO, which may be required to increase initial margin for all customers, including those choosing to bear fellow customer risk, forcing the latter to bear both increased funding cost and a greater amount of funds at risk).

[64] For additional discussion of cost issues, with particular reference to the costs of the proposed Complete Legal Segregation Model and the Legal

Continued

forms an appropriate perspective for considering the costs of each model for protecting cleared swaps customer collateral. The Commission further believes that the operational costs and Risk Costs that commenters have identified for each model should be examined in light of the current practice of many swaps customers to incur costs to obtain individual collateral protection with independent third-parties.

With respect to operational costs, the Commission notes that commenters appeared to have relied upon appropriate assumptions in their estimates for the Legal Segregation Model (whether Complete or with Recourse) and the Physical Segregation Model.[65] With respect to Risk Costs, the Commission observes that commenters appeared to have relied upon appropriate assumptions in their estimates for the Legal Segregation with Recourse Model and the Futures Model.[66] In contrast, the Commission finds, at least initially, persuasive the comments questioning the estimates of Risk Costs for the Complete Legal Segregation Model and the Physical Segregation Model, to the extent that such estimates are based on the assumption that collateral from non-defaulting cleared swaps customers would be fully available to DCOs in practice.[67]

2. Questions

The Commission seeks comment on potential operational costs associated with implementing the Futures Model, and whether such costs could vary depending on the volume of swaps to be cleared.

Further, the Commission seeks comment on potential operational costs and Risk Costs for all models other than the Futures Model, especially with respect to (i) the extent to which such costs could be offset against the costs that swaps customers currently incur to obtain individual collateral protection, and (ii) the extent to which such costs may correspond to the implicit costs that customers may bear due to Fellow-Customer Risk.

The Commission also seeks comment on the assumptions underlying estimates of Risk Costs for the Complete Legal Segregation Model and the Physical Segregation Model.

- Specifically, is it plausible that an FCM might decline gradually over time rather than in a sudden event? If so, is it plausible that customers of such a declining FCM might transfer their cleared swaps and related collateral to another FCM?
- If the Commission were to permit a DCO to access collateral from non-defaulting cleared swaps customers to cure a default, would it be prudent, in light of answers to the foregoing questions, for the DCO to rely upon such collateral in calculating the financial resources package that it must hold? Why or why not, or to what extent? If not, or if only to a limited extent, how does that conclusion affect the Risk Costs for the Complete Legal Segregation Model (as well as the Physical Segregation Model)? Do DCOs account for potential differences between fellow customer collateral at the time of calculation and expected fellow-customer collateral at the time of default in their default resource calculations? If so, how?

In addition, as discussed above, a number of commenters on the ANPR suggested that consideration of the costs and benefits of all models should be informed by the protections for collateral obtained by customers in the existing swaps market and of the costs incurred for such protections.[68] The Commission invites additional comment on these subjects, including quantitative information. Specifically, the Commission invites the submission of additional information on the costs of each level of protection, as well as the submission of detailed quantitative information on the effects, if any, of the absence of Fellow-Customer Risk on guaranty fund levels, margin levels and other economic characteristics of the use of collateral in the cleared swaps market. Additionally, the Commission invites the submission of detailed quantitative information on the costs currently incurred to protect collateral in the cleared and uncleared swaps markets.

Finally, some commenters on the ANPR stated that swaps, including cleared swaps, have inherent characteristics that differentiate them from exchange-traded futures contracts and that affect the magnitude of the exposure that Cleared Swaps Customers have to Fellow-Customer Risk.[69] The Commission invites additional comment on the prevalence of such characteristics and their bearing on the costs and benefits of the proposed rule and potential alternatives.

*C. Benefits*[70]

1. Rationale

a. Fellow-Customer Risk and Investment Risk

The Commission agrees with commenters that the Legal Segregation Model (whether Complete or with Recourse) and the Physical Segregation Model would mitigate Fellow-Customer Risk and Investment Risk to differing extents. With respect to Fellow-Customer Risk, the Commission believes that: (i) The Physical Segregation Model would eliminate Fellow-Customer Risk, albeit only to the extent permitted under the Bankruptcy Code;[71] (ii) the Complete Legal Segregation Model would largely mitigate Fellow-Customer Risk in FCM defaults of all magnitudes;[72] and (iii) the Legal Segregation with Recourse Model would

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Segregation with Recourse Model relative to the Futures Model, see the cost-benefit analysis at section VII(C) infra.

[65] The Commission is not persuaded by the claim that it may be difficult for FCMs and DCOs to maintain separate models for futures customer collateral and cleared swaps customer collateral. Many FCMs are part of organizations that currently (and in the future will) maintain separate models for futures and uncleared swaps, and there has been no evidence of problems with the ability of such FCMs to operate both business lines. Indeed, there are DCOs that currently maintain different guaranty funds for cleared swaps and futures contracts, and that apply materially different margin models to such contracts (*e.g.,* futures contracts vs. credit default swaps vs. interest rate swaps), again without reported trouble.

[66] Regarding the comment stating that the Legal Segregation with Recourse Model would result in a "wealth transfer" from the DCO and its FCM members to cleared swaps customers, the Commission notes that such comment did not include an estimate for any additional costs resulting from such "transfer." Moreover, such statement is simply the obverse of the observation by other commenters that the Futures Model would involve implicit costs to customers. *See, e.g.,* Federal Farm Credit Banks Funding Corp. at 3 ("Under the [futures] model, the hundreds of millions of dollars that the System Banks will likely post as initial margin and variation margin for cleared trades would be at economic risk").

[67] For example, the size of the customer account at Lehman declined substantially in the days before its bankruptcy filing and caused DCOs to declare it in default. For additional discussion of the relationship of estimates of Risk Costs to assumptions about the availability of the collateral of non-defaulting customers in the event of an FCM default, see the discussion of fellow-customer behavior and "diversification" effects in relation to the design of a DCO's financial resources package in the cost-benefit analysis at section VII(C)(2)(b) infra.

[68] *See* section II(C)(2)(c)(2) supra.

[69] *See, e.g.,* note 38, supra.

[70] For additional discussion of benefits issues, with particular reference to the benefits of the proposed Complete Legal Segregation Model and the Legal Segregation with Recourse Model relative to the Futures Model, see the cost-benefit analysis at section VII(C) infra.

[71] As discussed further below, section 766(h) of the Bankruptcy Code, 11 U.S.C. 766(h), requires that customer property be distributed "ratably to customers on the basis and to the extent of such customers' allowed net equity claims * * *."

[72] Because the DCO would allocate collateral between defaulting and non-defaulting cleared swaps customers based on information the FCM provided the day prior to default, such allocation would not reflect movement in the cleared swaps portfolio of such customers on the day of default.

largely mitigate Fellow-Customer Risk [73] in all but the most extreme FCM defaults.

The Commission agrees with commenters that the Physical Segregation Model would eliminate Investment Risk because the FCM and DCO would invest the collateral of one cleared swaps customer separately from the collateral of another such customer. Therefore, the FCM or DCO may attribute losses on such investments to one particular customer. The Commission believes that the Legal Segregation Model (whether Complete or with Recourse) and the Futures Model would not mitigate Investment Risk. Such models permit the FCM and DCO to hold the collateral of all cleared swaps customers in one account, and therefore neither the FCM nor the DCO would be able to attribute investments (and losses thereon) to one particular customer.

b. Portability

The Commission agrees with commenters that the Complete Legal Segregation Model and the Physical Segregation Model would enhance portability of the cleared swaps of non-defaulting customers in the event of an FCM default. The Commission notes that the Legal Segregation with Recourse Model would not likely facilitate portability to the same extent, because the DCO is unlikely to release the collateral of such non-defaulting customers until it has completed the process of liquidating the portfolio of the defaulting FCM and customers. Therefore, even if the DCO or trustee ports the cleared swaps of non-defaulting customers, such customers may need to post additional collateral at the non-defaulting FCM to support such swaps. Such customers may not be able to meet such increased capital demands, especially during a time of resource scarcity.

c. Systemic Risk

The Commission agrees with comments that the Complete Legal Segregation Model and the Physical Segregation Model would most mitigate systemic risk by enhancing portability of the cleared swaps of non-defaulting customers in the event that an FCM defaults. The Commission notes that certain international regulators also emphasize the importance of portability. For example, the Consultative Report on the Principles for Financial Market Infrastructures (the "CPSS–IOSCO Principles") [74] issued by the Committee on Payment and Settlement Systems ("CPSS") and the Technical Committee of the International Organization of Securities Commissions ("IOSCO," and together "CPSS–IOSCO") and the Proposal for a Regulation on OTC Derivatives, Central Counterparties and Trade Repositories by the European Parliament and Council (the "EU Proposal") [75] highlight the importance of portability of cleared swaps customer contracts and related collateral. As stated in the CPSS–IOSCO Principles, the "[e]fficient and complete portability of customer positions and collateral is important in both pre-default and post-default scenarios, but is particularly critical when a participant defaults or is undergoing insolvency proceedings".[76] The EU Proposal explains that segregation and portability are "critical to effectively reduc[ing] counterparty credit risk through the use of [central counterparties], to achiev[ing] a level playing field among European [central counterparties] and to protect the legitimate interests of clients of clearing members".[77]

d. Induced Changes in Behavior [78]

The Commission agrees with commenters that argued that the better the protection that a model affords to the collateral of non-defaulting cleared swaps customers, the more likely customers would leave excess margin at an FCM. In contrast, the Commission does not find persuasive arguments that the Legal Segregation Model (especially Complete) and the Physical Segregation Model would cause changes in behavior, by (i) discouraging cleared swaps customers from creating market discipline by clearing through less risky firms,[79] or (ii) discouraging FCMs from maintaining substantial excess net capital to present a more attractive profile to customers.[80]

With respect to (i), cleared swaps customers generally cannot exert material market discipline because they lack information to accurately assess the risk of their FCMs. For example, certain commenters noted that cleared swaps customers cannot obtain information about the risk profile of fellow customers.[81] Buy-side commenters reinforced such observation by stating that they would not want fellow customers learning of their own risk profiles.[82] Even if FCMs were to disclose general policies regarding the risk profiles of customers that they accept, it is not clear how cleared swaps customers would learn about exceptions to the FCM policies that may be granted. Given the foregoing, the Commission is interested in whether FCM disclosures to cleared swaps customers could be improved. What measures could FCMs take to provide more comprehensive and useful disclosures regarding their proprietary risks and the risk profiles of their customers? For example, one commenter suggested that the Commission could require FCM disclosures to include the following:

- The FCM's total equity, regulatory capital and net worth;
- The dollar value of the FCM's proprietary margin requirements as a percentage of its segregated and secured customer margin requirements;
- What number of the FCM's customers comprise an agreed significant percentage of its customer segregated funds;
- The aggregate notional value of non-hedged, principal OTC transactions into which the FCM has entered;
- The amount, generic source and purpose of any unsecured and uncommitted short-term funding the FCM is using;
- The aggregate amount of financing the FCM provides for customer transactions involving illiquid financial products for which it is difficult to obtain timely and accurate prices;
- The percentage of defaulting assets (debits and deficits) the FCM had during the prior year compared to its year-end segregated and secured customer funds; and
- A summary of the FCM's current risk practices, controls and procedures.[83]

The Commission requests comment as to whether it would make the FCM disclosure more useful to customers if such disclosure contained one or more of the elements above. Which elements would be most helpful to customers? What would be the cost to FCMs of generating such disclosures? What would be the costs and benefits to

[73] *Id.*

[74] *See* CPSS–IOSCO, CPSS–IOSCO Principles (March 10, 2011), available at *http://www.bis.org/publ/cpss94.pdf.*

[75] *See* European Commission, EU Proposal (Sept. 15, 2010), available at *http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/20100915_proposal_en.pdf.*

[76] *See* CPSS–IOSCO Principles at 69.

[77] *See* EU Proposal at 10 (Sept. 15, 2010).

[78] *See* section VII(C)(2) herein for a description of induced changes in behavior for DCOs if the Commission adopts either the Complete Legal Segregation or the Legal Segregation with Recourse Models.

[79] *See, e.g.,* CME at 4, ISDA Supplemental at 6.

[80] See, *e.g.,* ISDA Supplemental at 6.

[81] *E.g.,* ADM at 3, BlackRock at 5, CIEBA at 2, 4–6, FFCB at 4, FHLB at 1, MFA at 8, Tudor at 2.

[82] *E.g.,* BlackRock at 5, FHLB at 2.

[83] *See* NewEdge at 3 to 5.

customers of receiving and reviewing such disclosures?

With respect to (ii), the Commission notes that FCMs have claimed in recent net capital rulemakings that Commission capital requirements are sufficient.[84] If such capital requirements are sufficient, it would appear that excess net capital is not necessary.[85]

e. Portfolio Margining.[86]

In response to concerns regarding the impact of models other than the Futures Model on portfolio margining,[87] the Commission believes that such impact would likely be positive. Specifically, a DCO could more easily justify to the Commission that issuing an order under section 4d(f) of the CEA (or approving rules permitting commingling pursuant to proposed regulation 39.15(b)(2))[88] is appropriate if the regulations under such section mitigate Fellow-Customer Risk, since the impact of any different risk from the product being brought into the portfolio would be limited to the customer who chooses to trade that product. This is in contrast to the Futures Model, where the risks that the product being brought into the portfolio affect customers who do not—and would not—trade that product.

2. Questions

The Commission seeks comment on the above analysis of benefits accorded by each model, including whether there are any additional benefits that the Commission should consider. What benefits would be realized by, alternatively, adopting the Futures Model?

*D. Proposing the Complete Legal Segregation Model: Weighing of Costs and Benefits*

As mentioned above, commenters generally agreed that customers would bear the costs of implementing any model. Therefore, the Commission believes that it is appropriate to give weight to the preference of customers. The Commission finds it compelling that most (although not all) buy-side commenters to the ANPR favored a model other than the Futures Model. The Commission notes that models other than the Futures Model would provide more individualized protection to cleared swaps customer collateral in accordance with section 4d(f) of the CEA. Any such model may provide substantial benefits in the form of (i) decreased Fellow-Customer Risk (as well as Investment Risk, in certain circumstances), (ii) increased likelihood of portability, (iii) decreased systemic risk, and (iv) positive impact on portfolio margining. The Commission seeks additional comments, in particular from customers, as to whether and why, in light of this NPRM, they favor or oppose adoption of the Futures Model. The Commission anticipates that, to the extent it decides to adopt the Futures Model, the proposed rule text from proposed regulation 22.2 to proposed regulation 22.10 would implement such model. The Commission notes that changes to the language of proposed regulation 22.15 may be necessary. Specifically, proposed regulation 22.15 would need to include an additional section to the effect that a DCO may, if its rules so provide, use the Cleared Swaps Customer Collateral of all Cleared Swaps Customers of a Depositing Futures Commission Merchant that has defaulted on a payment to the DCO with respect to its Cleared Swaps Customer Account.

In choosing between the Legal Segregation Model (whether Complete or with Recourse) and the Physical Segregation Model, the Commission notes that the operational costs for the Physical Segregation Model are substantially higher than the operational costs for the Legal Segregation Model (whether Complete or with Recourse).

With respect to benefits, the Commission believes that the Physical Segregation Model provides only incremental advantages over the Legal Segregation Model (whether Complete or with Recourse) with respect to the mitigation of Fellow-Customer Risk. The Physical Segregation Model, unlike the Legal Segregation Model (whether Complete or with Recourse), does eliminate Investment Risk. However, the Commission notes that (i) it is in the process of further addressing Investment Risk by proposing amendments to regulation 1.25, and (ii) each FCM and DCO already values investments conservatively. Finally, the Commission observes that the Physical Segregation Model generally enhances portability to the same extent as the Complete Legal Segregation Model, and therefore would have similar effects on systemic risk. The Physical Segregation Model and the Legal Segregation Model (whether Complete or with Recourse) would likely enhance portfolio margining to the same extent.

Consequently, after weighing the potential costs and benefits of the Physical Segregation Model, the Commission has decided that this model does not provide the best balance, in that it provides similar benefits as the Legal Segregation Model (whether Complete or with Recourse), but costs more to implement. Hence, the Commission has determined not to propose the Physical Segregation Model.

In choosing between the Complete Legal Segregation Model and the Legal Segregation with Recourse Model, the Commission notes that commenters have argued that implementing the former would result in significant Risk Costs, whereas implementing the latter would result in no Risk Costs. As mentioned above, the Commission finds, at least initially, persuasive comments that question the assumptions underlying the estimates of Risk Costs for the Complete Legal Segregation Model. Nevertheless, the Commission recognizes that such assumptions form an area of divergence between commenters, and therefore asks for additional comment on the Risk Costs for the Complete Legal Segregation Model. The Commission observes that operational costs for the Complete Legal Segregation Model and the Legal Segregation with Recourse Model are approximately the same.

With respect to benefits, the Commission notes that the Complete Legal Segregation Model would mitigate Fellow-Customer Risk even in extreme FCM defaults, unlike the Legal Segregation with Recourse Model. Further, the Complete Legal Segregation Model would enhance portability (and therefore mitigate systemic risk) to a significantly greater extent than the Legal Segregation with Recourse Model. Finally, the Complete Legal Segregation Model would have an incremental advantage over the Legal Segregation with Recourse Model with respect to impact on portfolio margining.

Consequently, after weighing the potential costs and benefits, the Commission has determined that the Complete Legal Segregation Model provides the best balance, and therefore has determined to propose the Complete Legal Segregation Model. Nevertheless, because the Commission is still evaluating the costs associated with such model, as well as with the Legal

[84] *See, e.g.,* Newedge Letter of June 8, 2009 at 2 ("increasing capital requirements does not necessarily ensure fiscal solvency."), *id.* at 4 (increasing capital requirements would be anti-competitive). (Attachment B to the Newedge comment to this rulemaking).

[85] *See* section VII(C)(2)(c) infra for additional discussion of induced changes in behavior for DCOs, including effects on monitoring of FCM risk, if the Commission adopts either the Complete Legal Segregation or the Legal Segregation with Recourse Models.

[86] *See* section IV(A)(2) herein for a more detailed description of Commission orders under section 4d(f) of the CEA.

[87] *See* SIFMA at 3–4, Investment Company Institute at 5–6, Futures Industry Association at 6.

[88] *See* Notice of Proposed Rulemaking on Risk Management Requirements for Derivatives Clearing Organizations, 76 FR 3698 (Jan. 20, 2011).

Segregation with Recourse Model, the Commission is also considering the Legal Segregation with Recourse Model.[89]

*E. The Optional Approach*

1. Rationale

As mentioned above, a number of commenters urged the Commission to propose the Optional Approach. The Commission has preliminarily declined to propose the Optional Approach because it may not be compatible with the Bankruptcy Code and regulation part 190 ("Part 190"). Specifically, if customer collateral cannot be transferred, section 766(h) of the Bankruptcy Code[90] requires that such collateral be distributed on a *pro rata* basis. In implementing this section of the Bankruptcy Code, the Commission has created in Part 190 the "account class" concept, which enables customer collateral to be separated into different categories for distribution depending on the type of customer (*i.e.,* futures customer, foreign futures customer, and cleared swaps customer) holding a claim. All customers belonging to one "account class" would share *pro rata* in the collateral attributed to that "account class." Therefore, all cleared swaps customers would belong to one "account class," and would share *pro rata* in the cleared swaps collateral remaining after their contracts are ported or liquidated. If, under the Optional Approach, certain cleared swaps customers had chosen a model that provided more individual collateral protection while others had not, the former would still share in any shortfalls in cleared swaps customer collateral resulting from the choices of the latter. The Commission notes that the "account class" concept, which has been tested and upheld in prior bankruptcy proceedings, has never permitted customers transacting in the same type of contracts, with two different segregation requirements, to be deemed participants in separate "account classes."[91]

Moreover, as a number of commenters have noted, optional models may cause legal, regulatory, operational and other complexities.[92]

2. Questions

It may be possible for the Commission to resolve the incompatibility between (i) the Optional Approach and (ii) the Bankruptcy Code and Part 190, by permitting DCOs to require that FCMs establish separate legal entities, each of which is limited to clearing at DCOs that use only one of (A) the Complete Legal Segregation Model or (B) the Legal Segregation with Recourse Model. The Commission notes, however, that this approach might cause concerns with respect to open access and competition. The Commission seeks comment on the practicability of this approach.

- What costs (including implementation, operational, and capital) would such DCOs and FCMs incur?
- Would FCMs be willing to establish such separate legal entities? What systemic risk impacts might there be, if any?
- Would such an approach create benefits or burdens in other contexts?
- What would be the effect of this approach on competition and on opening FCM access to clearing organizations?

In addition, the Commission seeks comment on whether the Optional Approach should be expanded to add the Futures Model as an option. If so, what would be the impact on (1) costs, (2) the protection of Cleared Swaps Customer Collateral, and (3) the existence of effective choice by customers?

The Commission also seeks comment on whether to implement a model that permits DCOs to offer the Physical Segregation Model for cleared swaps customer collateral for some set of customers of their FCM members, with the remaining cleared swaps customer collateral staying in an omnibus account under the Futures Model. (Under this model, the customers in question would hold claims with respect to the collateral placed in physical segregation directly against the DCO rather than against the FCM through which the customers clear.)[93]

- How would such a model work in the ordinary course of business (*i.e.,* pre-FCM member default)? For example, how would an FCM and a DCO structure their respective cash flows to accommodate such model? To the extent that an FCM or DCO may structure their cash flows in different ways, what are the issues, costs, or risks of each way?
- What changes to proposed Part 22 and Part 190 should the Commission make to accommodate this model?
- Who (*e.g.,* the cleared swaps customer, FCM member, and DCO) would have what rights in cleared swaps customer collateral at every stage of clearing (including with respect to initial margin and variation payments and collections)?
- In the event of an FCM bankruptcy, would such cleared swaps customer collateral constitute "customer property" subject to ratable distribution pursuant to section 766(h) of the Bankruptcy Code?
  - To what extent would the answer to this question depend on the manner in which the FCM and the DCO structured their respective cash flows in the ordinary course of business?
  - To the extent cleared swaps customer collateral is removed from "customer property":
    - What vulnerabilities might that raise for the protection of such collateral in an FCM or a DCO bankruptcy? For example, is there a risk that, in some circumstances, such property might be deemed to be part of a bankrupt FCM's or DCO's bankruptcy estate subject to the claims of creditors other than the relevant swaps customers?
    - What changes would need to be made to self-regulatory organization audit programs to ensure protection of

[89] *See* generally section IV(O) below.

[90] 11 U.S.C. 761(h).

[91] The Commission created the "account class" concept in adopting original part 190. *See* 46 FR 57535 (Nov. 24, 1981). The Commission noted that "the accounts held by a commodity broker would be divided into four types or classes: Futures accounts, foreign futures accounts, leverage accounts and commodity options accounts, which correspond to the four estates a commodity broker may have based upon the different types of transactions it handles for customers." *Id.* at 57536. These classes corresponded to different definitions of "customer" found in section 761(9) of the Bankruptcy Code: With respect to a "futures commission merchant," a "foreign futures commission merchant," a "leverage transaction merchant," and a "commodity options dealer." *See* 11 U.S.C. 761(9).

In making that proposal, the Commission cited to text in the House Report for the 1978 Bankruptcy Code concerning those definitions, which noted that:

It is anticipated that a debtor with multifaceted characteristics will have separate estates for each different kind of customer. Thus, a debtor that is a leverage transaction merchant and a commodity options dealer would have separate estates for the leverage transaction customers and for the options customers, and a general estate for other creditors.

*See* H.R. Rep. 95–595 at 355, 1978 U.S.C.C.A.N. 5963, 6346.

In the release adopting part 190, the Commission added another "account class," delivery accounts, for property related to the making or taking of physical delivery by a customer. Delivery accounts are not mentioned in section 761(9) of the Bankruptcy Code, but are, again, related to a "different kind of customer." *See* 48 FR 8716, 8731 (Mar. 1, 1983). Similarly, in April of 2010, the Commission added another "account class," for cleared OTC transactions. Once again, this represented a "separate estate" for a "different kind of customer." *See* 75 FR 17297 (Apr. 6, 2010). Separating cleared swaps customers by the type of model the DCO adopts does not fit this tested rubric: The customers are all of the same "kind," namely, all cleared swaps customers.

[92] *See, e.g.,* ICE at 12, Investment Company Institute at 6, LCH at 7.

[93] *See* comment from Jerrold Salzman, available at *http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=42253&SearchText=* (discussing the legal segregation of certain customer accounts as a way to minimize fellow customer risk).

cleared swaps customer collateral pre-bankruptcy?

- Should such a model be an option elected by cleared swaps customers, or mandatory for defined "high-risk" customers?
  - By whom would the definition of "high-risk" be set?
  - What criteria should be included in the definition of "high risk"?
  - Would the definition of "high risk" vary by asset class?
- To the extent the model is optional by a cleared swaps customer, to what extent might there be a tendency for cleared swaps customers posing greater risk to remain in the omnibus pool? What policy concerns, if any, might be raised by the inclusion of a larger concentration of cleared swaps customers posing greater risk in the omnibus pool?

Please provide a detailed quantitative analysis of the costs and benefits of this model relative to other models that are being considered in this NPRM, and relative to the existing uncleared swaps market. Please specify how each cost and benefit would be ultimately allocated to, or borne by, cleared swaps customers, FCMs and DCOs. Specifically, how would this type of model affect operational costs and Risk Costs?

*F. Structure of These Proposed Regulations*

Proposed regulation part 22 ("Part 22") establishes the basic architecture for protecting cleared swaps customer collateral through the promulgation of definitions and procedures for the segregation of cleared swaps pertaining to customers, as well as associated collateral. The Commission intends for proposed Part 22 to incorporate legal segregation, and to parallel, for the most part, the substance of corresponding provisions in part 1 to Title 17 (the "Part 1 Provisions"), in updated and clarified form, with respect to issues such as requirements for treatment of customer funds on a day-to-day basis, required amounts of collateral in customer accounts, and required qualifications for permitted depositories. While most of the proposed regulations in Part 22 will remain the same for the Complete Legal Segregation Model and the Legal Segregation with Recourse Model, proposed regulation 22.15 sets forth alternatives to take into account the fact that, under the Legal Segregation with Recourse Model, following an event of default a DCO would be able to access the collateral of non-defaulting cleared swaps customers after the DCO applied (i) its own capital to cure the default and (ii) the guaranty fund contributions of its non-defaulting FCM members.

The infrastructure supporting legal segregation is established in proposed regulations 22.11–22.16, including (i) the requirement that an FCM transmit to its DCO daily information regarding customers and their swaps, (ii) tools that the DCO may use to manage the risk it incurs with respect to individual customers, (iii) steps the FCM is required to take if it fails to meet a cleared swaps customer margin call in full, and (iv) an explicit requirement that cleared swaps customer collateral be treated on an individual basis. The Commission requests comment on whether Part 22 differs in substance from the Part 1 Provisions, other than in the specific instances described in this NPRM.

In addition, proposed revisions to Part 190 of the Commission's regulations generally implement changes wrought by the Dodd-Frank Act, including the inclusion of swaps cleared with a DCO as customer contracts for all commodity brokers, the inclusion of swaps execution facilities as a category of trading venue, and additional conforming changes to time periods. Additional proposed changes have been made to conform Part 190 to current market practices (*e.g.,* providing for auctions of swaps portfolios in the event of a commodity broker insolvency).

## IV. Section by Section Analysis: Segregation of Cleared Swaps for Customers

*A. Proposed Regulation 22.1: Definitions*

Proposed regulation 22.1 establishes definitions for, *inter alia,* the following terms: "cleared swap," "cleared swaps customer," "cleared swaps customer account," "cleared swaps customer collateral," "cleared swaps proprietary account," "clearing member," [94] "collecting futures commission merchant," "commingle," "customer," "depositing futures commission merchant," "permitted depository," [95] and "segregate."

1. "Segregate" and "Commingle"

The Commission has never defined the terms "segregate" and "commingle," although the Part 1 Provisions make extensive use of these terms. Regulation 22.1 proposes definitions for these terms that are intended to codify the common meaning of such terms under the Part 1 Provisions. Pursuant to the proposal, to "segregate" two or more items means to keep them in separate accounts and to avoid combining them in the same transfer between accounts. In contrast, to "commingle" two or more items means to hold them in the same account, or to combine such items in a transfer between accounts. For purposes of these definitions, to keep items in separate accounts means: (i) To hold tangible items [96] physically separate within one's own organization; (ii) to deposit tangible or intangible items [97] with a Permitted Depository (as discussed further below) in separate accounts; and (iii) to reflect tangible or intangible items in separate entries in books and records. To hold items in the same account means exactly the opposite—namely, (i) to hold tangible items physically together within one's own organization; (ii) to deposit tangible or intangible items with a Permitted Depository in the same account; and (iii) to reflect tangible or intangible items in the same entries in books and records.

2. "Cleared Swap"

The term "Cleared Swap" has no analog in the Part 1 Provisions. Regulation 22.1 proposes a definition that incorporates section 1a(7) of the CEA,[98] as added by section 721 of the Dodd-Frank Act. This definition then excludes, for purposes of Part 22 only, cleared swaps (and related collateral) that, pursuant to Commission order under section 4d(a) of the CEA,[99] are

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[94] Under the Commission's proposal, the term "clearing member" means "any person that has clearing privileges such that it can process, clear and settle trades through a derivatives clearing organization on behalf of itself or others. The derivatives clearing organization need not be organized as a membership organization."

[95] The Commission is proposing to define "permitted depository" as a depository that meets the following conditions:

(a) The depository must (subject to proposed regulation 22.9) be one of the following types of entities:

(1) A bank located in the United States;

(2) a trust company located in the United States;

(3) a Collecting Futures Commission Merchant registered with the Commission (but only with respect to a Depositing Futures Commission Merchant providing Cleared Swaps Customer Collateral); or

(4) a derivatives clearing organization registered with the Commission; and

(b) the FCM or the DCO must hold a written acknowledgment letter from the depository as required by proposed regulation 22.5. *See* also the discussion under section IV(D).

[96] Tangible items may include, *e.g.,* gold ingots or warehouse receipts, as discussed further below.

[97] Intangible items may include, *e.g.,* wire transfers or dematerialized securities, as discussed further below.

[98] 7 U.S.C. 1a(7). The Commission is working on regulations, along with the Securities and Exchange Commission, that would further define certain key terms of the Dodd-Frank Act, including "swaps." *See Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act,* 75 FR 51429 (Aug. 20, 2010). Such regulations, when finalized, would automatically be incorporated in the definition of "cleared swap" cited herein.

[99] 7 U.S.C. 6d(a).

commingled with futures contracts (and related collateral) in an account established for the futures contracts. The definition conversely includes, for purposes of Part 22 only, futures contracts or foreign futures contracts (and, in each case, related collateral) that, pursuant to Commission order under section 4d(f) of the CEA,[100] are commingled with cleared swaps (and related collateral) in an account established for the cleared swaps. The rationale for such exclusion and inclusion is that, under Commission precedent,[101] once cleared swaps (and related collateral) are commingled with futures contracts (and related collateral) in a futures account, the Part 1 Provisions and the Bankruptcy Rules would apply to the cleared swaps (and related collateral) as if such swaps constituted futures contracts (and related collateral). Similarly, once futures contracts or foreign futures contracts (and, in each case, related collateral) are commingled with cleared swaps (and related collateral) in a cleared swaps account, the proposed definition of "Cleared Swap" would apply Part 22 and the Bankruptcy Rules to the former contracts as if they constituted cleared swaps (and related collateral). Therefore, the proposed definition of "Cleared Swap," with such exclusion and inclusion, simply extends Commission precedent.

3. "Cleared Swaps Customer" and "Customer"

Regulation 22.1 proposes a definition of "Cleared Swaps Customer" that has two elements. First, an entity holding a Cleared Swaps Proprietary Account (as discussed further below) is not a "Cleared Swaps Customer" with respect to the Cleared Swaps (and related collateral) in that account. Such exclusion is consistent with regulation 1.3,[102] which defines "customer" and "commodity customer" for futures contracts. Second, an entity is only a "Cleared Swaps Customer" with respect to its Cleared Swaps (and related collateral). Additionally, the same entity may be a "customer" or "commodity customer" (as regulation 1.3 defines such terms) with respect to its futures contracts, and a "foreign futures or foreign options customer" (as regulation 30.1(c) [103] defines such term) with respect to its foreign futures contracts.[104] Because certain provisions of Part 22 distinguish the status of such entity (i) as a "Cleared Swaps Customer" and (ii) as a "customer" or "commodity customer" or "foreign futures or options customer," regulation 22.1 proposes a definition for "Customer" that includes any customer of an FCM other than a "Cleared Swaps Customer."

4. "Cleared Swaps Customer Collateral"

Regulation 22.1 proposes to define "Cleared Swaps Customer Collateral" to include money, securities, or other property that an FCM or a DCO receives, from, for, or on behalf of a Cleared Swaps Customer, which (i) is intended to or does margin, guarantee, or secure a Cleared Swap,[105] or (ii) if the Cleared Swap is in the form or nature of an option, constitutes the settlement value of such option. Additionally, regulation 22.1 proposes to define "Cleared Swaps Customer Collateral" to include "accruals," which are the money, securities, or other property that an FCM or DCO receives, either directly or indirectly, as incident to or resulting from a Cleared Swap that the FCM intermediates for a Cleared Swaps Customer.[106]

In general, the proposed definition parallels regulation 1.3,[107] which defines "customer funds" for futures contracts. However, the proposed definition differs from regulation 1.3 in three instances.[108] First, the proposed definition explicitly includes a Cleared Swap in the form or nature of an option as "Cleared Swaps Customer Collateral." The Commission believes that such change appropriately clarifies that a Cleared Swap functioning as an option, but not labeled as one, falls within the scope of the proposed definition. Second, the proposed definition does not explicitly include option premiums as "Cleared Swaps Customer Collateral." The Commission believes that such amounts are already incorporated in the settlement value of the option, and that listing such amounts separately may cause unnecessary confusion. Third, the proposed definition explicitly includes in "accruals" the money, securities, or other property that a DCO may receive relating to the Cleared Swap that an FCM intermediates for a Cleared Swap Customer. The Commission believes that such inclusion is appropriate since proposed regulation 22.3 permits a DCO to invest the "Cleared Swaps Customer Collateral" that it receives from the FCM in accordance with regulation 1.25.[109] Therefore, any increases in value

[100] 7 U.S.C. 6d(f).

[101] For example, current regulation 190.01(a) states: "* * * if positions in commodity contracts that would otherwise belong to one account class (and the money, securities, and/or other property margining, guaranteeing, or securing such positions), are, pursuant to a Commission order, commingled with positions in commodity contracts of the futures account class (and the money, securities, and/or other property margining, guaranteeing, or securing such positions), then the former positions (and the relevant money, securities, and/or other property) shall be treated, for purposes of this part, as being held in an account of the futures account class." 17 CFR 190.01(a). In the notice proposing current regulation 190.01(a), 74 FR 40794 (Aug. 13, 2009), the Commission stated that the regulation codified two previous interpretative statements: (i) The Interpretative Statement Regarding Funds Related to Cleared-Only Contracts Determined To Be Included in a Customer's Net Equity, 73 FR 65514 (Nov. 4, 2008); and (ii) the Interpretative Statement Regarding Funds Determined to be Held in the Futures Account Type of Customer Account Class, 69 FR 69510 (Nov. 30, 2004).

[102] 17 CFR 1.3.

[103] 17 CFR 30.1(c).

[104] The contracts (and related collateral) of such entity would be subject to three different segregation regimes. Specifically, the entity would be entitled to the protections of (i) the Corresponding Provisions with respect to its futures contracts (and related collateral), (ii) regulation 30.7 with respect to its foreign futures contracts (and related collateral), and (iii) Part 22 with respect to its Cleared Swaps (and related collateral).

[105] Proposed regulation 22.1 provides that "Cleared Swaps Customer Collateral" includes collateral that an FCM or a DCO receives from, for, or on behalf of a Cleared Swaps Customer that either (i) is actually margining, guaranteeing, or securing a Cleared Swap or (ii) is intended to margin, guarantee, or secure a Cleared Swap. This provision is a clarification of "customer funds" as defined in regulation 1.3, which includes "all money, securities, and property received by a futures commission merchant or by a clearing organization from, for, or on behalf of, customers or option customers * * * to margin, guarantee, or secure futures contracts."

[106] The Commission does not intend to include in Part 22 a parallel to regulation 1.21, given that (i) regulation 22.1 proposes to broadly include "accruals" in the definition of "Cleared Swaps Customer Collateral" and (ii) regulation 22.2(c) proposes to permit an FCM to commingle the "Cleared Swaps Customer Collateral" of multiple "Cleared Swaps Customers."

Regulation 1.21 states: "All money received directly or indirectly by, and all money and equities accruing to, a futures commission merchant from any clearing organization or from any clearing member or from any member of a contract market incident to or resulting from any trade, contract or commodity option made by or through such futures commission merchant on behalf of any commodity or option customer shall be considered as accruing to such commodity or option customer within the meaning of the Act and these regulations. Such money and equities shall be treated and dealt with as belonging to such commodity or option customer in accordance with the provisions of the Act and these regulations. Money and equities accruing in connection with commodity or option customers' open trades, contracts, or commodity options need not be separately credited to individual accounts but may be treated and dealt with as belonging undivided to all commodity or option customers having open trades, contracts, or commodity option positions which if closed would result in a credit to such commodity or option customers." 17 CFR 1.21.

The Commission requests comment on whether it should include in Part 22 a parallel to regulation 1.21.

[107] 17 CFR 1.3.

[108] In addition to these three instances, the proposed definition does not incorporate certain parallels to regulation 1.3 (exclusion from "customer funds" of collateral to secure security futures products in a securities account) because such parallels are not applicable to the context of Cleared Swaps (and related collateral).

[109] 17 CFR 1.25.

resulting from the investment would properly belong to the Cleared Swaps Customer, and would constitute another form of "Cleared Swaps Customer Collateral."

5. "Cleared Swaps Customer Account" and "Cleared Swaps Proprietary Account"

Regulation 22.1 proposes to define "Cleared Swaps Customer Account" as (i) an account that an FCM maintains at a Permitted Depository (as such term is discussed below) for the Cleared Swaps (and related collateral) of its Cleared Swaps Customers, or (ii) an account that a DCO maintains at a Permitted Depository, for collateral related to Cleared Swaps that the FCM members intermediate for their Cleared Swaps Customers. The proposed definition does not include any physical locations in which an FCM or a DCO may itself hold tangible Cleared Swaps Customer Collateral. As described below, regulations 22.2 and 22.3 propose to define such physical locations as the "FCM Physical Location" and the "DCO Physical Location," respectively. The proposed definition is consistent with regulation 1.3,[110] which defines "futures account." However, the proposed definition provides greater specificity than regulation 1.3 regarding (i) the entities maintaining the "Cleared Swaps Customer Account" (*i.e.,* the FCM or DCO) and (ii) the Permitted Depositories for a "Cleared Swaps Customer Account."

Regulation 22.1 proposes a definition for "Cleared Swaps Proprietary Account" that is substantially similar to regulation 1.3, which defines "Proprietary Account" for futures contracts.[111] The proposed definition contains a proviso, in paragraph (b)(8), that states "an account owned by any shareholder or member of a cooperative association of producers, within the meaning of section 6a of the Act, which association is registered as an FCM and carries such account on its records, shall be deemed to be a Cleared Swaps Customer Account and not a Cleared Swaps Proprietary Account of such association, unless the shareholder or member is an officer, director, or manager of the association." This proviso parallels paragraph viii in the definition of "Proprietary Account" in regulation 1.3. The Commission requests comment on whether this proviso remains relevant, and, in particular, with respect to Cleared Swaps.

[110] 17 CFR 1.3.

[111] *Id.*

6. "Collecting Futures Commission Merchant" and "Depositing Futures Commission Merchant"

The terms "Collecting Futures Commission Merchant" and "Depositing Futures Commission Merchant" have no analogs in the Part 1 Provisions. Regulation 22.1 proposes to define a "Collecting Futures Commission Merchant" as one that carries Cleared Swaps on behalf of another FCM and the Cleared Swaps Customers of that other FCM and, as part of doing so, collects Cleared Swaps Customer Collateral. In contrast, regulation 22.1 proposes to define a "Depositing Futures Commission Merchant" as one that carries Cleared Swaps on behalf of its Cleared Swaps Customers through a Collecting Futures Commission Merchant, and, as part of doing so, deposits Cleared Swaps Customer Collateral with such Collecting Futures Commission Merchant. Regulation 22.7, as described below, proposes to employ the terms "Collecting Futures Commission Merchant" and "Depositing Futures Commission Merchant" to delineate the circumstances in which one FCM may serve as a Permitted Depository to another.

*B. Proposed Regulation 22.2—Futures Commission Merchants: Treatment of Cleared Swaps Customer Collateral*

Regulation 22.2 proposes requirements for an FCM's treatment of Cleared Swaps Customer Collateral, as well as the associated Cleared Swaps.

1. In General

Regulation 22.2(a) proposes to require an FCM to treat and deal with the Cleared Swaps of Cleared Swaps Customers, as well as associated Cleared Swaps Customer Collateral, as belonging to the Cleared Swaps Customers. In other words, the FCM may not use Cleared Swaps Customer Collateral to cover or support (i) its own obligations or (ii) the obligations of Customers (*e.g.,* entities transacting in futures or equities contracts). Such proposal parallels regulations 1.20(a) and 1.26(a), which apply to "customer funds," and obligations purchased with customer funds, for futures contracts.[112]

2. Location of Collateral

Regulation 22.2(b) proposes to require that an FCM segregate all Cleared Swaps Customer Collateral that it receives. Such proposal parallels regulations 1.20(a) and 1.26(a).[113] Additionally, regulation 22.2(b) proposes to require that an FCM adopt one of two methods to hold segregated Cleared Swaps Customer Collateral, which parallel either implicit assumptions or explicit provisions of regulation 1.20(a).

a. The First Method

Paralleling an implicit assumption of regulations 1.20(a) and 1.26(a), the first method permits the FCM to hold Cleared Swaps Customer Collateral itself.[114] Continuing such parallel, the first method limits the FCM to holding tangible collateral (*e.g.,* gold ingots or warehouse receipts) because no FCM currently serves as a depository registered with domestic or foreign banking regulators, and because of uncertainty regarding the effectiveness of such segregation if an FCM that was so registered held intangible collateral in its own accounts. Finally, the first method requires the FCM, in holding such Cleared Swaps Customer Collateral, to:

- Physically separate the collateral from FCM property (*e.g.,* in a box or vault);
- Clearly identify each physical location (an "FCM Physical Location") in which it holds such collateral as a "Location of Cleared Swaps Customer Collateral" (*e.g.,* by affixing a label or sign to the box or vault);
- Ensure that the FCM Physical Location provides appropriate protection for such collateral (*e.g.,* by confirming that the box or vault has locks and is fire resistant); and
- Record in its books and records the amount of such collateral separately from FCM funds (*i.e.,* to reflect the reality of physical separation in books and records).

[112] Regulation 1.20(a) states: "Under no circumstances shall any portion of customer funds be obligated to a clearing organization, any member of a contract market, a futures commission merchant, or any depository except to purchase, margin, guarantee, secure, transfer, adjust or settle trades, contracts or commodity option transactions of commodity or option customers." 17 CFR 1.20(a).

[113] Regulation 1.20(a) states: "All customer funds shall be separately accounted for and segregated as belonging to commodity or option customers." *Id.*

Regulation 1.26(a) states: "Each futures commission merchant who invests customer funds in instruments described in Sec. 1.25 shall separately account for such instruments and segregate such instruments as belonging to such commodity or option customers." 17 CFR 1.26.

[114] Regulation 1.20(a) does not require that an FCM hold "customer funds" in a depository. Rather, it applies certain requirements to the holding of "customer funds *when* deposited with any bank, trust company, clearing organization or another futures commission merchant * * *" (emphasis added). In the absence of a requirement to use a depository, regulation 1.20(a) must implicitly permit the FCM to hold "customer funds" itself. *Id.* Regulation 1.26(a) contains similar language regarding the use of a depository. *Id.*

b. The Second Method

Paralleling an explicit provision of regulations 1.20(a) and 1.26(a),[115] the second method permits the FCM to hold Cleared Swaps Customer Collateral outside of itself, *i.e.,* at a depository.[116] Continuing that parallel, the second method limits the FCM to certain Permitted Depositories (as further discussed below), and requires that the FCM deposit such collateral in a Cleared Swaps Customer Account.

3. Commingling

Regulation 22.2(c) proposes to permit an FCM to commingle the Cleared Swaps Customer Collateral of multiple Cleared Swaps Customers, while prohibiting the FCM from commingling Cleared Swaps Customer Collateral with:

- FCM property, except as permitted under proposed regulation 22.2(e) (as discussed below); or
- "Customer funds" for futures contracts (as regulation 1.3 defines such term) or the "foreign futures or foreign options secured amount" (as regulation 1.3 defines such term), except as permitted by a Commission rule, regulation or order (or a derivatives clearing organization rule approved pursuant to regulation 39.15(b)(2)).[117]

Proposed regulation 22.2(c) parallels regulations 1.20(a), 1.20(c), and 1.26(a).[118]

4. Limitations on Use

Regulation 22.2(d) proposes certain limitations on the use that an FCM may make of Cleared Swaps Customer Collateral. First, regulation 22.2(d)(1) proposes to prohibit an FCM from using, or permitting the use of, the Cleared Swaps Customer Collateral or one Cleared Swaps Customer to purchase, margin, or settle the Cleared Swaps, or any other transaction, of a person other than the Cleared Swaps Customer. Such proposal parallels regulation 1.20(c) and 1.22.[119] Second, regulation 22.2(d)(2) proposes to prohibit an FCM from using Cleared Swaps Customer Collateral to margin, guarantee, or secure the non-Cleared Swap contracts (*e.g.,* futures or foreign futures contracts) of the entity constituting the Cleared Swaps Customer.[120] Such proposal parallels regulation 1.22.[121]

Regulation 22.2(d)(2) proposes to prohibit an FCM from imposing, or permitting the imposition of, a lien on Cleared Swaps Customer Collateral, including on any FCM residual financial interest therein (as regulation 22.2(e)(3) discusses further). The Commission believes that such a prohibition, in the event that an FCM becomes insolvent, would preempt the claim of an FCM creditor against any portion of the Cleared Swaps Customer Collateral, and would thereby prevent the FCM creditor from interfering with the porting of such collateral to a solvent FCM.

Regulation 22.2(d)(3) proposes to prohibit an FCM from claiming that any of the following constitutes Cleared Swaps Customer Collateral:

- Money invested in the securities, memberships, or obligations of any DCO, DCM, SEF, or SDR; or
- Money, securities, or other property that any DCO holds and may use for a purpose other than to margin, guarantee, secure, transfer, adjust or settle the obligations incurred by the FCM on behalf of its Cleared Swaps Customers.

Such proposal parallels regulation 1.24.[122]

5. Exceptions

Regulation 22.2(e) proposes certain exceptions to the abovementioned requirements and limitations.

a. Permitted Investments

Proposed regulation 22.2(e)(1) constitutes an exception to regulation 22.2(d) (Limitations on Use). Regulation 22.2(e)(1) proposes to allow an FCM to

[115] Regulation 1.20(a) states: "All customer funds shall be separately accounted for and segregated as belonging to commodity or option customers. Such customer funds when deposited with any bank, trust company, clearing organization or another futures commission merchant shall be deposited under an account name which clearly identifies them as such and shows that they are segregated as required by the Act and this part." *Id.* Regulation 1.26(a) contains similar language. *Id.*

[116] If an FCM chooses to accept intangible Cleared Swaps Customer Collateral, then the proposal effectively requires the FCM to maintain such collateral outside of itself. If the FCM accepts tangible Cleared Swaps Customer Collateral (*e.g.,* a gold ingot) and transfers such collateral to a depository (*e.g.,* a DCO), the FCM will be considered to be depositing such collateral rather than maintaining the collateral itself.

[117] As the discussion on the proposed definition of "Cleared Swaps" highlights, if the Commission adopts a rule or regulation or issues an order pursuant to section 4d(a) of the CEA, or if the Commission approves DCO rules pursuant to proposed regulation 39.15(b)(2) permitting such commingling, the Commission would apply the Corresponding Provisions and Part 190 to the Cleared Swap (and related collateral) as if the swap constituted a futures contract (and related collateral).

In contrast, if the Commission adopts a rule or regulation or issues an order pursuant to section 4d(f) of the CEA, or if the Commission approves DCO rules pursuant to proposed regulation 39.15(b)(2) permitting such commingling, the proposed definition of "Cleared Swap" would operate to apply Part 22 and Part 190 to (i) the futures contract (and related collateral) or (ii) the foreign futures contract (and related collateral) as if such contracts constituted Cleared Swaps (and related collateral).

[118] Regulations 1.20(a) and 1.26(a) implicitly (i) permit the FCM to commingle "customer funds" from multiple futures customers and (ii) prohibit the FCM from commingling "customer funds" with either FCM funds or funds supporting customer transactions in non-futures contracts. Specifically, regulation 1.20(a) states: "All customer funds shall be separately accounted for and segregated as belonging to commodity or option customers." Similarly, regulation 1.26(a) states: "Each futures commission merchant who invests customer funds in instruments described in Sec. 1.25 shall separately account for such instruments and segregate such instruments as belonging to such commodity or option customers." 17 CFR 1.20(a) and 1.26(a).

Regulation 1.20(c), in contrast, first explicitly prohibits an FCM from commingling the "customer funds" of one futures customer with (i) "customer funds" of another futures customer, (ii) funds supporting customer transactions in non-futures contracts (*e.g.,* the "foreign futures and options secured amount," as defined in regulation 1.3), and (iii) FCM funds. Specifically, regulation 1.20(c) states: "Each futures commission merchant shall treat and deal with the customer funds of a commodity customer or of an option customer as belonging to such commodity or option customer. All customer funds shall be separately accounted for, and shall not be commingled with the money, securities, or property of a futures commission merchant or of any other person. * * *" Notwithstanding the foregoing, however, regulation 1.20(c) then permits an FCM to commingle "customer funds" of multiple futures customers for convenience. Specifically, regulation 1.20(c) contains the following proviso: "*Provided, however,* that customer funds treated as belonging to the commodity or option customers of a futures commission merchant may for convenience be commingled and deposited in the same account or accounts with any bank or trust company, with another person registered as a futures commission merchant, or with a clearing organization. * * *" Regulation 1.20(c) does not contain a similar exception for (i) funds supporting customer transactions in non-futures contracts or (ii) FCM funds. 17 CFR 1.20(c).

[119] Regulation 1.20(c) states: "All customer funds shall be separately accounted for, and shall not * * * be used to secure or guarantee the trades, contracts or commodity options, or to secure or extend the credit, of any person other than the one for whom the same are held." *Id.*

Regulation 1.22 states: "No futures commission merchant shall use, or permit the use of, the customer funds of one commodity and/or option customer to purchase, margin, or settle the trades, contracts, or commodity options of, or to secure or extend the credit of, any person other than such customer or option customer." 17 CFR 1.22.

[120] As mentioned above, an entity may simultaneously transact (i) futures contracts, (ii) foreign futures contracts, and (iii) Cleared Swaps. Such entity would constitute a Cleared Swaps Customer only with respect to its Cleared Swaps.

[121] Regulation 1.22 further states: "Customer funds shall not be used to carry trades or positions of the same commodity and/or option customer other than in commodities or commodity options traded through the facilities of a contract market." 17 CFR 1.22.

[122] Regulation 1.24 states: "Money held in a segregated account by a futures commission merchant shall not include: (a) Money invested in obligations or stocks of any clearing organization or in memberships in or obligations of any contract market; or (b) money held by any clearing organization which it may use for any purpose other than to purchase, margin, guarantee, secure, transfer, adjust, or settle the contracts, trades, or commodity options of the commodity or option customers of such futures commission merchant." 17 CFR 1.24.

invest Cleared Swaps Customer Collateral in accordance with regulation 1.25, as such regulation may be amended from time to time. Regulation 1.25 delineates permitted investments of "customer funds" (as regulation 1.3 defines such term) for futures contracts.[123]

By allowing certain investments of Cleared Swaps Customer Collateral, proposed regulation 22.2(e)(1) parallels regulation 1.20(c).[124]

b. Permitted Withdrawals

Proposed regulation 22.2(e)(2) permits an FCM to withdraw Cleared Swaps Customer Collateral for such purposes as meeting margin calls at a DCO or a Collecting FCM, or to meet charges lawfully accruing in connection with a cleared swap, such as brokerage or storage charges. Regulation 22.2(e)(2) parallels regulation 1.20(c) and implements section 4d(f)(3)(A)(ii).

c. Deposits of Own Money, Securities, or Other Property

Proposed regulation 22.2(e)(3) constitutes an exception to regulations 22.2(b) (Location of Cleared Swaps Customer Collateral) and (c) (Commingling). Regulation 22.2(e)(3) proposes to permit an FCM: (i) To place its own property in an FCM Physical Location or (ii) to deposit its own property in a Cleared Swaps Customer Account.[125] As further explained below, proposed regulation 22.2(f) (Requirements as to Amount) mandates an FCM to use its own capital to cover the negative account balance of any Cleared Swaps Customer. To avoid the possibility of a deficiency,[126] an FCM may choose to place or deposit, in advance, its own property in an FCM Physical Location or a Cleared Swaps Customer Account, as applicable. By permitting such placement or deposit, proposed regulation 22.2(e)(3) parallels regulation 1.23.[127]

d. Residual Financial Interest

Proposed regulation 22.2(e)(4) clarifies that, if an FCM places or deposits its own property in an FCM Physical Location or a Cleared Swaps Customer Account, as applicable, then that property becomes Cleared Swaps Customer Collateral. This regulation would permit an FCM to retain a residual financial interest in property in excess of that necessary to comport with proposed regulation 22.2(f) (Requirements as to Amount). It allows the FCM to make withdrawals from the FCM Physical Location or the Cleared Swaps Customer Account, as applicable, so long as the FCM first ascertains that such withdrawals do not surpass its residual financial interest. In general, proposed regulation 22.2(e)(4) parallels regulation 1.23.[128]

e. Requirements as to Amount

i. Background

Proposed regulation 22.2(f) sets forth an explicit calculation for the value of Cleared Swaps Customer Collateral that each FCM must hold, which parallels the implicit calculation in the Part 1 Provisions. The Part 1 Provisions clearly require an FCM to segregate "customer funds" (as regulation 1.3 defines such term) for futures contracts.[129] However, the Part 1 Provisions also consider "customer funds" to be fungible. Specifically, because the Part 1 Provisions permit FCM commingling of "customer funds" from multiple futures customers[130] and FCM investment of such funds,[131] the Part 1 Provisions implicitly allow an FCM to meet its obligations without maintaining the exact property that each futures customer conveys. The Part 1 Provisions do require an FCM to maintain, at a minimum, an overall amount of "customer funds" in segregation.[132] Nevertheless, the Part 1 Provisions do not set forth an explicit calculation for such amount. Instead, the Part 1 Provisions imply that an FCM must maintain an amount in segregation that would prevent the FCM from using the "customer funds" of one futures customer to "secure or guarantee the trades, contracts or commodity options, or to secure or extend the credit of any person other than the one for whom the same are held."[133] Form 1–FR–FCM builds upon this implicit calculation.

ii. Proposed Requirement

Consistent with the intention of the Commission to incorporate updated and clarified versions of the Part 1 Provisions in Part 22, the Commission proposes an explicit calculation for the amount of Cleared Swaps Customer Collateral that an FCM must maintain in segregation. As such this calculation is intended only to make explicit what the Part 1 Provisions left implicit, the

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[123] One commenter, Federated Investors, Inc. (Freeman and Hawke), argues that limitations on the investment of customer collateral in money market mutual funds are inappropriate for futures, and even more inappropriate for swaps. As mentioned above, the Commission has proposed amendments to regulation 1.25. *See Investment of Customer Funds and Funds Held in an Account for Foreign Futures and Foreign Options Transactions,* 75 FR 67642 (Nov. 3, 2010). With respect to limitations on investment of cleared swaps customer collateral, the Dodd-Frank Act provides, in newly-enacted section 4d(f)(4) of the CEA, that such collateral

* * * may be invested in obligations of the United States, in general obligations of any State or of any political subdivision of a State, and in obligations fully guaranteed as to principal and interest by the United States, or in any other investment that the Commission may by rule or regulation prescribe * * *.

Thus, with the exception of the specified government obligations, Congress chose not to mandate any specific acceptable customer investments. In exercising the power granted under section 4d(f)(4) to expand the universe of acceptable customer investments, the Commission is seeking the same goals as in regulation 1.25—namely, preserving principal and maintaining liquidity. *See* 75 FR at 67646. Accordingly, the Commission is proposing to incorporate the provisions of regulation 1.25 (as amended from time to time) by reference.

[124] Regulation 1.20(c) states: "* * * customer funds may be invested in instruments described in Sec. 1.25." 17 CFR 1.20(c).

[125] Regulation 22.2(e)(3) proposes to permit an FCM to deposit only those securities that are unencumbered and are of the types specified in regulation 1.25. Such proposal accords with regulation 1.23. *See* infra note 127. The Commission notes, however, that this proposal does not, and is not meant to, require a DCO to accept all of the types of securities or other property specified in regulation 1.25.

[126] *See* regulation 1.12(h) (requiring an FCM that learns of a deficiency in segregated funds to notify the Commission and the FCM's designated self-regulatory organization of that deficiency).

[127] Regulation 1.23 states: "The provision in section 4d(a)(2) of the Act and the provision in § 1.20(c), which prohibit the commingling of customer funds with the funds of a futures commission merchant, shall not be * * * construed to prevent a futures commission merchant from adding to such segregated customer funds such amount or amounts of money, from its own funds or unencumbered securities from its own inventory, of the type set forth in § 1.25, as it may deem necessary to ensure any and all commodity or option customers' accounts from becoming under segregated at any time." 17 CFR 1.23.

[128] Regulation 1.23 states, in addition to the text in note 127 supra: "The provision in section 4d(a)(2) of the Act and the provision in § 1.20(c), which prohibit the commingling of customer funds with the funds of a futures commission merchant, shall not be construed to prevent a futures commission merchant from having a residual financial interest in the customer funds, segregated as required by the Act and the rules in this part and set apart for the benefit of commodity or option customers * * * The books and records of a futures commission merchant shall at all times accurately reflect its interest in the segregated funds. A futures commission merchant may draw upon such segregated funds to its own order, to the extent of its actual interest therein, including the withdrawal of securities held in segregated safekeeping accounts held by a bank, trust company, contract market, clearing organization or other futures commission merchant. Such withdrawal shall not result in the funds of one commodity and/or option customer being used to purchase, margin or carry the trades, contracts or commodity options, or extend the credit of any other commodity customer, option customer or other customer." *Id.*

[129] *See* regulations 1.20(a) and (c) and 1.26(a).

[130] *See* regulation 1.20(c).

[131] *See* regulations 1.20(c) and 1.25.

[132] Regulation 1.32 states: "Each futures commission merchant must compute as of the close of each business day, on a currency-by-currency basis * * * (2) the amount of such customer funds required by the Act and these regulations to be on deposit in segregated accounts on behalf of such commodity and option customers. * * *" 17 CFR 1.32.

[133] Regulation 1.20.

calculation does not materially differ in the Form 1–FR–FCM from the calculation for "customer funds" of futures customers.

First, regulation 22.2(f) proposes to define "account" to reference FCM's books and records pertaining to the Cleared Swaps Customer Collateral of a particular Cleared Swaps Customer.

Second, regulation 22.2(f) proposes to require an FCM to reflect in its account for each Cleared Swaps Customer the market value of any Cleared Swaps Collateral that it receives from such customer, as adjusted for:

- Any uses that proposed regulation 22.2(d) permits;
- Any accruals or losses on investments permitted by proposed regulation 22.2(e) that, pursuant to the applicable FCM customer agreement, are creditable or chargeable to such Cleared Swaps Customer;
- Any charges lawfully accruing to the Cleared Swaps Customer, including any commission, brokerage fee, interest, tax, or storage fee; and
- Any appropriately authorized distribution or transfer of the Cleared Swaps Collateral.

Third, regulation 22.2(f) proposes to categorize accounts of Cleared Swaps Customers as having credit or debit balances. Accounts where the market value of Cleared Swaps Customer Collateral is positive after adjustments have credit balances. Conversely, accounts where the market value of Cleared Swaps Customer Collateral is negative after adjustments have debit balances.

Fourth, regulation 22.2(f) proposes to require an FCM to maintain in segregation, in its FCM Physical Location and/or its Cleared Swaps Customer Accounts at Permitted Depositories, an amount equal to the sum of any credit balances that Cleared Swaps Customers have in their accounts, excluding from such sum any debit balances that Cleared Swaps Customers have in their accounts (the "Collateral Requirement").

Finally, regulation 22.2(f) proposes an exception to the exclusion of debit balances, which parallels regulation 1.32(b).[134] Specifically, to the extent that a Cleared Swaps Customer deposited "readily marketable securities" with the FCM to secure a debit balance in its account, then the FCM must include such balance in the Collateral Requirement. "Readily marketable" is proposed to be defined as having a "ready market" as such latter term is defined in rule 15c3–1(c)(11) of the Securities and Exchange Commission (§ 241.15c3–1(c)(11) of this title). Regulation 22.2(f) proposes to deem a debit balance "secured" only if the FCM maintains a security interest in the "readily marketable securities," and holds a written authorization to liquidate such securities in its discretion. To determine the amount of the debit balance that the FCM must include in the Collateral Requirement, regulation 22.2(f) proposes to require the FCM: (i) To determine the market value of such securities, and (ii) to reduce such market value by applicable percentage deductions (*i.e.,* "securities haircuts") as set forth in rule 15c3–1(c)(2)(vi) of the Securities and Exchange Commission. The FCM would include in the Collateral Requirement that portion of the debit balance, not exceeding 100 percent, which is secured by such reduced market value.

iii. Question

The Commission requests comment on the Collateral Requirement proposed in regulation 22.2(f). Specifically, the Commission requests comment on whether the explicit calculation of such Collateral Requirement materially differs from the implicit calculation in the Part 1 Provisions for segregated "customer funds" of futures customers.

f. Segregated Account; Daily Computation and Record

Regulation 22.2(g), paralleling regulation 1.32,[135] proposes to require an FCM to compute, as of the close of each business day, on a currency-by-currency basis:

- The aggregate market value of the Cleared Swaps Customer Collateral in all FCM Physical Locations and all Cleared Swaps Customer Accounts at Permitted Depositories (the "Collateral Value");
- The Collateral Requirement; and
- The amount of the residual financial interest that the FCM holds in such Cleared Swaps Customer Collateral (*i.e.,* the difference between the Collateral Value and the Collateral Requirement).

Regulation 22.2(g), further paralleling regulation 1.32,[136] proposes to require the FCM to complete the abovementioned computation prior to noon on the next business day, and to keep all computations, together with supporting data, in accordance with regulation 1.31. "Noon" refers to noon in the time zone where the FCM's principal office is located.

*C. Proposed Regulation 22.3—Derivatives Clearing Organizations: Treatment of Cleared Swaps Customer Collateral*

Regulation 22.3 proposes requirements for DCO treatment of Cleared Swaps Customer Collateral from FCMs, as well as the associated Cleared Swaps. Such requirements generally parallel the Part 1 Provisions.

1. In General

Regulation 22.3(a) proposes to require a DCO to treat and deal with the Cleared Swaps Customer Collateral deposited by an FCM as belonging to the Cleared Swaps Customers of such FCM and not other persons, including, without limitation, the FCM. In other words, the DCO may not use Cleared Swaps Customer Collateral to cover or support (i) the obligations of the FCM depositing the Cleared Swaps Customer Collateral, (ii) the obligations of any other FCM, or (iii) the obligations of Customers (*e.g.,* entities transacting in futures or equities contracts) of any FCM. Such proposal parallels regulation 1.20(a), which applies to "customer funds" for futures contracts.[137]

2. Location of Collateral

Regulation 22.3(b) proposes to require that a DCO segregate all Cleared Swaps Customer Collateral that it receives from

[134] Regulation 1.32(b) states: "In computing the amount of funds required to be in segregated accounts, a futures commission merchant may offset any net deficit in a particular customer's account against the current market value of readily marketable securities, less applicable percentage deductions (*i.e.,* "securities haircuts") as set forth in rule 15c3–1(c)(2)(vi) of the Securities and Exchange Commission (17 CFR 241.15c3–1(c)(2)(vi)), held for the same customer's account. The futures commission merchant must maintain a security interest in the securities, including a written authorization to liquidate the securities at the futures commission merchant's discretion, and must segregate the securities in a safekeeping account with a bank, trust company, clearing organization of a contract market, or another futures commission merchant. For purposes of this section, a security will be considered readily marketable if it is traded on a "ready market" as defined in rule 15c3–1(c)(11)(i) of the Securities and Exchange Commission (17 CFR 240.15c3–1(c)(11)(i))." 17 CFR 1.32(b).

[135] Regulation 1.32(a) states: "Each futures commission merchant must compute as of the close of each business day, on a currency-by-currency basis: (1) The total amount of customer funds on deposit in segregated accounts on behalf of commodity and option customers; (2) the amount of such customer funds required by the Act and these regulations to be on deposit in segregated accounts on behalf of such commodity and option customers; and (3) the amount of the futures commission merchant's residual interest in such customer funds." 17 CFR 1.32(a).

[136] Regulation 1.32(c) states: "The daily computations required by this section must be completed by the futures commission merchant prior to noon on the next business day and must be kept, together with all supporting data, in accordance with the requirements of § 1.31." 17 CFR 1.32(c).

[137] *See* note 112 supra.

FCMs. Such proposal parallels regulations 1.20(b) and 1.26(b).[138] Additionally, regulation 22.2(b) proposes to require that a DCO adopt one of two methods to hold segregated Cleared Swaps Customer Collateral, which parallel either implicit assumptions or explicit provisions of regulation 1.20(b).

a. The First Method

Paralleling an implicit assumption of regulations 1.20(b) and 1.26(b), the first method permits the DCO to hold Cleared Swaps Customer Collateral itself.[139] Continuing such parallel, the first method limits the DCO to holding tangible collateral (*e.g.,* gold ingots or warehouse receipts) because no DCO serves as a depository for intangible collateral. Finally, the first method requires the FCM, in holding such Cleared Swaps Customer Collateral, to:

- Physically separate (*e.g.,* in a box or vault) such collateral from its own property, the property of any FCM, and the property of any other person that is not a Cleared Swaps Customer of an FCM;
- Clearly identify each physical location (the "DCO Physical Location") in which it holds such collateral as a "Location of Cleared Swaps Customer Collateral" (*e.g.,* by affixing a label or sign to the box or vault);
- Ensure that each such DCO Physical Location provides appropriate protection for such collateral (*e.g.,* by confirming that the box or vault has locks and is fire resistant); and
- Record in its books and records the amount of such collateral separately from its own funds, the funds of any FCM, and the funds of any other person that is not a Cleared Swaps Customer of an FCM (*i.e.,* to reflect the reality of physical separation in books and records).

b. The Second Method

Paralleling explicit provisions of regulations 1.20(b) and 1.26(b),[140] the second method permits the DCO to hold Cleared Swaps Customer Collateral from FCMs outside of itself.[141] Continuing such parallel, the second method limits the DCO to certain Permitted Depositories (as further discussed below), and requires that the DCO maintain a Cleared Swaps Customer Account with each Permitted Depository.

c. Questions

As described above, both the first and second methods incorporate assumptions with respect to DCO structure that were true when regulations 1.20(b) and 1.26(b) were first adopted and remain true currently. However, the Commission recognizes that DCO structure may change after the Dodd-Frank Act and the regulations thereunder become effective. Notably, the Commission recognizes that a depository registered with either domestic or foreign banking regulators may seek to become a DCO, and that such depository may seek to hold Cleared Swaps Customer Collateral, as well as other forms of customer property. The Commission therefore requests comment on what, if any, changes to proposed regulation 22.3 may be appropriate to accommodate such possibility. Specifically, the Commission requests comment on whether a DCO that is also a registered depository should be permitted to hold both tangible and intangible forms of Cleared Swaps Customer Collateral from FCMs itself. What challenges might this arrangement pose to protection (including effective segregation) of Cleared Swaps Customer Collateral (as well as other forms of customer property)? How might these challenges be addressed?

3. Commingling

Regulation 22.3(c) proposes to permit a DCO to commingle the Cleared Swaps Customer Collateral that it receives from multiple FCMs on behalf of their Cleared Swaps Customers, while prohibiting the DCO from commingling Cleared Swaps Customer Collateral with:

- The money, securities, or other property belonging to the DCO;
- The money, securities, or other property belonging to any FCM; or
- Other categories of funds that it receives from an FCM on behalf of Customers, including "customer funds" for futures contracts (as regulation 1.3 defines such term) or the "foreign futures or foreign options secured amount" (as regulation 1.3 defines such term), except as permitted by a Commission rule, regulation or order (or by a derivatives clearing organization rule approved pursuant to regulation 39.15(b)(2)).[142]

Proposed regulation 22.3(c) parallels regulations 1.20(a), 1.20(b), and 1.26(b).[143]

4. Exceptions

Regulations 22.3(d) and (e) propose certain exceptions to the abovementioned requirements and limitations.

a. FCM Deposits and Withdrawals

Regulation 22.3(d) constitutes an exception to regulation 22.3(c) (Commingling). Regulation 22.3(d) proposes to allow a DCO to place money, securities, or other property belonging to an FCM in a DCO Physical Location, or deposit such money, securities, or other property in the relevant Cleared Swaps Customer Account, pursuant to an instruction

[138] Regulation 1.20(b) states: "All customer funds received by a clearing organization from a member of the clearing organization to purchase, margin, guarantee, secure or settle the trades, contracts or commodity options of the clearing member's commodity or option customers and all money accruing to such commodity or option customers as the result of trades, contracts or commodity options so carried shall be separately accounted for and segregated as belonging to such commodity or option customers. * * *" 17 CFR 1.20(b).

Regulation 1.26(b) states: "Each clearing organization which invests money belonging or accruing to commodity or option customers of its clearing members in instruments described in § 1.25 shall separately account for such instruments and segregate such instruments as belonging to such commodity or option customers." 17 CFR 1.26(b).

[139] Regulation 1.20(b) does not require that a DCO hold "customer funds" from FCMs in a depository. Rather, it applies certain requirements to the holding of "customer funds *when* deposited in a bank or trust company * * *" (emphasis added). In the absence of a requirement to use a depository, regulation 1.20(b) must implicitly permit the DCO to hold "customer funds" from FCMs itself. *Id.* Regulation 1.26(b) contains similar language regarding the use of a depository. *Id.*

[140] Regulation 1.20(b) states: "All customer funds received by a clearing organization from a member of the clearing organization to purchase, margin, guarantee, secure or settle the trades, contracts or commodity options of the clearing member's commodity or option customers and all money accruing to such commodity or option customers as the result of trades, contracts or commodity options so carried shall be separately accounted for and segregated as belonging to such commodity or option customers, and a clearing organization shall not hold, use or dispose of such customer funds except as belonging to such commodity or option customers. Such customer funds when deposited in a bank or trust company shall be deposited under an account name which clearly shows that they are the customer funds of the commodity or option customers of clearing members, segregated as required by the Act and these regulations." *Id.* Regulation 1.26(b) contains similar language. *Id.*

[141] If a DCO chooses to accept intangible Cleared Swaps Customer Collateral from an FCM, then the proposal effectively requires the DCO to maintain such collateral outside of itself.

[142] *See* note 117 supra.

[143] Regulations 1.20(a), 1.20(b), and 1.26(b) implicitly (i) permit the DCO to commingle the "customer funds" that it receives from multiple FCMs and (ii) prohibit the DCO from commingling "customer funds" with DCO funds, FCM funds, or funds supporting customer transactions in non-futures contracts. Specifically, regulation 1.20(a) states: "All customer funds shall be separately accounted for and segregated as belonging to commodity or option customers." Regulation 1.20(b) further develops such language, as detailed in note 140 supra. Similarly, regulation 1.26(b) states: "Each clearing organization which invests money belonging or accruing to commodity or option customers of its clearing members in instruments described in § 1.25 shall separately account for such instruments and segregate such instruments as belonging to such commodity or option customers." 17 CFR 1.20(a), 1.20(b), and 1.26(a).

from the FCM. Regulation 22.3(d) further proposes to permit FCM withdrawals of money, securities, or other property from a DCO Physical Location or Cleared Swaps Customer Account. As discussed below, a DCO functions as a Permitted Depository for an FCM. Proposed regulation 22.3 enables such function, by facilitating (i) FCM deposits of its own money, securities, or other property in its Cleared Swaps Customer Account at the DCO,[144] and (ii) FCM withdrawals of its residual financial interest in the Cleared Swaps Customer Collateral.[145]

b. Permitted Investments

Regulation 22.3(e) constitutes an exception to regulation 22.3(b)(1) (Location of Cleared Swaps Collateral) and regulation 22.15 (Treatment of Cleared Swaps Collateral on an Individual Basis). Regulation 22.3(e) proposes to allow a DCO to invest Cleared Swaps Customer Collateral in accordance with regulation 1.25, which delineates permitted investments of "customer funds" (as regulation 1.3 defines such term) for futures contracts.

*D. Proposed Regulation 22.4—Futures Commission Merchants and Derivatives Clearing Organizations: Permitted Depositories*

1. The Permitted Depositories

Regulation 22.4 proposes a list of depositories permitted to hold Cleared Swaps Customer Collateral (the "Permitted Depositories"). For a DCO or an FCM, a Permitted Depository must (subject to regulation 22.9) be: (i) A bank located in the United States; (ii) a trust company located in the United States; or (iii) a DCO. As discussed further below, regulation 22.9 incorporates regulation 1.49 with respect to Permitted Depositories located outside the United States.[146] An FCM may also serve as a Permitted Depository, but only if it is a "Collecting Futures Commission Merchant" carrying the Cleared Swaps (and related Cleared Swaps Customer Collateral) of a "Depositing Futures Commission Merchant" (as regulation 22.1 proposes to define each such term). Before an entity may serve as a Permitted Depository, the DCO or FCM seeking to maintain a Cleared Swaps Customer Account must obtain a written acknowledgement letter, as discussed further below.

In general, proposed regulation 22.4 parallels regulations 1.20, 1.26 and 1.49(d)(2), with the exception of allowing an FCM to serve as a Permitted Depository only if the FCM is a "Collecting Futures Commission Merchant."[147] The Commission believes that such a limitation is appropriate, because the purpose for allowing an FCM to serve as a Permitted Depository is to facilitate the clearing of swaps carried by an FCM that is not a member of a particular DCO (*i.e.,* the Depositing Futures Commission Merchant) through another FCM that is a member of that DCO (*i.e.,* the Collecting Futures Commission Merchant).[148]

2. Question

The Commission seeks public comment on whether the limitation that it is proposing for an FCM serving as a Permitted Depository is appropriate.

*E. Proposed Regulation 22.5—Futures Commission Merchants and Derivatives Clearing Organizations: Written Acknowledgement*

1. Substantive Requirements

As mentioned above, a DCO or FCM must obtain a written acknowledgement letter from a potential Permitted Depository before opening a Cleared Swaps Customer Account.[149] Regulation 22.5 proposes substantive requirements for such letter. First, regulation 22.5 proposes to mandate that the FCM or DCO obtain a written acknowledgement letter in accordance with regulations 1.20 and 1.26, which shall apply to Cleared Swaps Customer Collateral as if such collateral constituted "customer funds" (as regulation 1.3 defines such term). The Commission seeks comment as to whether such incorporation by reference is the most appropriate way to proceed, or whether the Commission should publish a separate form acknowledgement letter for swaps. In what way should such separate form letter differ from the form letter previously published for futures customer funds?[150]

Second, regulation 22.5 proposes to exempt the FCM or DCO from the requirement to obtain a written acknowledgement letter, if the potential Permitted Depository is a DCO that has adopted rules providing for the segregation of Cleared Swaps Customer Collateral. This proposed exemption is consistent with regulation 1.20.[151]

2. Question

The Commission is currently considering a notice of proposed rulemaking amending regulation 1.20 with respect to requirements for written acknowledgement letters from depositories of "customer funds" (as regulation 1.3 defines such term) for futures contracts. The Commission seeks comment on whether the following are appropriate: (i) The incorporation of regulation 1.20 (as the Commission may choose to amend such

[144] *See* proposed regulation 22.2(d)(2).

[145] *See* proposed regulation 22.2(d)(3).

[146] While there is some ambiguity as to whether regulation 1.49 currently applies to DCOs given the provisions of current regulation 39.2, the Commission has proposed amendments that would remove regulation 39.2. *See Risk Management Requirements for Derivatives Clearing Organizations,* 76 FR 3698, 3714 (Jan. 20, 2011). Thus, if the proposed amendments are finalized as written, DCOs would be subject to the requirements set forth in regulation 1.49. In addition, notwithstanding regulation 39.2, the Commission and industry have proceeded on the basis that the requirements of regulation 1.49 apply to DCOs.

[147] Regulations 1.20(a) and (c) imply that an FCM may deposit "customer funds" with "any bank, trust company, clearing organization or another futures commission merchant." Regulation 1.20(b) implies than a DCO may deposit "customer funds" from FCMs with "a bank or trust company." Regulations 1.26(a) and (b) contain similar language. Regulation 1.49(d)(2) clarifies that an FCM or DCO may deposit "customer funds" in the United States only with "(i) A bank or trust company; (ii) A futures commission merchant registered as such with the Commission; or (iii) A derivatives clearing organization." 17 CFR 1.20, 1.26, and 1.49(d)(2).

[148] *See* section 4d(f)(3)(A)(ii) of the CEA, as amended by section 724 of the Dodd-Frank Act (explicitly stating that Cleared Swaps Customer Collateral may be withdrawn to margin, guarantee, secure, transfer, adjust, or settle a Cleared Swap with a DCO, or any member of a DCO, and not explicitly allowing withdrawals for any other purpose (except for permitted investments)).

[149] The function of a written acknowledgment letter is to ensure that a potential Permitted Depository is aware that (i) the FCM or DCO is opening a Cleared Swaps Customer Account, (ii) the funds deposited in such account constitute Cleared Swaps Customer Collateral, and (iii) such Cleared Swaps Customer Collateral is subject to the requirements of section 4d(f) of the CEA and Part 22 (when finalized).

[150] *See* 75 FR 47738 (Aug. 9, 2010) (proposing form acknowledgment letters for customer funds and secured amount funds).

[151] Currently, with respect to an FCM, regulation 1.20(a) states: "Each registrant shall obtain and retain in its files for the period provided in § 1.31 a written acknowledgment from such bank, trust company, clearing organization, or futures commission merchant, that it was informed that the customer funds deposited therein are those of commodity or option customers and are being held in accordance with the provisions of the Act and this part: *Provided, however,* that an acknowledgment need not be obtained from a clearing organization that has adopted and submitted to the Commission rules that provide for the segregation as customer funds, in accordance with all relevant provisions of the Act and the rules and orders promulgated thereunder, of all funds held on behalf of customers." 17 CFR 1.20(a).

Currently, with respect to a DCO, regulation 1.20(b) states: "The clearing organization shall obtain and retain in its files for the period provided by § 1.31 an acknowledgment from such bank or trust company that it was informed that the customer funds deposited therein are those of commodity or option customers of its clearing members and are being held in accordance with the provisions of the Act and these regulations." 17 CFR 1.20(b).

However, as noted above, the Commission is currently considering a notice of proposed rulemaking amending regulation 1.20. *See* 75 FR 47740 (Aug. 9, 2010).

regulation) in proposed regulation 22.5, and (ii) the adaptation of any form letter that the Commission may choose to promulgate under regulation 1.20 to accommodate Cleared Swaps Customer Collateral under regulation 22.5.

*F. Proposed Regulation 22.6—Futures Commission Merchants and Derivatives Clearing Organizations: Naming of Cleared Swaps Customer Accounts*

Regulation 22.6 proposes to require an FCM or DCO to ensure that the name of each Cleared Swaps Customer Account that it maintains with a Permitted Depository (i) clearly identifies the account as a "Cleared Swaps Customer Account," and (ii) clearly indicates that the collateral therein is "Cleared Swaps Customer Collateral" subject to segregation in accordance with section 4d(f) of the CEA and Part 22 (as final). Proposed regulation 22.6 parallels regulation 1.20(a), 1.20(b), 1.26(a), and 1.26(b).[152]

*G. Proposed Regulation 22.7—Permitted Depositories: Treatment of Cleared Swaps Customer Collateral*

Regulation 22.7 proposes to require a Permitted Depository to treat all funds in a Cleared Swaps Customer Account as Cleared Swaps Customer Collateral. Regulation 22.7 further proposes to prohibit a Permitted Depository from holding, disposing of, or using any Cleared Swaps Customer Collateral as belonging to any person other than (i) the Cleared Swaps Customers of the FCM maintaining such Cleared Swaps Customer Account or (b) the Cleared Swaps Customers of the FCMs for which the DCO maintains such Cleared Swaps Customer Account. In other words, no Permitted Depository may use Cleared Swaps Customer Collateral to cover or support the obligations of the FCM or DCO maintaining the Cleared Swaps Customer Account. Proposed regulation 22.7 parallels section 4d(f)(6) of the CEA, as added by section 724 of the Dodd-Frank Act.[153] Proposed regulation 22.7 also parallels regulation 1.20.[154]

*H. Proposed Regulation 22.8—Situs of Cleared Swaps Accounts*

1. Proposed Requirements

Proposed regulation 22.8 has no analog in the Part 1 Provisions. Regulation 22.8 proposes to require (i) each FCM to designate the United States as the site (*i.e.,* the legal situs) of the FCM Physical Location and the "account" (as regulation 22.2(f)(1) defines such term) that the FCM maintains for each Cleared Swaps Customer, and (ii) each DCO to designate the United States as the site (*i.e.,* the legal situs) of the DCO Physical Location and the Cleared Swaps Customer Account that the DCO maintains on its books and records for the Cleared Swaps Customers of each FCM. In light of increased cross-border activity,[155] the Commission believes that proposed regulation 22.8 is appropriate, as it is intended to ensure that, in the event of an FCM or DCO insolvency, Cleared Swaps Customer Collateral, whether received by an FCM or DCO, would be treated in accordance with the United States Bankruptcy Code. The Commission does not intend for proposed regulation 22.8 to affect the actual locations in which an FCM or DCO may hold Cleared Swaps Customer Collateral. As discussed further below, an FCM or DCO may hold Cleared Swaps Customer Collateral (i) in denominations other than the United States dollar and (ii) at depositories within or outside of the United States. Additionally, the Commission does not intend for proposed regulation 22.8 to affect choice of law provisions that a DCO might set forth in its rules or an FCM might set forth in its agreement with a Cleared Swaps Customer.

2. Questions

The Commission requests comment on whether proposed regulation 22.8 achieves the purpose of the Commission—namely, to ensure that Cleared Swaps Customer Collateral be treated in accordance with the United States Bankruptcy Code, to the extent possible. If proposed regulation 22.8 does not achieve such purpose, what alternatives should the Commission consider to achieve such purpose? Additionally, the Commission requests comment on the benefits and costs of proposed regulation 22.8, as well as any alternatives.

*I. Proposed Regulation 22.9—Denomination of Cleared Swaps Customer Collateral and Location of Depositories*

Regulation 22.9 proposes to incorporate regulation 1.49 by reference, as applicable to Cleared Swaps Customer Collateral. Regulation 1.49 sets forth, for futures contracts, rules determining the permitted denominations of customer funds (*i.e.,* permitted currencies and amounts in each currency), permitted locations of customer funds (*i.e.,* permitted countries and amounts in each country), and qualifications that entities outside of the United States must meet to become Permitted Depositories (*e.g.,* minimum regulatory capital). However, regulation 22.9 proposes to allow an FCM to serve as a Permitted Depository only if that FCM is a "Collecting Futures Commission Merchant" carrying the Cleared Swaps, and associated Cleared Swaps Customer Collateral, for the Cleared Swaps Customers of a "Depositing Futures Commission Merchant." Such proposal accords with proposed regulation 22.4.

*J. Proposed Regulation 22.10—Incorporation by Reference*

Regulation 22.10 proposes to incorporate by reference regulations 1.27 (Record of investments), 1.28 (Appraisal of obligations purchased with customer funds), 1.29 (Increment or interest resulting from investment of customer funds), and 1.30 (Loans by futures commission merchants; treatment of proceeds), as applicable to Cleared Swaps Customers and Cleared Swaps Customer Collateral. Regulation 1.27 requires FCMs and DCOs investing "customer funds" (as regulation 1.3 defines such term) to maintain specified records concerning such investments. Regulation 1.28 requires FCMs investing "customer funds" to record and report such investment at no greater than market value. Regulation 1.29 permits

[152] With respect to the responsibilities of an FCM, regulation 1.20(a) states: "Such customer funds when deposited with any bank, trust company, clearing organization or another futures commission merchant shall be deposited under an account name which clearly identifies them as such and shows that they are segregated as required by the Act and this part." 17 CFR 1.20(a). With respect to the responsibilities of a DCO, regulation 1.20(b) states: "Such customer funds when deposited in a bank or trust company shall be deposited under an account name which clearly shows that they are the customer funds of the commodity or option customers of clearing members, segregated as required by the Act and these regulations." 17 CFR 1.20(b). Regulations 1.26(a) and (b) contain similar language.

[153] Section 4d(f)(6) of the CEA states: "It shall be unlawful for any person, including any derivatives clearing organization and any depository institution, that has received any money, securities, or property for deposit in a separate account or accounts as provided in paragraph (2) to hold, dispose of, or use any such money, securities, or property as belonging to the depositing futures commission merchant or any person other than the swaps customer of the futures commission merchant." 7 U.S.C. 6d.

[154] Regulation 1.20 states: "No person, including any clearing organization or any depository, that has received customer funds for deposit in a segregated account, as provided in this section, may hold, dispose of, or use any such funds as belonging to any person other than the option or commodity customers of the futures commission merchant which deposited such funds." 17 CFR 1.20.

[155] For example, the Commission currently regulates certain entities based outside of the United States (*e.g.,* LCH.Clearnet Limited and ICE Clear Europe, each of which is based in the United Kingdom).

FCMs and DCOs investing "customer funds" to receive and retain any increment or interest thereon. Regulation 1.30 permits FCMs to loan their own funds to customers on a secured basis, and to repledge or sell such security pursuant to agreement with such customers. Regulation 1.30 does make clear, however, that the proceeds of such loans, when used to purchase, margin, guarantee, or secure futures contracts, shall be treated as "customer funds."

*K. Proposed Regulation 22.11—Information To Be Provided Regarding Customers and Their Cleared Swaps*

1. Proposed Requirements

In order to implement the Complete Legal Segregation Model, regulations 22.11 to 22.16 propose, among other things, requirements that ensure that each DCO and FCM: (i) Obtains, on a daily basis, information necessary for risk management; (ii) performs, on a daily basis, risk management calculations and records the results; (iii) receives on the day of default, any residual Cleared Swaps Customer Collateral; and (iv) allocates, on the day of default, the value of Cleared Swaps Customer Collateral that it owes to each individual customer. Regulations 22.11 to 22.16 recognize that swaps may be cleared through a multi-tier system, with certain FCMs clearing swaps for customers directly with the DCO and other FCMs clearing swaps for customers indirectly through another FCM. Therefore, Part 22 recognizes the concepts of "Depositing Futures Commission Merchant" and "Collecting Futures Commission Merchant," each of which is described above. Regulations 22.11 to 22.16 extend their requirements through each potential tier of clearing, from the Depositing Futures Commission Merchant through the Collecting Futures Commission Merchant and finally to the DCO.

Regulation 22.11 proposes to require that (i) each Depositing Futures Commission Merchant provide to its Collecting Futures Commission Merchant and (ii) each FCM member provide to its DCO, in each case, information sufficient to identify Cleared Swaps Customers on a one-time basis, and information sufficient to identify the portfolio of rights and obligations belonging to such customers with respect to their Cleared Swaps on a daily basis. If a Depositing Futures Commission Merchant or FCM member also serves as a Collecting Futures Commission Merchant, then it must provide the specified information with respect to each individual Cleared Swaps Customer for which it acts (on behalf of a Depositing Futures Commission Merchant) as a Collecting Futures Commission Merchant.

The abovementioned information should aid Collecting Futures Commission Merchants and DCOs in their daily risk management programs by (i) revealing ownership of cleared swaps customer contracts (in contrast to currently available Large Trader information, which is based on control of futures contracts) and (ii) permitting DCOs to aggregate the positions of Cleared Swaps Customers clearing through multiple FCMs, and Collecting Futures Commission Merchants to aggregate the contracts of Cleared Swaps Customers clearing through multiple Depositing Futures Commission Merchants. The abovementioned information will also enable Collecting Futures Commission Merchants and DCOs to conform to their obligations to allocate Cleared Swaps Customer Collateral, in the event of an FCM default, pursuant to proposed regulation 22.15.

The DCO is at the apex of the reporting structure that regulation 22.11 establishes, as it receives all information for each individual Cleared Swaps Customer that FCMs, Collecting Futures Commission Merchants, and Depositing Futures Commission Merchants serve. Therefore, regulation 22.11 proposes to hold the DCO responsible for taking appropriate steps to confirm that the information that it receives is accurate and complete, and ensure that the information is being produced on a timely basis. However, because the DCO may not have a direct relationship with, *e.g.,* a Depositing Futures Commission Merchant, the Commission intends for the DCO to take "appropriate steps" to ensure that its FCM members enter into suitable arrangements with, *e.g.,* a Depositing Futures Commission Merchant to verify the accuracy and timeliness of information. In this manner, the Commission intends for the verification requirement to be applied through each potential tier of clearing.

2. Questions

Does the proposed requirement in regulation 22.11 for a Depositing Futures Commission Merchant to provide a Collecting Futures Commission Merchant with information sufficient to identify its Cleared Swaps Customers raise any, *e.g.,* competitive concerns? Could such concerns be resolved if the identities of such Cleared Swaps Customers are coded, with the DCO, but not the Collecting Futures Commission Merchant, receiving a copy of such code? What other methods would resolve such concerns?

*L. Proposed Regulation 22.12—Information To Be Maintained Regarding Cleared Swaps Customer Collateral*

Regulation 22.12 proposes to require DCOs and Collecting Futures Commission Merchants to use the information provided pursuant to proposed regulation 22.11 to calculate, no less frequently than once each business day, the amount of collateral required (i) for each relevant Cleared Swaps Customer (including each such customer of a Depositing Futures Commission Merchant), based on the portfolio of rights and obligations arising from its Cleared Swaps; and (ii) for all relevant Cleared Swaps Customers. It is not the responsibility of a DCO or a Collecting Futures Commission Merchant to monitor or to calculate the extent to which a Cleared Swaps Customer has, in fact, posted excess or insufficient collateral. In the latter case, the relevant FCM will have, in effect, made a loan to the Cleared Swaps Customer and will have a claim against that customer, outside of the relationship with the DCO or the Collecting Futures Commission Merchant.

*M. Proposed Regulation 22.13—Additions to Cleared Swaps Customer Collateral*

Regulation 22.13 proposes two tools that DCOs or Collecting Futures Commission Merchants may use to manage the risk they incur with respect to individual Cleared Swaps Customers. These tools are not intended to be mandatory or exclusive, and the Commission seeks comment on how the Commission may enable DCOs or Collecting Futures Commission Merchants to use other tools to manage such risk.

Regulation 22.13(a) proposes to clarify that a DCO or Collecting Futures Commission Merchant may increase the collateral required of a particular Cleared Swaps Customer or group of such customers, based on an evaluation of the credit risk posed by such customer(s), in which case such higher amount shall be calculated and recorded as provided in proposed regulation 22.12, and would (on an individual basis) be available in the event of a default by any such Cleared Swaps Customer. This proposed clarification is not intended to interfere with the right of any FCM to increase the collateral requirements with respect to any of its customers. The Commission requests comment regarding whether a DCO or a

Collecting Futures Commission Merchant may wish to increase the collateral required, in the manner described above, for any reason other than credit risk.

Similarly, proposed regulation 22.13(b) clarifies that any collateral deposited by an FCM out of its own funds pursuant to proposed regulation 22.2(e)(3), in which the FCM has a residual financial interest pursuant to proposed regulation 22.2(e)(4), may, to the extent of such residual interest, be used by a DCO or Collecting Futures Commission Merchant to margin the cleared swaps of any or all of such customers. Thus, if a DCO chooses to require an FCM member, or if a Collecting Futures Commission Merchant chooses to require a Depositing Futures Commission Merchant, in each case, to post such additional collateral out of its own funds, the collateral would be available, to the extent specified above, on an omnibus basis, in the event of default of any relevant Cleared Swaps Customer.

*N. Proposed Regulation 22.14—Futures Commission Merchant Failure To Meet a Customer Margin Call in Full*

The structure of proposed regulations 22.14(a) through (d) is intended to ensure that each tier of clearing receives the requisite transmissions of Cleared Swaps Customer Collateral and information to attribute such collateral on the date of an FCM default. Starting from the lowest tier, regulation 22.14(a) proposes to require a Depositing Futures Commission Merchant that fails to meet a margin call with respect to a Cleared Swaps Customer Account, in full, to (i) transmit to its Collecting Futures Commission Merchant, with respect to each Cleared Swaps Customer of the Depositing Futures Commission Merchant whose contracts contribute to that margin call, the lesser of the amount called for or the remaining collateral for that customer on deposit at such Depositing Futures Commission Merchant, and (ii) advise the Collecting Futures Commission Merchant of the identity of the Cleared Swaps Customer and the amount transmitted on behalf of such customer. Moving towards the middle tier, regulation 22.14(b) proposes to parallel the above requirement for a Depositing Futures Commission Merchant that also serves as a Collecting Futures Commission Merchant. Moving towards the apex, regulations 22.14(c) and (d) propose to parallel the above requirement for an FCM member of a DCO, including if the FCM member is also a Collecting Futures Commission Merchant.

Regulations 22.14(e) and (f) propose to address a situation involving investment risk, the loss of value of collateral, despite the application of haircuts. Specifically, if (i) the collateral collected by a DCO or Collecting Futures Commission Merchant is sufficient to meet the amount of collateral required by regulation 22.12 on the business day before the failure to meet the margin call (with sufficiency measured including the application of haircuts specified by the rules and procedures of the DCO or the policies applied by the Collecting Futures Commission Merchant), and (ii) as of the close of business on the business day of the failure to meet the margin call, the value of such collateral is, due to changes in market value, less than the amount required by regulation 22.12 on the business day before the failure to meet the margin call, then that loss of value will be shared among the customers *pro rata:* The amount of collateral attributable to each customer will be reduced by the percentage difference between the amount specified in regulation 22.12 on that previous business day and the market value of the collateral on the day of the failure to meet the margin call. The Commission believes that investment risk, unlike fellow-customer risk, should not be borne by the DCO. The Commission seeks comment on this allocation of investment risk.

*O. Proposed Regulation 22.15—Treatment of Cleared Swaps Customer Collateral on an Individual Basis*

Proposed regulation 22.15 sets forth the basic principle of individual collateral protection. It requires each DCO and each Collecting Futures Commission Merchant to treat the amount of collateral required with respect to the portfolio of rights and obligations arising out of the Cleared Swaps intermediated for each Cleared Swaps Customer as belonging to that customer. That amount may not be used to margin, guarantee or secure the cleared swaps, or any other obligations, of an FCM, or of any other customer.

It should be noted that what is protected is an amount (*i.e.,* a value) of collateral, rather than any specific item of collateral.

As discussed above, the Commission is proposing herein the Complete Legal Segregation Model, but is seeking comment as to whether the Legal Segregation with Recourse Model would be more appropriate. Under the Legal Segregation with Recourse Model, this regulation would be modified to permit the use of the Cleared Swaps Customer Collateral of non-defaulting customers after the exhaustion of both the DCO's contribution to default resources from its own capital, and the guaranty fund contributions of clearing members.

Specifically, an additional section would be added to the effect that

> a derivatives clearing organization may, if its rules so provide, and if the derivatives clearing organization has first exhausted the resources described in §§ 39.11(b)(1)(ii) [the derivatives clearing organization's own capital], (iii) [Guaranty fund deposits], and (iv) [other financial resources deemed acceptable by the Commission], use the Cleared Swaps Customer Collateral of all Cleared Swaps Customers of a depositing futures commission merchant that has defaulted in a payment to the derivatives clearing organization with respect to its Cleared Swaps Customer Account.

Under such a proposal, the Commission does not contemplate requiring the use of a DCO's assessment powers before permitting the use of the collateral of non-defaulting customers under the Legal Segregation with Recourse Model.

*P. Proposed Regulation 22.16—Disclosures to Customers*

In order to make Cleared Swaps Customers aware of the limits of protection under the Complete Legal Segregation Model, proposed regulations 22.16(a) and (b) require FCMs to disclose to their Cleared Swaps Customers the governing provisions relating to use of customer collateral, transfer of Cleared Swaps and related collateral, neutralization of the risks of customer positions, or liquidation of cleared swaps, in each case in the event of a default by its FCM related to the Cleared Swaps Customer Account, either to a Collecting Futures Commission Merchant or directly to a DCO. Proposed regulation 22.16(c) specifies that the governing provisions are the rules of the DCO, or the provisions of the customer agreement between the Depositing Futures Commission Merchant and the Collecting Futures Commission Merchant, on or through which the Depositing Futures Commission Merchant clears swaps for Cleared Swaps Customers.

The Commission is particularly interested in further discussion of the benefits and costs of each model in light of the proposed regulations (*i.e.,* the Complete Legal Segregation Model that is proposed and the Legal Segregation with Recourse Model that is being considered). In particular, the Commission seeks comment on (1) Operational costs: The incremental activities commenters would be required to perform, with respect to

cleared swaps and cleared swaps collateral under each model that they are not currently required to perform with respect to futures and futures collateral, and the initial and annualized costs of such activities. How can these costs be estimated industry-wide? Please provide a detailed basis for these estimates; and (2) Risk Environment Costs: How do you see the industry adapting to the risk changes attendant to each model? What types of costs would you expect your institution to incur if the industry adapts to the model in the most efficient manner feasible? How are those costs different from the costs your institution incurs relative to futures and futures collateral? What is a reasonable estimate of the initial and annualized ongoing incremental costs incurred by your institution, and how can such costs be estimated industry wide? Please provide a detailed basis for your estimates.

## V. Section by Section Analysis: Amendments to Regulation Part 190

### *A. Background*

In April of 2010, prior to the enactment of the Dodd-Frank Act, the Commission promulgated rules to establish an account class for cleared OTC derivatives (and related collateral).[156] At that time, there were questions concerning the authority of the Commission to require the segregation of cleared OTC derivatives (and related collateral), or to establish the account class for the insolvency of a DCO. As a result, protection for cleared OTC derivatives (and related) collateral was limited to those cases where such derivatives and collateral were required to be segregated pursuant to the rules of a DCO, and the reach of the account class was limited to cases of the bankruptcy of a commodity broker that is an FCM. Moreover, while section 4d(a)(2) of the CEA permitted the inclusion in the domestic futures account class of transactions and related collateral from outside that class, there was no similar provision permitting the inclusion in the cleared OTC account class of transactions and related collateral from outside that latter class.

Section 724 of the Dodd-Frank Act has resolved these questions. As mentioned above, section 4d(f) of the Dodd-Frank Act requires, among other things, segregation of Cleared Swaps and Cleared Swaps Customer Collateral. Section 4d(f)(3)(B) of the CEA permits the inclusion of positions in other contracts (such as exchange-traded futures) and related collateral with Cleared Swaps and Cleared Swaps Customer Collateral. Section 724(b) of the Dodd-Frank Act amends the Bankruptcy Code to include in the definition of "commodity contracts" Cleared Swaps with respect to both FCMs and DCOs. Thus, this section V proposes amendments to regulation Part 190, pursuant to Commission authority under section 20 of the CEA, in order to give effect to section 724 of the Dodd-Frank Act. Such amendments conform to proposed Part 22.

### *B. Definitions*

The Commission proposes certain technical amendments to regulation 190.01 to remove the reference to the definition of "Opt-out customer" from the definition of "Non-Public Customer," and to include or exclude Cleared Swaps and Cleared Swaps Collateral in the definitions of "Clearing Organization," "Non-Public Customer," and "Principal Contract," as appropriate. The Commission also proposes substantive changes to the definitions of "Account Class" and "Cleared Swaps."

#### 1. Proposed Amendment to Regulation 190.01(a)—Account Class

The Commission proposes amending regulation 190.01(a) to change the definition of account class to include a class for cleared swaps accounts, without limiting that definition to commodity brokers that are FCMs (as is currently the case). In addition, commodity option accounts would be deleted from the definition because the term commodity options, as defined in section 1.3, includes options on futures (which are regulated as futures) and options on commodities (which under the Dodd-Frank Act are swaps). The additions of subsections (a)(2)(i) and (a)(2)(ii) are meant to make clear that options on futures and options on commodities should not be grouped into one account class; rather options on futures should be deemed part of the futures account class and options on commodities should deemed part of the cleared swaps account class. Another proposed amendment, subsection (a)(3), is intended to clarify that Commission orders putting futures contracts and related collateral in the cleared swaps account class (pursuant to new section 4d(f)(3)(B) of the CEA) are treated, for bankruptcy purposes, in a manner analogous to orders putting cleared swaps and related collateral in the futures account class (pursuant to CEA section 4d(a)(2)). The proposed amended § 190.01(a) would clarify that if, pursuant to a Commission rule, regulation or order (or a derivatives clearing organization rule approved pursuant to regulation 39.15(b)(2)), positions or transactions that would otherwise belong to one class are associated with positions and related collateral in commodity contracts another account class, then the former positions and related collateral shall be treated as part of the latter account class.

#### 2. Proposed New Regulation 190.01(e)—Calendar Day

The Commission proposes defining the term "calendar day" to include the time from midnight to midnight.

#### 3. Proposed Amendment to Regulation 190.01(f)—Clearing Organization

The Commission proposes to amend the definition of clearing organization to remove, as unnecessary, the reference to commodity options traded on or subject to the rules of a contract market or board of trade.

#### 4. Proposed Amendment to Regulation 190.01(cc)—Non-Public Customer

The Commission proposes to amend the definition of non-public customer to include references to non-public customers under regulation 30.1(c) (with respect to foreign futures and options customers) and in the definition of cleared swaps proprietary account.

#### 5. Proposed Amendment to Regulation 190.01(hh)—Principal Contract

The Commission proposes to amend the definition of principal contract to include an exclusion for cleared swaps contracts.

#### 6. Proposed Amendment to Regulation 190.01(ll)—Specifically Identifiable Property

The Commission proposes to amend the definition of specifically identifiable property to change, in subsection (ll)(2)(ii), an anachronistic reference to section 5a(a)(12) of the CEA to a reference to 5c(c) of the CEA, and to change references to "business days" in subsections (ll)(4) and (ll)(5) to references to "calendar days," to conform to other proposed changes to Part 190 implementing Public Law 111–16, the Statutory Time-Periods Technical Amendments Act of 2009, which (in relevant part) changed the time period in 11 U.S.C. 764(b) from five (business) days to seven (calendar) days.[157] Because the pace of recent commodity broker bankruptcies has included work on weekends, references to four or fewer "business days" have

[156] *See* Account Class, 75 FR 17297 (Apr. 6, 2010).

[157] *See generally* 75 FR 75432, 75435 (Dec. 3, 2010).

been changed to the same number of calendar days; while references to five business days have been changed to six calendar days.

7. Proposed Amendment to Regulation 190.01 (pp)—Cleared Swap

Proposed new § 190.01(pp) replaces the definition of "Cleared OTC Derivative" that the Commission previously adopted with a definition of cleared swap that incorporates by reference the definition of that term in § 22.1.

*C. Proposed Amendments to Regulation 190.02—Operation of the Debtor's Estate Subsequent to the Filing Date and Prior to the Primary Liquidation Date*

The Commission is proposing certain technical amendments to (1) expand regulation 190.02 to apply to cleared swaps (and related collateral) and (2) change references to "business days" to references to "calendar days," and require transfer instructions by the sixth calendar day after the order for relief and instructed transfers to be completed by the seventh calendar day after the order for relief, in order to fall within the protection of section 764(b) of the Bankruptcy Code. Other proposed amendments to § 190.02(g)(1)(i) are intended to clarify that maintenance margin refers to the maintenance margin requirements of the applicable designated contract market or swap execution facility. Inclusion of the words "if any" reflects Commission recognition that there may be situations where there is no applicable designated contract market or swap execution facility.

*D. Proposed Amendments to Regulation 190.03—Operation of the Debtor's Estate Subsequent to the Primary Liquidation Date*

In addition to certain technical amendments to (1) expand regulation 190.03 to apply to cleared swaps (and related collateral) and (2) change references to "business days" to references to "calendar days," proposed amendments to § 190.03(a)(3) are intended to clarify that maintenance margin refers to the maintenance margin requirements of the applicable designated contract market or swap execution facility. Inclusion of the words "if any" reflects Commission recognition that there may be situations where there is no applicable designated contract market or swap execution facility.

*E. Proposed Amendments to Regulation 190.04—Operation of the Debtor's Estate—General*

Proposed amendments to regulation 190.04 would extend the liquidation of open commodity contracts held for a house account or a customer account by or on behalf of a commodity broker that is a debtor to commodity contracts traded on swap execution facilities.[158] These commodity contracts would be liquidated in accordance with the rules of the relevant swap execution facility or designated contract market, under a liquidation process that, to the extent possible under market conditions at the time of liquidation, results in competitive pricing. In addition, in order to conform to current market practice, the amendments would allow open commodity contracts that are liquidated by book entry to be offset using the settlement price as calculated by the relevant clearing organization pursuant to its rules, which rules would also be required to promote competitive pricing to the extent feasible under market conditions at the time of liquidation. Such rules are required to be submitted to the Commission for approval pursuant to section 5c(c) of the CEA, or approved by the Commission (or its delegate) pursuant to regulation 190.10(d).

*F. Proposed Amendments to Regulation 190.05—Making and Taking Delivery on Commodity Contracts*

Proposed amendments to regulation 190.05 are technical in nature, changing a reference to "contract market" to "designated contract market, swap execution facility, or clearing organization," and requiring the submission of rules for approval subject to section 5c(c) of the CEA.

*G. Proposed Amendments to Regulation 190.06—Transfers*

Proposed amendments to regulation 190.06(a) are intended to clarify that nothing in paragraph (a) would constrain the contractual right of the DCO to liquidate open commodity contracts, even those pertaining to customers (whether transacting in futures, cleared swaps, or other products).

Proposed amendments to regulation 190.06(e) would permit the trustee to transfer accounts with no open commodity contracts. In past commodity broker bankruptcies, the Commission has permitted the transfer of such accounts. Moreover, section 761(9)(A)(ii)(I) and (II) of the Bankruptcy Code define a "customer" to include an entity that holds a claim against the FCM arising out of: (i) the liquidation of a commodity contract and (ii) a deposit or payment of property with such FCM for the purpose of making or margining a commodity contract, either of which might occur after or before the customer holds a commodity contract. Further, section 764 of the Bankruptcy Code prohibits the trustee from avoiding post-petition transfers: (i) facilitating the liquidation of a commodity contract, and presumably claims attendant thereto, and (ii) of any cash, securities, or other property margining or securing a commodity contract, and presumably claims thereto.

Proposed amendments to regulation 190.06(g) would prohibit the trustee from avoiding pre-petition transfers made by a clearing organization on behalf of customers of the debtor of accounts held for or on behalf of customers of the debtor as long as the money, securities, or other property accompanying such transfer would not exceed the funded balance of such accounts based on information available as of the close of business on the business day immediately preceding such transfer minus the value on the date of return or transfer of any property previously returned or transferred thereto. The Commission believes that this change promotes portability by allowing clearing organizations to efficiently manage the customer accounts of the debtor in a default scenario.

In light of the importance of transfers to swaps markets, the Commission observes that certain portions of regulation 190.06 are not being changed. Specifically, regulation 190.06(f)(3) addresses partial transfers, whether with respect to fewer than all customers (subsection (i)), or with respect to fewer than all contracts cleared on behalf of a particular customer (subsection (ii)). Moreover, regulation 190.06(e)(2) limits the amount of equity that may be transferred in respect of any account to the funded balance of that account, subject to certain adjustments, "based on available information as of the calendar day immediately preceding transfer" (emphasis supplied).

While a transfer of all contracts in all accounts may be preferable, it may, in certain circumstances, be impracticable. If so, the regulations described above accommodate partial transfers.

In addition, technical amendments have been made to change "business day" to "calendar day."

[158] Open commodity contracts traded on a designated contract market would continue to be liquidated in accordance with the rules of the relevant designated contract market.

*H. Proposed Amendments to Regulation 190.07—Calculation of Allowed Net Equity*

Proposed amendments to regulation 190.07(b) clarify that individual cleared swaps customer accounts within an omnibus account are to be treated individually. A proposed amendment to regulation 190.07(c) corrects a typographical error. Proposed amendments to regulation 190.07(e) would change the valuation of an open commodity contract so that the value of the commodity contract would be derived from the settlement price as calculated by the relevant clearing organization pursuant to its rules, provided that such rules have been submitted to the Commission for approval pursuant to section 5c(c)(4) of the CEA and have received such approval, or have been approved pursuant to regulation 190.10(d). This change is intended to conform the valuation of an open commodity contract to current market practices. Another proposed amendment to regulation 190.07(e) would change references to securities traded over-the-counter pursuant to the National Association of Securities Dealers Automated Quotation System to securities not traded on an exchange, again to conform to current market practices.

*I. Proposed Amendments to Regulation 190.09—Member Property*

Proposed amendments to regulation 190.09(b) have been made to include references to an account excluded pursuant to the proviso in regulation 30.1(c) (with respect to proprietary foreign futures and options customers) and to the cleared swaps proprietary account.

*J. Proposed Amendments to Regulation 190.10—General*

Proposed amendments to regulation 190.10 (a) have been made to remove references to providing notice by telegram or ordinary postal mail and to require notice by e-mail and overnight mail.

*K. Proposed Amendments to Appendix A to Part 190—Bankruptcy Forms, Bankruptcy*

Proposed changes to appendix A, form 1 would remove references to "bulk transfers" and replace the term with the word "transfers." While the Commission believes that the trustee should transfer as much of a customer account as possible for each account class [159] to one non-defaulting FCM, the Commission recognizes that there may be situations where a bulk transfer may not be possible.[160]

Technical amendments also are being proposed for appendix A to Part 190. These amendments would include revisions to reflect the addition of section 4d(f) by section 724 of the Dodd-Frank Act. In addition, amendments have been made to clarify that Commission approval with respect to the rules of a registered entity that require Commission approval means Commission approval under section 5c(c) of the CEA. Additional technical amendments to appendix A to Part 190 have been proposed to conform certain time periods to the proposed changes made by the Commission to implement Public Law 111–16, the Statutory Time-Periods Technical Amendments Act of 2009.

*L. Proposed Amendments to Appendix B to Part 190—Special Bankruptcy Distributions*

Proposed amendments to appendix B would clarify that the cross margining program is intended to apply only to futures customers and futures customer funds.

**VI. Effective Date**

The Commission requests comment on the appropriate timing of effectiveness for the final rules for Part 22.[161] Specifically, is six months after the promulgation of final rules sufficient? If not, please specify a recommended time period, and explain in detail the reasons why no shorter period will be sufficient.

**VII. Administrative Compliance**

*A. Regulatory Flexibility Act*

The Regulatory Flexibility Act ("RFA")[162] requires that agencies, in proposing rules, consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis addressing the impact. The proposed rules will affect DCOs and FCMs. The Commission has previously determined that DCOs and FCMs are not small entities for purposes of the RFA.[163]

Accordingly, pursuant to section 605(b) of the RFA, 5 U.S.C. 605(b), the Chairman, on behalf of the Commission, certifies that these proposed rule amendments will not have a significant economic impact on a substantial number of small entities. The Commission invites the public to comment on this finding.

*B. Paperwork Reduction Act*

1. Introduction

Provisions of proposed new Part 22 of the Commission's rules include new information disclosure and recordkeeping requirements that constitute the collection of information within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[164] The Commission therefore is submitting this proposed collection of information to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.[165] The title for this collection of information is "Disclosure and Retention of Certain Information Relating to Cleared Swaps Customer Collateral," OMB Control Number 3038–NEW. This collection of information will be mandatory. The information in question will be held by private entities and, to the extent it involves consumer financial information, may be protected under Title V of the Gramm-Leach-Bliley Act as amended by the Dodd-Frank Act.[166] This collection of information has not yet been assigned an OMB control number.

2. Information Provided by Reporting Entities

Proposed section 22.2(g) requires each FCM with Cleared Swaps Customer Accounts to compute daily the amount of Cleared Swaps Customer Collateral on deposit in Cleared Swaps Customer Accounts, the amount of such collateral

[159] Account class means each of the following types of customer accounts that must be recognized as a separate class of account by the trustee: futures accounts, foreign futures accounts, leverage accounts, delivery accounts as defined in § 190.05(a)(2) of this part, and cleared swaps accounts.

[160] For example, when evaluating the creditworthiness of various FCMs, the trustee may conclude that it would be preferable to transfer portions of a customer account to several different non-defaulting FCMs who have high credit ratings instead of one non-defaulting futures commission merchant with lower credit quality.

[161] The amendments to Part 190 appear to be self-executing, but commenters are invited to suggest why an implementation period for these amendments might be necessary.

[162] 5 U.S.C. 601 *et seq.*

[163] *See* 66 FR 45605, 45609 (Aug. 29, 2001) (DCOs); 47 FR 18618, 18619–20 (Apr. 30, 1982) (FCMs).

[164] 44 U.S.C. 3501 *et seq.*

[165] *Id.*

[166] *See generally* Notice of Proposed Rulemaking, Privacy of Consumer Financial Information; Conforming Amendments Under Dodd-Frank Act, 75 FR 66014 (Oct. 27, 2010).

required to be on deposit in such accounts and the amount of the FCM's residual financial interest in such accounts. The computations and supporting data must be kept in accordance with the CFTC regulation 1.31, which establishes generally applicable rules for recordkeeping under the CEA. The purpose of this collection of information is to help ensure that FCMs' Cleared Swaps Customer Accounts are in compliance at all times with statutory and regulatory requirements for such accounts.

Proposed section 22.5(a) requires an FCM or DCO to obtain, from each depository with which it deposits cleared swaps customer funds,[167] a letter acknowledging that such funds belong to the cleared swaps customers of the FCM, and not the FCM itself or any other person. The purpose of this collection of information is to confirm that the depository understands its responsibilities with respect to protection of cleared swaps customer funds.

Proposed section 22.11 requires each FCM that intermediates cleared swaps for customers on or subject to the rules of a DCO, whether directly as a clearing member or indirectly through a Collecting Futures Commission Merchant, to provide the DCO or the Collecting Futures Commission Merchant, as appropriate, with information sufficient to identify each customer of the FCM whose swaps are cleared by the FCM. Section 22.11 also requires the FCM, at least once daily, to provide the DCO or the Collecting Futures Commission Merchant, as appropriate, with information sufficient to identify each customer's portfolio of rights and obligations arising out of cleared swaps intermediated by the FCM. The purpose of this collection of information is to facilitate risk management by DCOs and Collecting Futures Commission Merchants, and, in the event of default by the FCM, to enable DCOs and Collecting Futures Commission Merchants to perform their duty, pursuant to section 22.15, to treat the collateral attributed to each customer of the FCM on an individual basis.

Proposed section 22.12 requires that each Collecting Futures Commission Merchant and DCO, on a daily basis, calculate, based on information received pursuant to proposed section 22.11 and on information generated and used in the ordinary course of business by the Collecting Futures Commission Merchant or DCO, and record certain information about the amount of collateral required for each Cleared Swaps Customer and the sum of these amounts.

Proposed section 22.16 requires that each FCM who has cleared swaps customers disclose to each of such customers the governing provisions, as established by DCO rules or customer agreements between collecting and depositing FCMs, relating to use of customer collateral, transfer, neutralization of the risks, or liquidation of cleared swaps in the event of a default by a depositing FCM relating to a cleared swaps customer account. The purpose of this collection of information is to ensure that cleared swaps customers are informed of the procedures to which accounts containing their swaps collateral may be subject in the event of a default by their FCM.

The recordkeeping and disclosure requirements of sections 22.2(g) and 22.11 are expected to apply to approximately 100 entities on a daily basis.[168] The recordkeeping requirement of section 22.5 is expected to apply to approximately 100 entities on an approximately annual basis. Based on experience with analogous recordkeeping and disclosure requirements for FCMs in futures transactions, the recordkeeping and disclosure required by section 22.2(g) is expected to require about 100 hours annually per entity, for a total burden of approximately 20,000 hours. At an hourly rate of $25 per hour, the cost burden would be approximately $2500 per entity per year for a total of $250,000. Also based on experience with analogous recordkeeping requirements for FCMs in futures transactions, the recordkeeping requirement of section 22.5 is expected to require about 5 hours per entity per year, for a total burden of approximately 500 hours per year. At an hourly rate of $25 per hour, the cost burden would be approximately $125 annually per entity, for a total of $12,500.

The disclosure required by section 22.11 involves information that FCMs that intermediate swaps generate and use in the usual and customary ordinary course of their business. It is expected that the required disclosure will be performed using automated data systems that FCMs maintain and use in the usual and customary ordinary course of their business but that certain additional functionality will need to be added to these systems to perform the required disclosure. Because of the novel character of proposed section 22.11, it is not possible to make a precise estimate of the paperwork burden. We estimate that the necessary modifications to, and maintenance of, systems may require a range of between 20 and 40 hours of work annually at a salary of approximately $75 per hour.[169] The total annual burden for section 22.11 therefore is estimated at 2,000 to 4,000 hours and $150,000 to $300,000.

The recordkeeping required by proposed section 22.12 involves information that Collecting Futures Commission Merchants and DCOs will receive pursuant to proposed section 22.11 or that they generate and use in the usual and customary ordinary course of their business. It is expected that the required recordkeeping will be performed using automated data systems that Collecting Futures Commission Merchants and DCOs maintain and use in the usual and customary ordinary course of their business but that certain additional functionality will need to be added to these systems to perform the required disclosure. Because of the novel character of proposed section 22.12, it is not possible to make a precise estimate of the paperwork burden. We estimate that the necessary modifications to, and maintenance of, systems may require a range of between 20 and 40 hours of work annually at a salary of approximately $75 per hour.[170] It is expected that the required recordkeeping will be performed by approximately 100 entities. The total annual burden for section 22.11

[167] Proposed section 22.5(c) provides an exception for a DCO serving as a depository where such DCO has made effective rules that provide for the segregation of Cleared Swaps Customer Collateral in accordance with all relevant provisions of the CEA and the regulations thereunder.

[168] This estimate is based on the following: there are currently approximately 125 FCMs registered with the Commission. However, it is expected that only FCMs with substantial capital will be capable of clearing swaps. There are approximately 75 FCMs with adjusted net capital in excess of $25 million, accordingly, and allowing room for growth, it is estimated that there will be 100 FCMs subject to these requirements.

[169] The range of estimates of hours is influenced by the fact that FCMs commonly use similar or identical data systems produced by a small number of vendors, so there may be significant economies of scale in making the system modifications required for the section 22.11 disclosure. The estimates also are based on the assumption that half of the time required to modify systems will be expended on a one-time basis and annualized over five years.

[170] The range of estimates of hours is influenced by the fact that FCMs and DCOs commonly use similar or identical data systems produced by a small number of vendors, so there may be significant economies of scale in making the system modifications required for the section 22.12 recordkeeping. The estimates also are based on the assumption that half of the time required to modify systems will be expended on a one-time basis and annualized over five years.

therefore is estimated at 2,000 to 4,000 hours and $150,000 to $300,000.

Proposed section 22.16 would apply to the same estimated 100 entities as sections 22.2(g), 22.5(a) and 22.11. The required disclosure would have to be made once each time a swaps customer begins to be cleared through a particular DCO or collecting FCM and each time a DCO or collecting FCM through which a customer's swaps are cleared changes it polices on the matters covered by the disclosure. It is expected that each disclosure would require about 0.2 hours of staff time by staff with a salary level of about $25 per hour. It is uncertain what average number of swaps customers FCMs will have, and what average number of disclosures will be required for each customer annually. Assuming an average of 500 customers per FCM and two disclosures per customer per year, the estimated total annual burden would be 200 hours and $5000 per entity, for an overall burden of $500,000.

3. Information Collection Comments

The Commission requests comment on all aspects of this proposed mandatory collection of information and document retention. Specifically, the Commission requests comment on whether the Commission has provided sufficient clarity concerning the types of information that would be required to be disclosed and retained.

*C. Cost-Benefit Analysis*

1. Introduction

a. Requirement Under Section 15(a) of the CEA

Section 15(a) of the CEA [171] requires the Commission to consider the costs and benefits of its actions before issuing a rulemaking under the CEA. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (i) Protection of market participants and the public; (ii) efficiency, competitiveness, and financial integrity of futures markets; (iii) price discovery; (iv) sound risk management practices; and (v) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.

b. Structure of the Analysis

As mentioned above, the Commission has decided to propose the Complete Legal Segregation Model. A number of commenters to the ANPR suggested that the costs and benefits of the Complete Legal Segregation Model should be informed by the Futures Model. Such commenters provided quantitative estimates of such costs (but not such benefits). Using these quantitative estimates of cost, the Commission discusses the costs and benefits of the Complete Legal Segregation Model (as well as the Legal Segregation with Recourse Model) in relation to a common baseline—namely, the Futures Model.

The Commission notes that other commenters suggested that the costs and benefits of the Complete Legal Segregation Model should be informed by the protections for collateral obtained by customers in the existing swaps markets and of the costs incurred for such protections. While this alternative is not part of the formal analysis, it can inform us of the costs of the various models. Therefore, the Commission has asked for additional comment on such protections, including quantitative estimates of costs, in section III(B) herein.

Finally, as mentioned above, the Commission is considering the Legal Segregation with Recourse Model. The Commission has asked for additional comment on the Legal Segregation with Recourse Model, as well as (i) the Futures Model and (ii) the Optional Approach.

2. Costs of the Complete Legal Segregation Model, the Legal Segregation With Recourse Model, and the Futures Model

There are several kinds of costs associated with the Complete Legal Segregation and the Legal Segregation with Recourse Models, relative to the Futures Model. These can be categorized as operational costs, Risk Costs (as section II(C)(3) defines such term), and costs associated with induced changes in behavior. The Complete Legal Segregation, the Legal Segregation with Recourse, and the Futures Models will require different payments from various parties in the event that there is a simultaneous default of one or more Cleared Swaps Customers and their FCMs. The direct effect of the Complete Legal Segregation and the Legal Segregation with Recourse Models, in contrast to the Futures Model, would be to protect the Cleared Swaps Customer Collateral of non-defaulting customers against claims by the relevant DCO.[172] In general, this protection of non-defaulting customers makes it more likely, relative to the Futures Model, that the financial resource package of the DCO (including, *e.g.,* the DCO's own capital contribution and the guaranty funds contributed by member FCMs) would need to be applied to the liability of the defaulting Cleared Swaps Customer(s).

a. Operational Costs

Operational costs associated with the Complete Legal Segregation and the Legal Segregation with Recourse Models result from a greater need, relative to the Futures Model, to transfer information about individual Cleared Swaps Customer Contracts between FCMs and DCOs, an increased amount of account information kept by DCOs, potential increases in compliance costs, and related kinds of costs. Some of these costs will be one-time set-up costs, and other costs will be recurring. Operational costs associated with the Complete Legal Segregation and the Legal Segregation with Recourse Models can be expected to be identical or close to identical because the informational and other operational requirements of both models are substantially similar—where the two models differ is in the scope of DCO's claim to Cleared Swaps Customer Collateral in the event of the simultaneous default of one or more Cleared Swaps Customers and their FCMs.

Precise determination of the extent of operational costs associated with the Complete Legal Segregation and the Legal Segregation with Recourse Models depends on the number of Cleared Swaps Customers at each FCM, the number and types of Cleared Swaps Customer Accounts held by each customer, and other factors. Some estimates of the typical FCM's costs were provided by ISDA. As discussed above, in comments on the ANPR, ISDA estimates that the Complete Legal Segregation and the Legal Segregation with Recourse Models would involve a one-time cost increase of $0.8 million to $1 million per FCM, plus a recurring

[171] 7 U.S.C. 19(a).

[172] According to comments on the ANPR, the direct benefit to customers in the form of reduced risk of loss of collateral stemming from the activities of fellow customers may generate indirect benefits. For example, commenters indicated that increased security for collateral could increase their ability to use swaps for business purposes, although this effect could be counterbalanced by increased dollar costs. Commenters also stated that the increased protection against Fellow-Customer Risk would reduce their need to incur costs to protect against the effects of loss of Cleared Swaps Customer Collateral.

annual cost with a median estimate of roughly $0.7 million.[173] In addition, there would be costs faced by each DCO, which would likely be of a similar magnitude, unless the DCO already possesses the information required to implement the Complete Legal Segregation and the Legal Segregation with Recourse Models. A DCO with such information may find the operational costs associated with the Complete Legal Segregation and the Legal Segregation with Recourse Models to be negligible.

b. Risk Costs

Risk Costs refer to the costs associated with reassigning liability in the event of a customer default (*i.e.,* the Complete Legal Segregation Model or the Legal Segregation with Recourse Model compared to the Futures Model). This can usefully be divided into direct and indirect costs (and associated benefits). The direct costs of the Complete Legal Segregation and the Legal Segregation with Recourse Models are the increased risk the DCO will face when one or more Cleared Swaps Customers and their FCMs default. Under the Complete Legal Segregation Model, this is equal to the probability of a default by a Cleared Swaps Customer and its FCM, times the expected contribution that fellow customers would have provided toward the uncovered loss. The gain to Cleared Swaps Customers under this model is the value they place on avoiding this same cost (*i.e.,* owning insurance against Fellow-Customer Risk). The Legal Segregation with Recourse Model is fundamentally similar, except that the Cleared Swaps Customers may ultimately be responsible for some of that deficiency, should the capital of the DCO and the guaranty fund contributions of non-defaulting FCM members be exhausted.[174]

Thus, the Complete Legal Segregation Model will potentially result in a decrease in the financial resources package available to the DCO in the event of default. Hence, maintaining the same assurance of performance requires the DCO to raise additional financial resources. While the Legal Segregation with Recourse Model does not directly reduce DCO financial resources, it restructures them so as to likely lead a DCO to change its default management structure. The exact nature of the Risk Costs will depend on how each DCO structures its default management structure if the Complete Legal Segregation or the Legal Segregation with Recourse Models is chosen over the Futures Model. The comments sent to the Commission have suggested two possible ways by which the DCO may vary its default management structure: (i) By increasing the amount of collateral that each Cleared Swaps Customer must provide; or (ii) by increasing the amount of resources that each FCM must contribute to the guaranty fund.

Focusing on (i) (an increase in the amount of collateral that each Cleared Swaps Customer must provide), estimates of the size of the increase vary, and in principle depend on whether the Complete Legal Segregation Model or the Legal Segregation with Recourse Model is under consideration. In comments on the ANPR, both CME and ISDA suggest that the Complete Legal Segregation Model would require an increase of approximately 70% in Cleared Swaps Customer Collateral, or an increase of roughly $500–600 billion in total required Cleared Swaps Customer Collateral relative to the Futures Model. The organizations had somewhat different views of the Legal Segregation with Recourse Model. ISDA noted that the total pool of capital available to a DCO under this model would not be changed, although there would be "a real wealth transfer" from the FCMs and DCO to the customers, while CME suggested that the increase would be of a similar magnitude to the effect of the Complete Legal Segregation Model.

If instead the capital structure is restored though (ii) (an increase in the amount of resources that each FCM would contribute to the guaranty fund), what were described as "conservative" estimates suggest an increase of $50 billion (CME) to $128 billion (ISDA) in guaranty funds for the Complete Legal Segregation Model.[175] By contrast, LCH, in its comment, stated that there would be no need for additions to the guaranty fund under either the Complete Legal Segregation Model or the Legal Segregation with Recourse Model because the manner in which it currently calculates the size of its guaranty fund provides adequate resources against default risk under the Complete Legal Segregation Model and the Legal Segregation with Recourse Model and because, in the view of LCH, a guaranty fund of similar size would be required to provide adequate security under the Futures Model.

The wide divergence in these figures is due in large part to different implicit assumptions about fellow customer behavior, and how such behavior should affect a DCO's prudent design of its financial resources package. Specifically, Core Principle B for DCOs, section 5b(c)(2)(B) of the CEA, requires the sufficiency of a DCO's financial resources package to be judged relative to the "worst" exposure, in a probabilistic sense, created by a member or participant in extreme but plausible market conditions. In the Complete Legal Segregation Model, such an approach likely requires an assessment of the largest stressed loss on a to-be-specified number of the largest customers to the given FCM since, in this instance, the DCO would not have access to the collateral of non-defaulting customers in such an event. By contrast, the Futures and the Legal Segregation with Recourse Models allow (to a degree) for the sufficiency of the DCO financial resources package to be judged relative to the "worst" loss that an FCM suffers in its omnibus customer account, recognizing that account as a diversified pool and taking advantage of the diversification benefit realized by the DCO across the customers within that pool. This is so because the Futures Model (and, at a later point, the Legal Segregation with Recourse Model) would allow the DCO to use the collateral of non-defaulting customers to cover losses the DCO would otherwise face as a result of a simultaneous default of one or more Cleared Swaps Customers and their FCMs.[176]

However, the extent of the diversification effect arising from the DCO's access to the entire omnibus customer account allowed by the Futures Model (and, at a later point in the process, the Legal Segregation with Recourse Model) depends on how much

[173] *See* note 43 supra.

[174] Implicitly then, unless there are offsetting changes, the resources available to the DCO to cover its obligations to counterparties in the event of the default of one or more Cleared Swaps Customers and their FCMs would potentially be smaller under the Complete Legal Segregation Model than under the Legal Segregation with Recourse Model, and hence the guarantee offered to Cleared Swaps counterparties by the DCO would potentially be less secure under the Complete Legal Segregation Model. Such offsetting changes, however, are required by proposed Commission requirements regarding DCO financial resource packages. *See* section II(C)(1) herein. As the following discussion indicates, the DCO may take steps, in terms of enhanced resources and use of risk-management tools to insure the security that it offers to Cleared Swaps counterparties.

[175] Presumably, some of the cost to the FCMs would be offset by enhanced charges to customers. Buy-side commenters to the ANPR have indicated that they would be willing to bear such charges.

[176] While the Legal Segregation with Recourse Model permits the DCO to take into account the omnibus customer account, as a diversified pool, in calculating the total resources available to cover the DCO's obligations resulting from a combined customer/FCM default, as explained above, it would expose the DCO to a higher risk of having to use the DCO's own capital and the guaranty fund contributions of non-defaulting FCM members than the Futures Model.

of the resources supplied by non-defaulting Cleared Swaps Customers (via initial margin) will be present in the account following a default. If all Cleared Swaps Customer Contracts remained with the defaulting FCM through the default, then the DCO could potentially measure the adequacy of the guaranty fund based on a fully diversified pool of customer positions. Conversely, if all Cleared Swaps Customers would transfer their positions to a different FCM in anticipation of the default, then the diversification (and its consequence for the DCO's financial resources package) would be eliminated.[177]

More generally, the extent to which the Complete Legal Segregation or the Legal Segregation with Recourse Models really requires a larger guaranty fund or higher levels of collateral per Cleared Swaps Customer (relative to the Futures Model) depends on the extent to which Cleared Swaps Customer Contracts can be expected to remain with the defaulting FCM during the time period immediately before the default.[178] Since the circumstances of particular FCM defaults will vary, DCOs, in determining their financial resources package, can be expected to take into consideration the possibility that, at least for some FCM defaults, there will be warning signs, resulting in a portion of Cleared Swaps Customer Collateral being transferred out of the Cleared Swaps Customer Account maintained by the defaulting FCM. And while determining the appropriate assumptions regarding customer behavior under either the Futures or the Legal Segregation with Recourse Models is central to the issue of capital adequacy, it may prove less central to the consideration of costs and benefits under this rule, since both those costs and benefits depend on the extent to which Cleared Swaps Customers will transfer their Cleared Swaps Contracts.

A distinct question in evaluating Risk Cost is how to translate a Cleared Swaps Customer Collateral or guaranty fund increase to a cost increase. A customer required to post an additional $100 of Cleared Swaps Customer Collateral is not made worse off by $100. Moreover, the cost to the customer is, at least in part, offset by the benefit to the DCO. The cost to the customer of a Cleared Swaps Customer Collateral increase of $100 is the difference between the gain he or she would have received by retaining that $100, and the return he or she will receive on the asset while it is on deposit with the FCM or DCO. For example, the customer might invest the $100 in buying and holding grain over the pendency of the swap if the level of Cleared Swaps Customer Collateral were not increased, while he or she is limited to the return on assets the DCO will accept as margin payment (*e.g.,* the t-bill rate) under the new, higher margins. While an exact figure for this difference is difficult to calculate precisely, it is likely to be in a range of 1–4% per year over the life of the swap. Offsetting this cost is the gain to the DCO of having additional assets available in the event of the simultaneous default of one or more Cleared Swaps Customers and their FCMs, which may enable it to obtain a higher rate of return on some of its other assets.[179] Similarly, the cost to an FCM of a guaranty fund contribution increase is equal to the difference in return between acceptable instruments for deposit to the guaranty fund and the FCM's potential return on that $100 if it were not deposited to the guaranty fund.

The benefit to customers of greater protection for customer margin provided by the Complete Legal Segregation Model and the Legal Segregation with Recourse Model also depends, to some extent, on assumptions about customers' behavior in advance of a fellow-customer default. Under the extreme assumption that all customers costlessly anticipate the default and move their positions to a different FCM, then neither the Complete Legal Segregation Model nor the Legal Segregation with Recourse Model provides any benefit to customers (since their Cleared Swaps Customer Accounts would not have been at risk under the benchmark). More generally, the greater the extent to which customers will move their positions, the lower the benefits of the Complete Legal Segregation Model and the Legal Segregation with Recourse Model relative to the Futures Model. Of course, under the Futures Model there exists uncertainty surrounding a customer's ability to anticipate an FCM default, and this uncertainty is either wholly or mostly eliminated under the Complete Legal Segregation and the Legal Segregation with Recourse Models. However, this benefit afforded the customer needs to be balanced against the cost to the DCO of insuring against this uncertainty, a portion of which can be anticipated to be passed along to the customer. Thus, both the capital costs and the benefits of the Complete Legal Segregation and the Legal Segregation with Recourse Models, relative to the Futures Model, will tend to be lower to the extent customers are likely to move their positions in advance of an FCM default and higher to the extent customers are unlikely to be able to move their positions. As a result, differing assumptions about customer mobility in advance of default are likely to have smaller implications for the relative costs and benefits of differing approaches than they do for Risk Cost considered in isolation.

c. Induced Changes in Behavior

Finally, in the category of costs and benefits associated with induced changes in behavior, several issues are worth noting. CME has argued that the Complete Legal Segregation and the Legal Segregation with Recourse Models could potentially reduce the incentives of individual customers to exercise due diligence when choosing an FCM. In effect, they argue that because the financial condition of the FCM, and of the FCM's other customers, will be less relevant to the customer's liability in the event of fellow customer default, the customer will devote less effort to monitoring the FCM and its customers. While this is likely to be true, these liability regimes have offsetting increased monitoring incentives on the part of FCMs and the DCO. That is, because the Complete Legal Segregation and the Legal Segregation with Recourse Models increase the likelihood that a customer default would impact the guaranty fund, increased incentives exist to protect that fund through more careful monitoring by the suppliers of the guaranty fund and their agent (the

[177] LCH states that a methodology in which no diversification is assumed represents their current practice, and is the most "conservative" in terms of capital adequacy. It argues that it is imprudent to assume that any funds in the omnibus Cleared Swaps Customer Account will remain at the time of default because that default may plausibly occur not as a sudden shock but, rather, as the end of a process of credit deterioration taking place over a number of days (potentially a number of weeks), during which time the Cleared Swaps Customers have time to port their Cleared Swaps Contracts and associated collateral away from the defaulting FCM. Thus, according to the logic of LCH's approach, the size of the guaranty fund and/or initial margin levels would need to be as high under the Futures Model as under either the Complete Legal Segregation or the Legal Segregation with Recourse Models.

[178] The LCH's observation also impacts the requisite change in Cleared Swaps Customer Collateral. The question of how to appropriately evaluate the omnibus customer account is a question of financial resources and is beyond the scope of this rulemaking. We note, however, that to the extent that immediate history may provide some guidance, the aggregate amount of segregated funds in Lehman's omnibus customer account dropped by roughly 75% during the week prior to its filing for bankruptcy.

[179] An additional offset to this cost is the value that customers assign to the increased safety of their collateral from fellow customer risk, a point which is discussed further below.

DCO). Indeed, as discussed above,[180] other commenters (BlackRock, Freddie Mac, and Vanguard) observe that the availability of fellow-customer collateral as a buffer reduces the incentives of DCOs to provide vigorous oversight. The net effect of these incentive changes on the incentive to monitor is difficult to quantify. However, the basic economics of monitoring suggest that there are efficiency gains to centralizing monitoring in a small number of parties.[181] This is because there are "free rider" effects associated with diffuse liability; when liability is spread upon a large number of agents, each gains little from devoting resources to monitoring the firm.[182] This effect is compounded by an information effect; even if the incentive exists, it is difficult for individual customers to gain access to information about the financial condition of the FCM, and even more so about the financial condition of their fellow customers. In contrast, the DCO will, especially under the Complete Legal Segregation Model and the Legal Segregation with Recourse Model, have good information about the financial condition of both FCMs and customers.

d. Portability

Another issue is the ease of moving Cleared Swaps Customer Contracts to new FCMs following an FCM default. Following a default by an FCM, the Cleared Swaps Contracts of the FCM's customers either have to be moved to another FCM, or closed. Moving a position to another FCM allows the DCO to maintain its net position in that contract at zero, which is generally a goal of a DCO. It also prevents a customer from needing to reestablish a position, which potentially can be costly, especially in a stressed economic state.[183] As discussed above, the various models result in different amounts of customer-specific information residing with the DCO under the various models. While it is difficult to quantify the effects of the alternatives on the cost of moving positions between FCMs, it would seem that both the Complete Legal Segregation and the Legal Segregation with Recourse models do not decrease portability, especially given the increases in capital requirements that many commenters view as a likely consequence of either model. In fact, ISDA emphasizes that the Complete Legal Segregation Model likely increases portability.

e. Potential Preferences of Cleared Swaps Customers

Overall, evaluating the costs and benefits of the Complete Legal Segregation Model and the Legal Segregation with Recourse Model relative to the Futures Model requires one to know the inherently-subjective valuation end-users place on the lower likelihood of losing their initial margin, as well as more precise estimates of the cost. Given the constraints on such knowledge, and the likelihood that the benefits to customers will, to some extent, vary with the cost to DCOs (that is, both are related to the same underlying factors), the best indirect evidence of the likely effect is the comments provided by the buy-side. While the Commission has not canvassed all buy-side members, most of those that chose to comment on the ANPR support the change. It is not knowable if these commenters fully internalized all of the potential costs outlined above (*e.g.,* potentially higher margins, increased costs imposed by FCMs). However, these commenters generally told the Commission that they understood that more protection for customer collateral was likely to come at a cost and that they nevertheless favored more protective approaches.

f. The Optional Approach

A final option is giving DCOs the choice of which segregation model to employ. If all DCOs would adopt the same model when given a choice, then the foregoing analysis would apply. In contrast, if different DCOs might adopt different models, then the analysis of the system-wide costs and benefits would need to account for the choices made by the extant DCOs. The Commission seeks comment on the likely alternatives that would emerge if DCOs had the option of choosing their segregation model, and the likely costs and benefits of having alternative default models available.[184]

3. Summary of Benefits of Legal Segregation Models

Based on the discussion in the previous section, the primary expected benefits of adopting the Complete Legal Segregation or the Legal Segregation with Recourse Models to implementing section 724 of the Dodd-Frank Act can be summarized as follows.

a. Fellow-Customer Risk

The primary direct benefit from either the Complete Legal Segregation or the Legal Segregation with Recourse Models is to reduce the risk to Cleared Swaps Customers of losing the value of their collateral in a scenario in which an FCM and one or more of its customers defaults on its obligations in connection with Cleared Swaps transactions. The Complete Legal Segregation Model would largely eliminate this risk.[185] The Legal Segregation with Recourse Model would limit this risk to defaults in which the magnitude of the Cleared Swaps Customer component of the default exceeds the aggregate of the DCO's own capital and the guaranty fund contributions of non-defaulting FCM members.

As discussed in the previous section, the value of this reduced risk of loss to Cleared Swaps Customers will, to some degree, depend on the extent to which such customers are able to anticipate FCM defaults and voluntarily transfer their Cleared Swaps Contracts, and associated collateral, to other FCMs before the default occurs. In practice, some FCM defaults may be anticipated by a substantial proportion of Cleared Swaps Customers, while others may occur suddenly with few or no customers able to transfer their collateral.[186] For this reason, an important benefit of the Legal Segregation Model (particularly the Complete Legal Segregation Model) is greater certainty. By providing post-default protection against Fellow-Customer Risk (as such term is defined above), the Legal Segregation Model provides Cleared Swaps Customers with a degree of certainty that they will not lose their collateral due to the actions of other customers regardless of whether they are able to anticipate an FCM default. Swaps customers who commented on the ANPR indicated that such certainty was critical to their business model. The direct benefit to Cleared Swaps Customers of reduced Fellow-Customer Risk and reduced

[180] *See* note 56 supra.

[181] In the banking literature, this argument supports capital requirements as effective disincentives to excessive risk-taking.

[182] *See, e.g.,* Andrei Shleifer and Robert W. Vishny, A Survey of Corporate Governance, 52 J. Fin. 737, 753 (1997) (discussing effect of "free rider" issues on monitoring in context of corporate governance).

[183] *See* ISDA Supplemental at 2.

[184] Section III(E) describes certain concerns with adopting the Optional Approach.

[185] As noted above, this model would leave some residual fellow-customer risk because the DCO would allocate collateral between defaulting and non-defaulting customers based on information the FCM provided the day prior to default, so the allocation would not reflect movement in the cleared swaps portfolio of customers on the day of default.

[186] *See* footnote 178 supra (regarding recent experience with Lehman). *Cf. e.g.,* Inskeep v. Griffin, 440 B.R. 148, 151–52 (Beginning on Monday, December 21, 1998 and continuing into the morning of Tuesday, December 22, 1998 * * * Park * * * a trader who operated out of Griffin Trading Company's London office, substantially exceeded his trading limits and suffered losses * * * As a result of Park's losses, Griffin Trading became insolvent.").

uncertainty may generate a variety of indirect benefits, for example an increased ability by some businesses to use cleared swaps as a risk management tool or a reduced need by Cleared Swaps Customers to incur costs to protect against the consequences of Fellow-Customer Risk in the event of an FCM default.

b. Portability and Systemic Risk

An additional benefit of the Complete Legal Segregation Model is to foster portability. By preserving the collateral of non-defaulting Cleared Swaps Customers, this model increases the likelihood that the Cleared Swaps Contracts of these customers can be successfully transferred. Fostering such transfer, as opposed to the liquidation of these Cleared Swaps Contracts, will carry benefits both for the Cleared Swaps Customers and for the financial system as a whole (the latter by reducing the likelihood that markets would be roiled by a mass liquidation).

c. Induced Changes in Behavior

Further benefits are expected to result from changes in behavior induced by the direct costs and benefits of the Complete Legal Segregation or Legal Segregation with Recourse Models. Because DCOs will not be able to rely on the collateral of non-defaulting Cleared Swaps Customers, they will have incentives to increase the extent of their monitoring of the risk posed by their FCM members and the major customers of those FCMs. This will have a tendency to reduce the incidence of FCM and major customer defaults. Some commenters on the ANPR suggested that the greater protection provided by the Legal Segregation Model (particularly the Complete Legal Segregation Model) will mean that Cleared Swaps Customers have less incentive to monitor the riskiness of their FCMs than under the Futures Model in which customers are exposed to greater risk of loss. However, for reasons explained in the previous section, DCOs are in a better position than Cleared Swaps Customers to monitor FCMs, and the customers thereof, so the benefits from increased monitoring by DCOs can be expected to outweigh any reduced monitoring by customers.[187]

4. Relevance to Section 15(a)(2) Considerations

The costs and benefits discussed in the previous sections bear on a number of the considerations listed in section 15(a)(2) of the CEA:

a. Protection of market participants and the public. The primary benefit of the Complete Legal Segregation Model, reduction in the risk of loss of Cleared Swaps Customer Collateral, advances this interest. The Commission notes that the Legal Segregation with Recourse Model, which the Commission is considering, also achieves such benefit, but to a lesser extent.

b. Efficiency, competitiveness, and financial integrity of markets. As mentioned above, the Complete Legal Segregation Model would increase the likelihood that, in the event of a simultaneous FCM and Cleared Swaps Customer default, the DCO would be able to transfer the Cleared Swaps of non-defaulting Cleared Swaps Customers. Therefore, to the extent that the Complete Legal Segregation Model would enable Cleared Swaps Customers to avoid liquidation of their existing Cleared Swaps, this model would avoid what one commenter described as "major market disruption with significant adverse economic impact." [188] Such avoidance would therefore promote the financial integrity of the markets.

Additionally, behavioral responses to the Complete Legal Segregation Model discussed above may also affect the financial integrity of markets. To the extent that the Complete Legal Segregation Model creates incentives for DCOs to employ higher levels of monitoring of FCMs and their Cleared Swaps Customers, it will enhance the financial integrity of markets.

The Commission notes that, in contrast to the Complete Legal Segregation Model, the Legal Segregation with Recourse Model increases the likelihood of the transfer of Cleared Swaps Customer Contracts to a lesser extent. Therefore, the Legal Segregation with Recourse Model does not enhance the financial integrity of markets as much as the Complete Legal Segregation Model.

As mentioned above, the Complete Legal Segregation Model arguably entails greater Risk Costs, although not operational costs, than the Legal Segregation with Recourse Model. Both such models arguably entail greater operational costs than the Futures Model. However:

- As discussed above, commenters exhibited considerable divergence in their estimates of Risk Costs.
- As discussed above, ANPR commenters suggested that the incremental operational costs of the Complete Legal Segregation or the Legal Segregation with Recourse Models, as compared with the Futures Model, would be relatively modest against the size of the market for cleared swaps.
- Despite the possibility of increased Risk Costs and operational costs, most buy-side commenters to the ANPR suggested that they valued the degree of certainty that they will not lose Cleared Swaps Customer Collateral, and several such commenters indicated that the absence of this level of certainty would impair their ability to use cleared swaps for risk management purposes. To the extent that these commenters represented the perspective of swaps users generally, then, notwithstanding the possibility of increased Risk Costs and operational costs, adoption of either the Complete Legal Segregation or the Legal Segregation with Recourse Models may increase the efficiency and competitiveness of markets, because they may encourage buy-side use of such markets in the management of risk.

Because the Complete Legal Segregation Model would eliminate the ability of DCOs to access the collateral of non-defaulting Cleared Swaps Customers in the event of an FCM default accompanied by the default of one or more customers, other things held constant, there could potentially be negative effects on a DCO's financial integrity. Such potential negative effects would not be present for the Legal Segregation with Recourse Model, because DCOs would still have the ability to access the collateral of non-defaulting Cleared Swaps Customers. To the extent that negative effects may exist, Core Principle B for DCOs, section 5b(c)(2)(B) of the CEA would require a DCO to have available alternative resources to protect the DCO from the consequences of a major FCM default, such as higher margin levels or larger guaranty funds. Consistent with this requirement, commenters on the ANPR who considered access to the collateral of non-defaulting Cleared Swaps Customers to be important generally assumed that DCOs would procure alternative financial resources if the Complete Legal Segregation Model is adopted. As a result, any potential negative effect of the Complete Legal Segregation Model on market integrity will be reflected in higher capital costs rather than an actual reduction in market integrity.

c. Price discovery. The effect of the Complete Legal Segregation Model (or the Legal Segregation with Recourse Model), as proposed, on price discovery will depend on the value that Cleared Swaps Customers assign to the additional protection that they will

[187] Moreover, any reduced monitoring by customers would also imply a reduced monitoring cost.

[188] *See* ISDA Supplemental at 3.

receive for Cleared Swaps Collateral against the cost that they will pay for such protection. If the former would exceed the latter, as buy-side commenters to the ANPR suggested, then Cleared Swaps Customers may be encouraged to participate in the markets, which could have a positive impact on price discovery

d. Sound risk management practices. To the extent that the Complete Legal Segregation Model or the Legal Segregation with Recourse Model creates incentives for higher levels of monitoring of FCMs and their Cleared Swaps Customers by DCOs, it will enhance sound risk management practices. As discussed above, some commenters suggested that the Complete Legal Segregation Model or the Legal Segregation with Recourse Model would reduce incentives for Cleared Swaps Customers to "risk manage" their FCMs. As noted above, there are significant questions about the ability of customers to "risk manage" their FCMs effectively. Moreover, the Commission expects that any such effect would be outweighed by enhanced risk management on the part of DCOs.

e. Other public interest considerations. As discussed above, some commenters suggested that the Complete Legal Segregation Model would increase market stability in times of stress facilitating the prompt transfer of customer positions without the need for liquidation when an FCM defaults.

5. Public Comment

The Commission invites public comment on its cost-benefit considerations, including the costs and benefits of the Complete Segregation Model (as proposed), the Legal Segregation with Recourse Model (which is under consideration), the Futures Model, and giving DCOs a choice of such approaches. Commenters are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits with their comment letters.

**List of Subjects**

*17 CFR Part 22*

Brokers, Clearing, Consumer protection, Reporting and recordkeeping requirements, Swaps.

*17 CFR Part 190*

Bankruptcy, Brokers, Commodity futures, Reporting and recordkeeping requirements, Swaps.

**VIII. Text of Proposed Rules**

For the reasons stated in this release, the Commission hereby proposes to amend Chapter as follows:

1. Add Part 22 to read as follows:

## PART 22—CLEARED SWAPS

Sec.

22.1 Definitions.
22.2 Futures Commission Merchants: Treatment of Cleared Swaps Customer Collateral.
22.3 Derivatives Clearing Organizations: Treatment of Cleared Swaps Customer Collateral.
22.4 Futures Commission Merchants and Derivatives Clearing Organizations: Permitted Depositories.
22.5 Futures Commission Merchants and Derivatives Clearing Organizations: Written Acknowledgement.
22.6 Futures Commission Merchants and Derivatives Clearing Organizations: Naming of Cleared Swaps Customer Accounts.
22.7 Permitted Depositories: Treatment of Cleared Swaps Customer Collateral
22.8 Situs of Cleared Swaps Accounts.
22.9 Denomination of Cleared Swaps Customer Collateral and Location of Depositories.
22.10 Incorporation by Reference.
22.11 Information To Be Provided Regarding Customers and Their Cleared Swaps.
22.12 Information To Be Maintained Regarding Cleared Swaps Customer Collateral.
22.13 Additions to Cleared Swaps Customer Collateral.
22.14 Futures Commission Merchant Failure To Meet a Customer Margin Call in Full.
22.15 Treatment of Cleared Swaps Customer Collateral on an Individual Basis.
22.16 Disclosures to Customers.

**Authority:** 7 U.S.C. 1a, 6d, 7a–1 as amended by Pub. L. 111–203, 124 Stat. 1376.

### § 22.1 Definitions.

For the purposes of this part:

*Cleared Swap.* This term refers to a transaction constituting a "cleared swap" within the meaning of section 1a(7) of the Act.

(1) This term shall exclude any swap (along with money, securities, or other property received to margin, guarantee, or secure such a swap) that, pursuant to a Commission rule, regulation, or order (or a derivatives clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter), is (along with such money, securities, or other property) commingled with a commodity future or option (along with money, securities, or other property received to margin, guarantee, or secure such a future or option) that is segregated pursuant to section 4d(a) of the Act.

(2) This term shall include any trade or contract (along with money, securities or other property received to margin, guarantee, or secure such a trade or contract), that (i) Would be required to be segregated pursuant to section 4d(a) of the Act, or (ii) Would be subject to § 30.7 of this chapter, but which is, in either case, pursuant to a Commission rule, regulation, or order (or a derivatives clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter), commingled with a swap (along with money, securities, or other property received to margin, guarantee, or secure such a swap) in an account segregated pursuant to section 4d(f) of the Act.

*Cleared Swaps Customer.* This term refers to any person entering into a Cleared Swap, but shall exclude any owner or holder of a Cleared Swaps Proprietary Account with respect to the Cleared Swaps in such account. A person shall be a Cleared Swaps Customer only with respect to its Cleared Swaps.

*Cleared Swaps Customer Account.* This term refers to any account for the Cleared Swaps of Cleared Swaps Customers and associated Cleared Swaps Customer Collateral that:

(1) A futures commission merchant maintains on behalf of Cleared Swaps Customers (including, in the case of a Collecting Futures Commission Merchant, the Cleared Swaps Customers of a Depositing Futures Commission Merchant) or

(2) A derivatives clearing organization maintains for futures commission merchants on behalf of Cleared Swaps Customers thereof.

*Cleared Swaps Customer Collateral.* (1) This term means all money, securities, or other property received by a futures commission merchant or by a derivatives clearing organization from, for, or on behalf of a Cleared Swaps Customer, which money, securities, or other property:

(i) Is intended to or does margin, guarantee, or secure a Cleared Swap; or

(ii) Constitutes, if a Cleared Swap is in the form or nature of an option, the settlement value of such option.

(2) This term shall also include accruals, *i.e.,* all money, securities, or other property that a futures commission merchant or derivatives clearing organization receives, directly or indirectly, which is incident to or results from a Cleared Swap that a futures commission merchant intermediates for a Cleared Swaps Customer.

*Cleared Swaps Proprietary Account.* (1) This term means an account for Cleared Swaps and associated collateral that is carried on the books and records of a futures commission merchant for persons with certain relationships with

that futures commission merchant, specifically:

(i) Where such account is carried for a person falling within one of the categories specified in paragraph (2) of this definition, or

(ii) Where ten percent or more of such account is owned by a person falling within one of the categories specified in paragraph (2) of this definition, or

(iii) Where an aggregate of ten percent or more of such account is owned by more than one person falling within one or more of the categories specified in paragraph (2) of this definition.

(2) The relationships to the futures commission merchant referred to in paragraph (1) of this definition are as follows:

(i) Such individual himself, or such partnership, corporation or association itself;

(ii) In the case of a partnership, a general partner in such partnership;

(iii) In the case of a limited partnership, a limited or special partner in such partnership whose duties include:

(*A*) The management of the partnership business or any part thereof;

(*B*) The handling, on behalf of such partnership, of (i) the Cleared Swaps of Cleared Swaps Customers or (ii) the Cleared Swaps Customer Collateral;

(*C*) The keeping, on behalf of such partnership, of records pertaining to (i) the Cleared Swaps of Cleared Swaps Customers or (ii) the Cleared Swaps Customer Collateral; or

(*D*) The signing or co-signing of checks or drafts on behalf of such partnership;

(iv) In the case of a corporation or association, an officer, director, or owner of ten percent or more of the capital stock of such organization;

(v) An employee of such individual, partnership, corporation or association whose duties include:

(*A*) The management of the business of such individual, partnership, corporation or association or any part thereof;

(*B*) The handling, on behalf of such individual, partnership, corporation, or association, of the Cleared Swaps of Cleared Swaps Customers or the Cleared Swaps Customer Collateral;

(*C*) The keeping of records, on behalf of such individual, partnership, corporation, or association, pertaining to the Cleared Swaps of Cleared Swaps Customers or the Cleared Swaps Customer Collateral; or

(*D*) The signing or co-signing of checks or drafts on behalf of such individual, partnership, corporation, or association;

(vi) A spouse or minor dependent living in the same household of any of the foregoing persons;

(vii) A business affiliate that, directly or indirectly, controls such individual, partnership, corporation, or association; or

(viii) A business affiliate that, directly or indirectly, is controlled by or is under common control with, such individual, partnership, corporation or association. *Provided, however,* that an account owned by any shareholder or member of a cooperative association of producers, within the meaning of section 6a of the Act, which association is registered as a futures commission merchant and carries such account on its records, shall be deemed to be a Cleared Swaps Customer Account and not a Cleared Swaps Proprietary Account of such association, unless the shareholder or member is an officer, director, or manager of the association.

*Clearing Member.* This term means any person that has clearing privileges such that it can process, clear and settle trades through a derivatives clearing organization on behalf of itself or others. The derivatives clearing organization need not be organized as a membership organization.

*Collecting Futures Commission Merchant.* A futures commission merchant that carries Cleared Swaps on behalf of another futures commission merchant and the Cleared Swaps Customers of the latter futures commission merchant, and as part of carrying such Cleared Swaps, collects Cleared Swaps Customer Collateral.

*Commingle.* To commingle two or more items means to hold such items in the same account, or to combine such items in a transfer between accounts.

*Customer.* This term means any customer of a futures commission merchant, other than a Cleared Swaps Customer, including, without limitation:

(1) Any "customer" or "commodity customer" within the meaning of § 1.3 of this chapter; and

(2) Any "foreign futures or foreign options customer" within the meaning of § 30.1(c) of this chapter.

*Depositing Futures Commission Merchant.* A futures commission merchant that carries Cleared Swaps on behalf of its Cleared Swaps Customers through another futures commission merchant and, as part of carrying such Cleared Swaps, deposits Cleared Swaps Customer Collateral with such futures commission merchant.

*Permitted Depository.* This term shall have the meaning set forth in § 22.4 of this part.

*Segregate.* To segregate two or more items is to keep them in separate accounts, and to avoid combining them in the same transfer between two accounts.

**§ 22.2 Futures Commission Merchants: Treatment of Cleared Swaps and Associated Cleared Swaps Customer Collateral.**

(a) *General.* A futures commission merchant shall treat and deal with the Cleared Swaps of Cleared Swaps Customers and associated Cleared Swaps Customer Collateral as belonging to Cleared Swaps Customers.

(b) *Location of Cleared Swaps Customer Collateral.* (1) A futures commission merchant must segregate all Cleared Swaps Customer Collateral that it receives, and must either hold such Cleared Swaps Customer Collateral itself as set forth in subparagraph (b)(2) of this section, or deposit such collateral into one or more Cleared Swaps Customer Accounts held at a Permitted Depository, as set forth in subparagraph (b)(3) of this section.

(2) If a futures commission merchant holds Cleared Swaps Customer Collateral itself, then the futures commission merchant must:

(i) Physically separate such collateral from its own property;

(ii) Clearly identify each physical location in which it holds such collateral as a "Location of Cleared Swaps Customer Collateral" (the "FCM Physical Location");

(iii) Ensure that the FCM Physical Location provides appropriate protection for such collateral; and

(iv) Record in its books and records the amount of such Cleared Swaps Customer Collateral separately from its own funds.

(3) If a futures commission merchant holds Cleared Swaps Customer Collateral in a Permitted Depository, then:

(i) The Permitted Depository must qualify pursuant to the requirements set forth in § 22.4 of this part, and

(ii) The futures commission merchant must maintain a Cleared Swaps Customer Account with each such Permitted Depository.

(c) *Commingling.* (1) A futures commission merchant may commingle the Cleared Swaps Customer Collateral that it receives from, for, or on behalf of multiple Cleared Swaps Customers.

(2) A futures commission merchant shall not commingle Cleared Swaps Customer Collateral with either of the following:

(i) Funds belonging to the futures commission merchant, except as expressly permitted in paragraph (e)(3) of this section; or

(ii) Other categories of funds belonging to Customers of the futures

commission merchant, including customer funds (as § 1.3 of this chapter defines such term) and the foreign futures or foreign options secured amount (as § 1.3 of this chapter defines such term), except as expressly permitted by Commission rule, regulation, or order, or by a derivatives clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter.

(d) *Limitations on Use.* (1) No futures commission merchant shall use, or permit the use of, the Cleared Swaps Customer Collateral of one Cleared Swaps Customer to purchase, margin, or settle the Cleared Swaps or any other trade or contract of, or to secure or extend the credit of, any person other than such Cleared Swaps Customer. Cleared Swaps Customer Collateral shall not be used to margin, guarantee, or secure trades or contracts of the entity constituting a Cleared Swaps Customer other than in Cleared Swaps, except to the extent permitted by a Commission rule, regulation or order, or by a derivatives clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter.

(2) A futures commission merchant may not impose or permit the imposition of a lien on Cleared Swaps Customer Collateral, including any residual financial interest of the futures commission merchant in such collateral, as described in paragraph (e)(4) of this section.

(3) A futures commission merchant may not include, as Cleared Swaps Customer Collateral,

(i) Money invested in the securities, memberships, or obligations of any derivatives clearing organization, designated contract market, swap execution facility, or swap data repository, or

(ii) Money, securities, or other property that any derivatives clearing organization holds and may use for a purpose other than those set forth in § 22.3 of this part.

(e) *Exceptions.* Notwithstanding the foregoing:

(1) *Permitted Investments.* A futures commission merchant may invest money, securities, or other property constituting Cleared Swaps Customer Collateral in accordance with § 1.25 of this chapter, which section shall apply to such money, securities, or other property as if they comprised customer funds or customer money subject to segregation pursuant to section 4d(a) of the Act and the regulations thereunder.

(2) *Permitted Withdrawals.* Such share of Cleared Swaps Customer Collateral as in the normal course of business shall be necessary to margin, guarantee, secure, transfer, adjust, or settle a Cleared Swaps Customer's cleared swaps with a derivatives clearing organization, or with a Collecting Futures Commission Merchant, may be withdrawn and applied to such purposes, including the payment of commissions, brokerage, interest, taxes, storage, and other charges, lawfully accruing in connection with such cleared swaps.

(3) *Deposits of Own Money, Securities, or Other Property.* In order to ensure that it is always in compliance with paragraph (f) of this section, a futures commission merchant may place in an FCM Physical Location or deposit in a Cleared Swaps Customer Account its own money, securities, or other property (*provided, that* such securities or other property are unencumbered and are of the types specified in § 1.25 of this chapter).

(4) *Residual Financial Interest.* (i) If, in accordance with paragraph (e)(3) of this section, a futures commission merchant places in an FCM Physical Location or deposits in a Cleared Swaps Customer Account its own money, securities, or other property, then such money, securities, or other property (including accruals thereon) shall constitute Cleared Swaps Customer Collateral.

(ii) The futures commission merchant shall have a residual financial interest in any portion of such money, securities, or other property in excess of that necessary for compliance with paragraph (f)(4) of this section.

(iii) The futures commission merchant may withdraw money, securities, or other property from the FCM Physical Location or Cleared Swaps Customer Account, to the extent of its residual financial interest therein. At the time of such withdrawal, the futures commission merchant shall ensure that the withdrawal does not cause its residual financial interest to become less than zero.

(f) *Requirements as to Amount.* (1) For purposes of this section 22.2(f), the term "account" shall reference the entries on the books and records of a futures commission merchant pertaining to the Cleared Swaps Customer Collateral of a particular Cleared Swaps Customer.

(2) The futures commission merchant must reflect in the account that it maintains for each Cleared Swaps Customer the market value of any Cleared Swaps Customer Collateral that it receives from such customer, as adjusted by:

(i) Any uses permitted under § 22.2(d) of this part;

(ii) Any accruals or losses on permitted investments of such collateral under § 22.2(e) of this part that, pursuant to the futures commission merchant's customer agreement with that customer, are creditable or chargeable to such customer;

(iii) Any charges lawfully accruing to the Cleared Swaps Customer, including any commission, brokerage fee, interest, tax, or storage fee; and

(iv) Any appropriately authorized distribution or transfer of such collateral.

(3) If the market value of Cleared Swaps Customer Collateral in the account of a Cleared Swaps Customer is positive after adjustments, then that account has a credit balance. If the market value of Cleared Swaps Customer Collateral in the account of a Cleared Swaps Customer is negative after adjustments, then that account has a debit balance.

(4) The futures commission merchant must maintain in segregation, in its FCM Physical Locations and/or its Cleared Swaps Customer Accounts at Permitted Depositories, an amount equal to the sum of any credit balances that the Cleared Swaps Customers of the futures commission merchant have in their accounts, excluding from such sum any debit balances that the Cleared Swaps Customers of the futures commission merchant have in their accounts.

(5) Notwithstanding the foregoing, the futures commission merchant must include, in calculating the sum referenced in paragraph (f)(4) of this section, any debit balance that a Cleared Swaps Customer may have in its account, to the extent that such balance is secured by "readily marketable securities" that the Cleared Swaps Customer deposited with the futures commission merchant.

(i) For purposes of this section, "readily marketable" shall be defined as having a "ready market" as such latter term is defined in Rule 15c3–1(c)(11) of the Securities and Exchange Commission (§ 241.15c3–1(c)(11) of this title).

(ii) In order for a debit balance to be deemed secured by "readily marketable securities," the futures commission merchant must maintain a security interest in such securities, and must hold a written authorization to liquidate the securities at the discretion of the futures commission merchant.

(iii) To determine the amount secured by "readily marketable securities," the futures commission merchant shall: (A) determine the market value of such securities; and (B) reduce such market value by applicable percentage deductions (*i.e.,* "securities haircuts") as set forth in Rule 15c3–1(c)(2)(vi) of the

Securities and Exchange Commission (§ 240.15c3–1(c)(2)(vi) of this title). The portion of the debit balance, not exceeding 100 per cent, that is secured by the reduced market value of such readily marketable securities shall be included in calculating the sum referred to in paragraph (f)(4) of this section.

(g) *Segregated Account; Daily Computation and Record.* (1) Each futures commission merchant must compute as of the close of each business day, on a currency-by-currency basis:

(i) The aggregate market value of the Cleared Swaps Customer Collateral in all FCM Physical Locations and all Cleared Swaps Customer Accounts held at Permitted Depositories (the "Collateral Value");

(ii) The sum referenced in paragraph (f)(4) of this section (the "Collateral Requirement"); and

(iii) The amount of the residual financial interest that the futures commission merchant holds in such Cleared Swaps Customer Collateral, which shall equal the difference between the Collateral Value and the Collateral Requirement.

(2) The futures commission merchant must complete the daily computations required by this section prior to noon on the next business day and must keep such computations, together with all supporting data, in accordance with the requirements of § 1.31 of this chapter.

**§ 22.3 Derivatives Clearing Organizations: Treatment of Cleared Swaps Customer Collateral.**

(a) *General.* A derivatives clearing organization shall treat and deal with the Cleared Swaps Customer Collateral deposited by a futures commission merchant as belonging to the Cleared Swaps Customers of such futures commission merchant and not other persons, including, without limitation, the futures commission merchant.

(b) *Location of Cleared Swaps Customer Collateral.* (1) The derivatives clearing organization must segregate all Cleared Swaps Customer Collateral that it receives from futures commission merchants, and must either hold such Cleared Swaps Customer Collateral itself as set forth in paragraph (b)(2) of this section, or deposit such collateral into one or more Cleared Swaps Customer Accounts held at a Permitted Depository, as set forth in paragraph (b)(3) of this section.

(2) If a derivatives clearing organization holds Cleared Swaps Customer Collateral itself, then the derivatives clearing organization must:

(i) Physically separate such collateral from its own property, the property of any futures commission merchant, and the property of any other person that is not a Cleared Swaps Customer of a futures commission merchant;

(ii) Clearly identify each physical location in which it holds such collateral as "Location of Cleared Swaps Customer Collateral" (the "DCO Physical Location");

(iii) Ensure that the DCO Physical Location provides appropriate protection for such collateral; and

(iv) Record in its books and records the amount of such Cleared Swaps Customer Collateral separately from its own funds, the funds of any futures commission merchant, and the funds of any other person that is not a Cleared Swaps Customer of a futures commission merchant.

(3) If a derivatives clearing organization holds Cleared Swaps Customer Collateral in a Permitted Depository, then:

(i) The Permitted Depository must qualify pursuant to the requirements set forth in § 22.4 of this part; and

(ii) The derivatives clearing organization must maintain a Cleared Swaps Customer Account with each such Permitted Depository.

(c) *Commingling.* (1) A derivatives clearing organization may commingle the Cleared Swaps Customer Collateral that it receives from multiple futures commission merchants on behalf of their Cleared Swaps Customers.

(2) A derivatives clearing organization shall not commingle the Cleared Swaps Customer Collateral that it receives from a futures commission merchant on behalf of Cleared Swaps Customers with any of the following:

(i) The money, securities, or other property belonging to the derivatives clearing organization;

(ii) The money, securities, or other property belonging to any futures commission merchant; or

(iii) Other categories of funds that it receives from a futures commission merchant on behalf of Customers, including customer funds (as § 1.3 of this chapter defines such term) and the foreign futures or foreign options secured amount (as § 1.3 of this chapter defines such term), except as expressly permitted by Commission rule, regulation or order, (or a derivatives clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter).

(d) *Exceptions; Deposits and Withdrawals from Futures Commission Merchants.* Notwithstanding the foregoing, pursuant to an instruction from a futures commission merchant, a derivatives clearing organization may place money, securities, or other property belonging to the futures commission merchant in a DCO Physical Location, or deposit such money, securities, or other property in the Cleared Swaps Customer Accounts that the derivatives clearing organization maintains. The derivatives clearing organization may permit the futures commission merchant to withdraw such money, securities, or other property from a DCO Physical Location or Cleared Swaps Customer Account.

(e) *Exceptions; Permitted Investments.* Notwithstanding the foregoing and § 22.15 of this part, a derivatives clearing organization may invest the money, securities, or other property constituting Cleared Swaps Customer Collateral in accordance with § 1.25 of this chapter, which section shall apply to such money, securities, or other property as if they comprised customer funds or customer money subject to segregation pursuant to section 4d(a) of the Act and the regulations thereunder.

**§ 22.4 Futures Commission Merchants and Derivatives Clearing Organizations: Permitted Depositories.**

In order for a depository to be a Permitted Depository:

(a) The depository must (subject to § 22.9) be one of the following types of entities:

(1) A bank located in the United States;

(2) A trust company located in the United States;

(3) A Collecting Futures Commission Merchant registered with the Commission (but only with respect to a Depositing Futures Commission Merchant providing Cleared Swaps Customer Collateral); or

(4) A derivatives clearing organization registered with the Commission; and

(b) The futures commission merchant or the derivatives clearing organization must hold a written acknowledgment letter from the depository as required by § 22.5 of this part.

**§ 22.5 Futures Commission Merchants and Derivatives Clearing Organizations: Written Acknowledgement.**

(a) Before depositing Cleared Swaps Customer Collateral, the futures commission merchant or derivatives clearing organization shall obtain and retain in its files a separate written acknowledgment letter from each depository in accordance with §§ 1.20 and 1.26 of this chapter, with all references to "customer funds" modified to apply to Cleared Swaps Customer Collateral, and with all references to section 4d(a) or 4d(b) of the Act and the regulations thereunder modified to apply to section 4d(f) of the Act and the regulations thereunder.

(b) The futures commission merchant or derivatives clearing organization shall adhere to all requirements specified in §§ 1.20 and 1.26 of this chapter regarding retaining, permitting access to, filing, or amending the written acknowledgment letter, in all cases as if the Cleared Swaps Customer Collateral comprised customer funds subject to segregation pursuant to section 4d(a) or 4d(b) of the Act and the regulations thereunder.

(c) Notwithstanding paragraph (a) of this section, an acknowledgement letter need not be obtained from a derivatives clearing organization that has made effective, pursuant to section 5c(c) of the Act and the regulations thereunder, rules that provide for the segregation of Cleared Swaps Customer Collateral, in accordance with all relevant provisions of the Act and the regulations thereunder.

**§ 22.6 Futures Commission Merchants and Derivatives Clearing Organizations: Naming of Cleared Swaps Customer Accounts.**

The name of each Cleared Swaps Customer Account that a futures commission merchant or a derivatives clearing organization maintains with a Permitted Depository shall (a) clearly identify the account as a "Cleared Swaps Customer Account" and (b) clearly indicate that the collateral therein is "Cleared Swaps Customer Collateral" subject to segregation in accordance with the Act and this part.

**§ 22.7 Permitted Depositories: Treatment of Cleared Swaps Customer Collateral.**

A Permitted Depository shall treat all funds in a Cleared Swaps Customer Account as Cleared Swaps Customer Collateral. A Permitted Depository shall not hold, dispose of, or use any such Cleared Swaps Customer Collateral as belonging to any person other than:

(a) The Cleared Swaps Customers of the futures commission merchant maintaining such Cleared Swaps Customer Account or;

(b) The Cleared Swaps Customers of the futures commission merchants for which the derivatives clearing organization maintains such Cleared Swaps Customer Account.

**§ 22.8 Situs of Cleared Swaps Accounts.**

The situs of each of the following shall be located in the United States:

(a) Each FCM Physical Location or DCO Physical Location;

(b) Each "account," within the meaning of § 22.2(f)(1), that a futures commission merchant maintains for each Cleared Swaps Customer; and

(c) Each Cleared Swaps Customer Account on the books and records of a derivatives clearing organization with respect to the Cleared Swaps Customers of a futures commission merchant.

**§ 22.9 Denomination of Cleared Swaps Customer Collateral and Location of Depositories.**

(a) Futures commission merchants and derivatives clearing organizations may hold Cleared Swaps Customer Collateral in the denominations, at the locations and depositories, and subject to the same segregation requirements specified in § 1.49 of this chapter, which section shall apply to such Cleared Swaps Customer Collateral as if it comprised customer funds subject to segregation pursuant to section 4d(a) of the Act.

(b) Each depository referenced in paragraph (a) of this section shall be considered a Permitted Depository for purposes of this part. *Provided, however,* that a futures commission merchant shall only be considered a Permitted Depository to the extent that it is acting as a Collecting Futures Commission Merchant (as § 22.1 of this part defines such term).

**§ 22.10 Incorporation by Reference.**

Sections 1.27, 1.28, 1.29, and 1.30 of this chapter shall apply to the Cleared Swaps Customer Collateral held by futures commission merchants and derivatives clearing organizations to the same extent as if such sections referred to:

(a) "Cleared Swaps Customer Collateral" in place of "customer funds;"

(b) "Cleared Swaps Customers" instead of "commodity or option customers" or "customers or option customers;"

(c) "Cleared Swaps Contracts" instead of "trades, contracts, or commodity options;" and

(d) "Section 4d(f) of the Act" instead of "section 4d(a)(2) of the Act."

**§ 22.11 Information to be Provided Regarding Customers and their Cleared Swaps.**

(a) Each Depositing Futures Commission Merchant shall provide to its Collecting Futures Commission Merchant the following information:

(1) The first time that the Depositing Futures Commission Merchant intermediates a Cleared Swap for a Cleared Swaps Customer, information sufficient to identify such customer; and

(2) At least once each business day thereafter, information sufficient to identify, for each Cleared Swaps Customer, the portfolio of rights and obligations arising from the Cleared Swaps that the Depositing Futures Commission Merchant intermediates for such customer.

(b) If an entity serves as both a Depositing Futures Commission Merchant and a Collecting Futures Commission Merchant, then:

(1) The information that such entity must provide to its Collecting Futures Commission Merchant pursuant to paragraph (a)(1) of this section shall also include information sufficient to identify each Cleared Swaps Customer of the Depositing Futures Commission Merchant for which such entity serves as a Collecting Futures Commission Merchant; and

(2) The information that such entity must provide to its Collecting Futures Commission Merchant pursuant to paragraph (a)(2) of this section shall also include information sufficient to identify, for each Cleared Swaps Customer referenced in paragraph (b)(1) of this section, the portfolio of rights and obligations arising from the Cleared Swaps that such entity intermediates as a Collecting Futures Commission Merchant, on behalf of its Depositing Futures Commission Merchant, for such customer.

(c) Each futures commission merchant that intermediates a Cleared Swap for a Cleared Swaps Customer, on or subject to the rules of a derivatives clearing organization, directly as a Clearing Member shall provide to such derivatives clearing organization the following information:

(1) The first time that such futures commission merchant intermediates a Cleared Swap for a Cleared Swaps Customer, information sufficient to identify such customer; and

(2) At least once each business day thereafter, information sufficient to identify, for each Cleared Swaps Customer, the portfolio of rights and obligations arising from the Cleared Swaps that such futures commission merchant intermediates for such customer.

(d) If the futures commission merchant referenced in paragraph (c) of this section is a Collecting Futures Commission Merchant, then:

(1) The information that it must provide to the derivatives clearing organization pursuant to paragraph (c)(1) of this section shall also include information sufficient to identify each Cleared Swaps Customer of any entity that acts as a Depositing Futures Commission Merchant in relation to the Collecting Futures Commission Merchant (including, without limitation, each Cleared Swaps Customer of any Depositing Futures Commission Merchant for which such entity also serves as a Collecting Futures Commission Merchant); and

(2) The information that it must provide to the derivatives clearing organization pursuant to paragraph (c)(2) of this section shall also include information sufficient to identify, for each Cleared Swaps Customer referenced in paragraph (d)(1) of this section, the portfolio of rights and obligations arising from the Cleared Swaps that the Collecting Futures Commission Merchant intermediates, on behalf of the Depositing Futures Commission Merchant, for such customer.

(e) Each derivatives clearing organization shall (1) take appropriate steps to confirm that the information it receives pursuant to paragraphs (c)(1) or (c)(2) of this section is accurate and complete, and (2) ensure that the futures commission merchant is providing the derivatives clearing organization the information required by paragraphs (c)(1) or (c)(2) of this section on a timely basis.

**§ 22.12 Information to be Maintained Regarding Cleared Swaps Customer Collateral.**

(a) Each Collecting Futures Commission Merchant receiving Cleared Swaps Customer Funds from an entity serving as a Depositing Futures Commission Merchant shall, no less frequently than once each business day, calculate and record:

(1) the amount of collateral required at such Collecting Futures Commission Merchant for each Cleared Swaps Customer of the entity acting as Depositing Futures Commission Merchant (including, without limitation, each Cleared Swaps Customer of any Depositing Futures Commission Merchant for which such entity also serves as a Collecting Futures Commission Merchant); and

(2) the sum of the individual collateral amounts referenced in paragraph (a)(1) of this section.

(b) Each Collecting Futures Commission Merchant shall calculate the collateral amounts referenced in paragraph (a) of this section with respect to the portfolio of rights and obligations arising from the Cleared Swaps that the Collecting Futures Commission Merchant intermediates, on behalf of the Depositing Futures Commission Merchant, for each Cleared Swaps Customer referenced in paragraph (a)(1).

(c) Each derivatives clearing organization receiving Cleared Swaps Customer Funds from a futures commission merchant shall, no less frequently than once each business day, calculate and record:

(1) The amount of collateral required at such derivatives clearing organization for each Cleared Swaps Customer of the futures commission merchant; and

(2) the sum of the individual collateral amounts referenced in paragraph (c)(1) of this section.

(d) If the futures commission merchant referenced in paragraph (c) of this section is a Collecting Futures Commission Merchant, then the derivatives clearing organization shall also perform and record the results of the calculation required in paragraph (c) of this section for each Cleared Swaps Customer of an entity acting as a Depositing Futures Commission Merchant in relation to the Collecting Futures Commission Merchant (including, without limitation, any Cleared Swaps Customer for which such entity is also acting as a Collecting Futures Commission Merchant).

(e) Each futures commission merchant shall calculate the collateral amounts referenced in paragraph (c) of this section with respect to the portfolio of rights and obligations arising from the Cleared Swaps that the futures commission merchant intermediates (including, without limitation, as a Collecting Futures Commission Merchant on behalf of a Depositing Futures Commission Merchant), for each Cleared Swaps Customer referenced in paragraphs (c)(1) and (d).

(f) The collateral requirement referenced in paragraph (a) of this section with respect to a Collecting Futures Commission Merchant shall be no less than that imposed by the relevant derivatives clearing organization with respect to the same portfolio of rights and obligations for each relevant Cleared Swaps Customer.

**§ 22.13 Additions to Cleared Swaps Customer Collateral.**

(a)(1) At the election of the derivatives clearing organization or Collecting Futures Commission Merchant, the collateral requirement referred to in § 22.12(a), (c), and (d) of this part applicable to a particular Cleared Swaps Customer or group of Cleared Swaps Customers may be increased based on an evaluation of the credit risk posed by such customer or group, in which case the derivatives clearing organization or Collecting Futures Commission Merchant shall collect and record such higher amount as provided in section 22.12 of this part.

(2) Nothing in paragraph (a)(1) of this section is intended to interfere with the right of a futures commission merchant to increase the collateral requirements at such futures commission merchant with respect to any of its Cleared Swaps Customers or Customers.

(b) Any collateral deposited by a futures commission merchant (including a Depositing Futures Commission Merchant) pursuant to § 22.2(e)(3) of this part, which collateral is identified as funds or securities in which such futures commission merchant has a residual financial interest pursuant to § 22.2(e)(4) of this part, may, to the extent of such residual financial interest, be used by the derivatives clearing organization or Collecting Futures Commission Merchant, as applicable, to margin, guarantee or secure the cleared swaps of any or all of such Cleared Swaps Customers.

**§ 22.14 Futures Commission Merchant Failure to Meet a Customer Margin Call in Full.**

(a) A Depositing Futures Commission Merchant which receives a call for either initial margin or variation margin with respect to a Cleared Swaps Customer Account from a Collecting Futures Commission Merchant, which call such Depositing Futures Commission Merchant does not meet in full, shall, with respect to each Cleared Swaps Customer of such Depositing Futures Commission Merchant whose Cleared Swaps contribute to such margin call,

(1) Transmit to the Collecting Futures Commission Merchant an amount equal to the lesser of

(i) The amount called for; or

(ii) The remaining Cleared Swaps Collateral on deposit at such Depositing Futures Commission Merchant for that Cleared Swaps Customer; and

(2) Advise the Collecting Futures Commission Merchant of the identity of each such Cleared Swaps Customer, and the amount transmitted on behalf of each such customer.

(b) If the entity acting as Depositing Futures Commission Merchant referenced in paragraph (a) of this section is also a Collecting Futures Commission Merchant, then:

(1) Such entity shall include in the transmission required in paragraph (a)(1) of this section any amount that it receives, pursuant to paragraph (a)(1) of this section, from a Depositing Futures Commission Merchant for which such entity acts as a Collecting Futures Commission Merchant; and

(2) Such entity shall present its Collecting Futures Commission Merchant with the information that it receives, pursuant to paragraph (a)(2) of this section, from a Depositing Futures Commission Merchant for which such

entity acts as a Collecting Futures Commission Merchant.

(c) A futures commission merchant which receives a call for margin (whether initial or variation) with respect to a Cleared Swaps Customer Account from a derivatives clearing organization, which call such futures commission merchant does not meet in full, shall, with respect to each Cleared Swaps Customer of such futures commission merchant whose Cleared Swaps contribute to such margin call:

(1) Transmit to the derivatives clearing organization an amount equal to the lesser of

(i) The amount called for; or

(ii) The remaining Cleared Swaps Collateral on deposit at such futures commission merchant for each such Cleared Swaps Customer; and

(2) advise the derivatives clearing organization of the identity of each such Cleared Swaps Customer, and the amount transmitted on behalf of each such customer.

(d) If the futures commission merchant referenced in paragraph (c) is a Collecting Futures Commission Merchant, then:

(1) Such Collecting Futures Commission Merchant shall include in the transmission required in paragraph (c)(1) of this section any amount that it receives from a Depositing Futures Commission Merchant pursuant to paragraph (a)(1) of this section; and

(2) Such Collecting Futures Commission shall present the derivatives clearing organization with the information that it receives from a Depositing Futures Commission Merchant pursuant to paragraph (a)(2) of this section.

(e) If,

(1) On the business day prior to the business day on which the Depositing Futures Commission Merchant fails to meet a margin call with respect to a Cleared Swaps Customer Account, such Collecting Futures Commission Merchant referenced in paragraph (a) of this section held, with respect to such account, Cleared Swaps Collateral of a value no less than the amount specified in § 22.12(a)(2) of this part, after the application of haircuts specified by policies applied by such Collecting Futures Commission Merchant in its relationship with the Depositing Futures Commission Merchant, and

(2) As of the close of business on the business day on which the margin call is not met, the market value of the Cleared Swaps Collateral held by the derivatives clearing organization or Collecting Futures Commission Merchant is, due to changes in such market value, less than the amount specified in § 22.12(a)(2) of this part, then the amount of such collateral attributable to each Cleared Swaps Customer pursuant to § 22.12(a)(1) of this part shall be reduced by the percentage difference between the amount specified in § 22.12(a)(2) of this part and such market value.

(f) If:

(1) On the business day prior to the business day on which the futures commission merchant fails to meet a margin call with respect to a Cleared Swaps Customer Account, the derivatives clearing organization referenced in paragraph (c) of this section held, with respect to such account, Cleared Swaps Collateral of a value no less than the amount specified in § 22.12(c)(2) of this part, after the application of haircuts specified by the rules and procedures of such derivatives clearing organization, and

(2) As of the close of business on the business day on which the margin call is not met, the market value of the Cleared Swaps Collateral held by the derivatives clearing organization is, due to changes in such market value, less than the amount specified in § 22.12(c)(2) of this part, then the amount of collateral attributable to each Cleared Swaps Customer pursuant to § 22.12(c)(1) of this part shall be reduced by the percentage difference between the amount specified in § 22.12(c)(2) and such market value.

**§ 22.15 Treatment of Cleared Swaps Customer Collateral on an Individual Basis.**

Subject to § 22.3(e) of this part, each derivatives clearing organization and each Collecting Futures Commission Merchant receiving Cleared Swaps Customer Collateral from a Depositing Futures Commission Merchant shall treat the value of collateral required with respect to the portfolio of rights and obligations arising out of the Cleared Swaps intermediated for each Cleared Swaps Customer, and collected from the Depositing Futures Commission Merchant, as belonging to such customer, and such amount shall not be used to margin, guarantee, or secure the Cleared Swaps or other obligations of the Depositing Futures Commission Merchant or of any other Cleared Swaps Customer or Customer.

**§ 22.16 Disclosures to Customers.**

(a) A futures commission merchant shall disclose, to each of its Cleared Swaps Customers, the governing provisions, as described in paragraph (c) of this section, relating to use of Cleared Swaps Customer Collateral, transfer, neutralization of the risks, or liquidation of Cleared Swaps in the event of a default by the futures commission merchant relating to the Cleared Swaps Customer Account, as well as any change in such governing provisions.

(b) If the futures commission merchant referenced in paragraph (a) of this section is a Depositing Futures Commission Merchant, then such futures commission merchant shall disclose, to each of its Cleared Swaps Customers, the governing provisions, as described in paragraph (c) of this section, relating to use of Cleared Swaps Customer Collateral, transfer, neutralization of the risks, or liquidation of Cleared Swaps in the event of a default by:

(1) Such futures commission merchant or

(2) Any relevant Collecting Futures Commission Merchant relating to the Cleared Swaps Customer Account, as well as any change in such governing provisions.

(c) The governing provisions referred to in paragraphs (a) and (b) of this section are the rules of each derivatives clearing organization, or the provisions of the customer agreement between the Collecting Futures Commission Merchant and the Depositing Futures Commission Merchant, on or through which the Depositing Futures Commission Merchant will intermediate Cleared Swaps for such Cleared Swaps Customer.

## PART 190—BANKRUPTCY

2. The authority citation for part 190 continues to read as follows:

**Authority:** 7 U.S.C. 1a, 2, 4a, 6c, 6d, 6g, 7a, 12, 19, and 24, and 11 U.S.C. 362, 546, 548, 556, and 761–766, unless otherwise noted.

3. In 17 CFR Part 190:

A. Remove the words "commodity account" and "commodity futures account" and add, in their place, the words "commodity contract account" in:

i. Sections 190.01(w), (y), and (kk)(6),

ii. Sections 190.02(d)(1), (6), and (7),

iii. Section 190.03(a)(2),

iv. Sections 190.06(g)(1)(i), (ii), and (3),

v. Sections 190.10(d)(1) and (h),

B. Remove the words "commodity futures contract" and add, in their place, the words "commodity contract" in § 190.05(a)(1) and (b)(1).

C. *Remove the words "contract market" and "board of trade" and add, in their place, the words "designated contract market" in:*

i. Sections 190.01(gg), (kk)(2)(i), (4) and (5),

ii. Section 190.04(d)(1)(i), and

iii. Section 190.07(e)(2)(ii)(B) Remove the words "commodity transaction" and

add, in their place, the words "commodity contract transaction" in § 190.02(d)(3).

4. In § 190.01, redesignate paragraphs (e) through (oo) as (f) through (pp), add a new paragraph (e) and revise paragraphs (a), (f), and newly redesignated paragraphs (cc), (hh), (ll)(2)(ii), (ll)(4), (ll)(5), and (pp) to read as follows:

**§ 190.01 Definitions.**

* * * * *

(a)(1) *Account class* means each of the following types of customer accounts which must be recognized as a separate class of account by the trustee: futures accounts, foreign futures accounts, leverage accounts, delivery accounts as defined in § 190.05(a)(2) of this part, and cleared swaps accounts.

(2)(i) To the extent that the equity balance, as defined in § 190.07 of this part, of a customer in a commodity option, as defined in § 1.3 of this chapter, may be commingled with the equity balance of such customer in any domestic commodity futures contract pursuant to regulations under the Act, the aggregate shall be treated for purposes of this part as being held in a futures account.

(ii) To the extent that such equity balance of a customer in a commodity option may be commingled with the equity balance of such customer in any cleared swaps account pursuant to regulations under this act, the aggregate shall be treated for purposes of this part as being held in a cleared swaps account.

(iii) If positions or transactions in commodity contracts that would otherwise belong to one account class (and the money, securities, or other property margining, guaranteeing, or securing such positions or transactions), are, pursuant to a Commission rule, regulation, or order (or a derivatives clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter), held separately from other positions and transactions in that account class, and are commingled with positions or transactions in commodity contracts of another account class (and the money, securities, or other property margining, guaranteeing, or securing such positions or transactions), then the former positions (and the relevant money, securities, or other property) shall be treated, for purposes of this part, as being held in an account of the latter account class.

* * * * *

(e) *Calendar day.* A calendar day includes the time from midnight to midnight.

(f) *Clearing organization* shall have the same meaning as that set forth in section 761(2) of the Bankruptcy Code.

* * * * *

(cc) *Non-public customer* means any person enumerated in the definition of *Proprietary Account* in sections 1.3 or 31.4(e) of this chapter, any person excluded from the definition of "foreign futures or foreign options customer" in the proviso to section 30.1(c) of this chapter, or any person enumerated in the definition of *Cleared Swaps Proprietary Account* in section 22.1 of this chapter, in each case, if such person is defined as a "customer" under paragraph (k) of this section.

* * * * *

(hh) *Principal contract* means a contract which is not traded on a designated contract market, and includes leverage contracts and dealer options, but does not include:

(1) Transactions executed off the floor of a designated contract market pursuant to rules approved by the Commission or rules which the designated contract market is required to enforce, or pursuant to rules of a foreign board of trade located outside the United States, its territories or possessions; or (2) cleared swaps contracts.

* * * * *

(ll) * * *

(2) * * *

(ii) Is a bona fide hedging position or transaction as defined in § 1.3 of this chapter or is a commodity option transaction which has been determined by the registered entity to be economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise pursuant to rules which have been approved by the Commission pursuant to section 5c(c) of the Commodity Exchange Act; and

* * * * *

(4) Any cash or other property deposited prior to the entry of the order for relief to pay for the taking of physical delivery on a long commodity contract or for payment of the strike price upon exercise of a short put or a long call option contract on a physical commodity, which cannot be settled in cash, in excess of the amount necessary to margin such commodity contract prior to the notice date or exercise date, which cash or other property is identified on the books and records of the debtor as received from or for the account of a particular customer on or after three calendar days before the first notice date or three calendar days before the exercise date specifically for the purpose of payment of the notice price upon taking delivery or the strike price upon exercise, respectively, and such customer takes delivery or exercises the option in accordance with the applicable contract market rules.

(5) The cash price tendered for any property deposited prior to the entry of the order for relief to make physical delivery on a short commodity contract or for exercise of a long put or a short call option contract on a physical commodity, which cannot be settled in cash, to the extent it exceeds the amount necessary to margin such contract prior to the notice date or exercise date, which property is identified on the books and records of the debtor as received from or for the account of a particular customer on or after three calendar days before the first notice date or three calendar days before the exercise date specifically for the purpose of a delivery or exercise, respectively, and such customer makes delivery or exercises the option in accordance with the applicable contract market rules.

* * * * *

(pp) *Cleared Swap.* This term shall have the same meaning as set forth in § 22.1 of this chapter.

* * * * *

5. In § 190.02, revise paragraphs (a), (b)(1), (b)(2), (d)(11), (e), (f)(1), and (g)(2)(i) to read as follows:

**§ 190.02 Operation of the debtor's estate subsequent to the filing date and prior to the primary liquidation date.**

* * * * *

(a) *Notices to the Commission and Designated Self-Regulatory Organizations—*

(1) *General.* Each commodity broker which files a petition in bankruptcy shall, at or before the time of such filing, and each commodity broker against which such a petition is filed shall, as soon as possible, but no later than one calendar day after the receipt of notice of such filing, notify the Commission and such broker's designated self-regulatory organization, if any, in accordance with § 190.10(a) of the filing date, the court in which the proceeding has been filed, and the docket number assigned to that proceeding by the court.

(2) *Of transfers under section 764(b) of the Bankruptcy Code.* As soon as possible, but in no event later than the close of business on third calendar day after the order for relief, the trustee, the applicable self-regulatory organization, or the commodity broker must notify the Commission in accordance with § 190.10(a) whether such entity or organization intends to transfer or to apply to transfer open commodity contracts on behalf of the commodity

broker in accordance with section 764(b) of the Bankruptcy Code and § 190.06(e) or (f).

(b) *Notices to customers.* (1) *Specifically identifiable property other than commodity contracts.* The trustee must use its best efforts to promptly, but in no event later than two calendar days after entry of the order for relief, commence to publish in a daily newspaper or newspapers of general circulation approved by the court serving the location of each branch office of the commodity broker, for two consecutive days a notice to customers stating that all specifically identifiable property of customers other than open commodity contracts which has not otherwise been liquidated will be liquidated commencing on the sixth calendar day after the second publication date if the customer has not instructed the trustee in writing on or before the fifth calendar day after the second publication date to return such property pursuant to the terms for distribution of specifically identifiable property contained in § 190.08(d)(1) and, on the seventh calendar day after such second publication date, if such property has not been returned in accordance with such terms on or prior to that date. Such notice must describe specifically identifiable property in accordance with the definition in this part and must specify the terms upon which that property may be returned. Publication of the form of notice set forth in the appendix to this part will constitute sufficient notice for purposes of this paragraph (b)(1).

(2) *Request for instructions regarding transfer of open commodity contracts.* The trustee must use its best efforts to request promptly, but in no event later than two calendar days after entry of an order for relief, customer instructions concerning the transfer or liquidation of the specifically identifiable open commodity contracts, if any, not required to be liquidated under paragraph (f)(1) of this section. The request for customer instructions required by this paragraph (b)(2) must state that the trustee is required to liquidate any such commodity contract for which transfer instructions have not been received on or before the sixth calendar day after entry of the order for relief, and any such commodity contract for which instructions have been received which has not been transferred in accordance with § 190.08(d)(2) on or before the seventh calendar day after entry of the order for relief. A form of notice is set forth in the appendix to this part.

* * * * *

(d) * * *

(11) Whether the claimant's positions in security futures products are held in a futures account or a securities account, as these terms are defined in § 1.3 of this chapter;

(e) *Transfers*—(1) *All cases.* The trustee for a commodity broker must immediately use its best efforts to effect a transfer in accordance with § 190.06(e) and (f) no later than the seventh calendar day after the order for relief of the open commodity contracts and equity held by the commodity broker for or on behalf of its customers.

(2) *Involuntary cases.* A commodity broker against which an involuntary petition in bankruptcy is filed, or the trustee if a trustee has been appointed in such case, must use its best efforts to effect a transfer in accordance with § 190.06(e) and (f) of all open commodity contracts and equity held by the commodity broker for or on behalf of its customers and such other property as the Commission in its discretion may authorize, on or before the seventh calendar day after the filing date, and immediately cease doing business: *Provided, however,* That the commodity broker may trade for liquidation only, unless otherwise directed by the Commission, by any applicable self-regulatory organization or by the court: And, *Provided further,* That if the commodity broker demonstrates to the Commission within such period that it was in compliance with the segregation and financial requirements of this chapter on the filing date, and the Commission determines, in its sole discretion, that such transfer or liquidation is neither appropriate nor in the public interest, the commodity broker may continue in business subject to applicable provisions of the Bankruptcy Code and of this chapter.

(f) * * *

(1) *Open commodity contracts.* All open commodity contracts except:

(i) Dealer option contracts, if the dealer option grantor is not the debtor, which cannot be transferred on or before the seventh calendar day after the order for relief; and

(ii) Specifically identifiable commodity contracts as defined in § 190.01(kk)(2) for which an instruction prohibiting liquidation is noted prominently in the accounting records of the debtor and timely received under paragraph (b)(2) of this section. Notwithstanding the foregoing, an open commodity contract must be offset if: such contract is a futures contract or a cleared swaps contract which cannot be settled in cash and which would otherwise remain open either beyond the last day of trading (if applicable), or the first day on which notice of intent to deliver may be tendered with respect thereto, whichever occurs first; such contract is a long option on a physical commodity which cannot be settled in cash and would be automatically exercised, has value and would remain open beyond the last day for exercise; such contract is a short option on a physical commodity which cannot be settled in cash; or, as otherwise specified in these rules.

* * * * *

(g) * * *

(2) * * *

(i) 100% of the maintenance margin requirements of the applicable designated contact market or swap execution facility, if any, with respect to the open commodity contracts in such account; or

* * * * *

6. In § 190.03, revise paragraphs (a)(3), (b)(3), (b)(4), (b)(5), and (c) to read as follows:

**§ 190.03 Operation of the debtor's estate subsequent to the primary liquidation date.**

* * * * *

(a) * * *

(3) *Margin calls.* The trustee must promptly issue margin calls with respect to any account referred to under paragraph (a)(1) of this section in which the balance does not equal or exceed 100% of the maintenance margin requirements of the applicable designated contact market or swap execution facility, if any, with respect to the open commodity contracts in such account, or if there are no such maintenance margin requirements, 100% of the clearing organization's initial margin requirements applicable to the open commodity contracts in such account, or if there are no such maintenance margin requirements or clearing organization initial margin requirements, then 50% of the customer initial margin applicable to the commodity contracts in such account: *Provided,* That no margin calls need be made to restore customer initial margin.

* * * * *

(b) * * *

(3) The trustee has received no customer instructions with respect to such contract by the sixth calendar day after entry of the order for relief;

(4) The commodity contract has not been transferred in accordance with § 190.08(d)(2) on or before the seventh calendar day after entry of the order for relief; or

(5) The commodity contract would otherwise remain open (*e.g.,* because it cannot be settled in cash) beyond the last day of trading in such contract (if

applicable) or the first day on which notice of delivery may be tendered with respect to such contract, whichever occurs first.

(c) *Liquidation of specifically identifiable property other than open commodity contracts.*

All specifically identifiable property other than open commodity contracts which have not been liquidated prior to the primary liquidation date, and for which no customer instructions have been timely received must be liquidated, to the extent reasonably possible, no later than the sixth calendar day after final publication of the notice referred to in § 190.02(b)(1). All other specifically identifiable property must be liquidated or returned, to the extent reasonably possible, no later than the seventh calendar day after final publication of such notice.

7. In § 190.04, revise paragraph (d)(1) to read as follows:

**§ 190.04 Operation of the debtor's estate—general.**

* * * * *

(d) *Liquidation*—(1) *Order of Liquidation.* (i) *In the Market.* Liquidation of open commodity contracts held for a house account or customer account by or on behalf of a commodity broker which is a debtor shall be accomplished pursuant to the rules of a clearing organization, a designated contract market, or a swap execution facility, as applicable. Such rules shall ensure that the process for liquidating open commodity contracts, whether for the house account or the customer account, results in competitive pricing, to the extent feasible under market conditions at the time of liquidation. Such rules must be submitted to the Commission for approval, pursuant to section 5c(c) of the Act, and be approved by the Commission. Alternatively, such rules must otherwise be submitted to and approved by the Commission (or its delegate pursuant to § 190.10(d) of this part) prior to their application.

(ii) *Book entry.* Notwithstanding paragraph (d)(1) of this section, in appropriate cases, upon application by the trustee or the affected clearing organization, the Commission may permit open commodity contracts to be liquidated, or settlement on such contracts to be made, by book entry. Such book entry shall offset open commodity contracts, whether matched or not matched on the books of the commodity broker, using the settlement price for such commodity contracts as determined by the clearing organization. Such settlement price shall be determined by the rules of the clearing organization, which shall ensure that such settlement price is established in a competitive manner, to the extent feasible under market conditions at the time of liquidation. Such rules must be submitted to the Commission for approval pursuant to section 5c(c) of the Act, and be approved by the Commission. Alternatively, such rules must otherwise be approved by the Commission (or its delegate pursuant to § 190.10(d) of this part) prior to their application.

* * * * *

8. In § 190.05, revise paragraph (b) introductory text to read as follows:

**§ 190.05 Making and taking delivery on commodity contracts.**

* * * * *

(b) Rules for deliveries on behalf of a customer of a debtor. Except in the case of a commodity contract which is settled in cash, each designated contract market, swap execution facility, or clearing organization shall adopt, maintain in effect and enforce rules which have been submitted in accordance with section 5c(c) of the Act for approval by the Commission, which:

* * * * *

9. In § 190.06, remove paragraph (e)(1)(iv) and redesignate paragraph (e)(1)(v) as (e)(1)(iv), revise paragraphs (a), (e)(1)(iii), (e)(2), (f)(3)(i) and (g)(2), and add paragraph (g)(1)(iii) to read as follows:

**§ 190.06 Transfers.**

(a) *Transfer rules.* No clearing organization or other self-regulatory organization may adopt, maintain in effect or enforce rules which:

(1) Are inconsistent with the provisions of this part;

(2) Interfere with the acceptance by its members of open commodity contracts and the equity margining or securing such contracts from futures commission merchants, or persons which are required to be registered as futures commission merchants, which are required to transfer accounts pursuant to § 1.17(a)(4) of this chapter; or

(3) Prevent the acceptance by its members of transfers of open commodity contracts and the equity margining or securing such contracts from futures commission merchants with respect to which a petition in bankruptcy has been filed, if such transfers have been approved by the Commission. *Provided, however,* that this paragraph shall not limit the exercise of any contractual right of a clearing organization or other registered entity to liquidate open commodity contracts.

* * * * *

(e) * * *

(1) * * *

(iii) Dealer option accounts, if the debtor is the dealer option grantor with respect to such accounts; or

* * * * *

*(2) Amount of equity which may be transferred.* In no case may money, securities or property be transferred in respect of any eligible account if the value of such money, securities or property would exceed the funded balance of such account based on available information as of the calendar day immediately preceding transfer less the value on the date of return or transfer of any property previously returned or transferred with respect thereto.

(f) * * *

(3) * * *

(i) If all eligible customer accounts held by a debtor cannot be transferred under this section, a partial transfer may nonetheless be made. The Commission will not disapprove such a transfer for the sole reason that it was a partial transfer if it would prefer the transfer of accounts, the liquidation of which could adversely affect the market or the bankrupt estate. Any dealer option contract held by or for the account of a debtor which is a futures commission merchant from or for the account of a customer which has not previously been transferred, and is eligible for transfer, must be transferred on or before the seventh calendar day after entry of the order for relief.

* * * * *

(g) * * *

(1) * * *

(iii) The transfer prior to the order for relief by a clearing organization of one or more accounts held for or on behalf of customers of the debtor, provided that (I) the money, securities, or other property accompanying such transfer did not exceed the funded balance of each account based on available information as of the close of business on the business day immediately preceding such transfer less the value on the date of return or transfer of any property previously returned or transferred thereto, and (II) the transfer is not disapproved by the Commission.

(2) *Post-relief transfers.* On or after the entry of the order for relief, the following transfers to one or more transferees may not be avoided by the trustee:

(i) The transfer of a customer account eligible to be transferred under paragraph (e) or (f) of this section made by the trustee of the commodity broker or by any self-regulatory organization of the commodity broker:

(A) On or before the seventh calendar day after the entry of the order for relief; and

(B) The Commission is notified in accordance with § 190.02(a)(2) prior to the transfer and does not disapprove the transfer; or

(ii) The transfer of a customer account at the direction of the Commission on or before the seventh calendar day after the order for relief upon such terms and conditions as the Commission may deem appropriate and in the public interest.

* * * * *

10. In § 190.07, redesignate paragraph (b)(2)(xiii) as paragraph (b)(2)(xiv), add a new paragraph (b)(2)(xiii), and revise paragraphs (b)(2)(viii), (b)(2)(ix), (b)(3)(v), (c)(1)(i), (e) introductory text, (e)(1) and (e)(4) to read as follows:

**§ 190.07 Calculation of allowed net equity.**

* * * * *

(b) * * *

(2) * * *

(viii) Subject to paragraph (b)(2)(ix) of this section, the futures accounts, leverage accounts, options accounts, foreign futures accounts, delivery accounts (as defined in § 190.05(a)(2)), and cleared swaps accounts of the same person shall not be deemed to be held in separate capacities: *Provided, however,* that such accounts may be aggregated only in accordance with paragraph (b)(3) of this section.

(ix) an omnibus customer account of a futures commission merchant maintained with a debtor shall be deemed to be held in a separate capacity from the house account and any other omnibus customer account of such futures commission merchant.

* * * * *

(xiii) with respect to the cleared swaps customer account class, each individual customer account within each omnibus customer account referred to in paragraph (ix) of this section shall be deemed to be held in a separate capacity from each other such individual customer account; subject to the provisions of paragraphs (i) through (xii) of this paragraph (b)(2).

* * * * *

(3) * * *

(v) The rules pertaining to separate capacities and permitted setoffs contained in this section must be applied subsequent to the entry of an order for relief; prior to the filing date, the provisions of § 1.22 of this chapter and of sections 4d(a)(2) and 4d(f) of the Act shall govern what setoffs are permitted.

* * * * *

(c) * * *

(1) * * *

(i) Multiplying the ratio of the amount of the net equity claim less the amounts referred to in (c)(1)(ii) of this section of such customer for any account class bears to the sum of the net equity claims less the amounts referred to in (c)(1)(ii) of this section of all customers for accounts of that class by the sum of:

(A) The value of the money, securities or property segregated on behalf of all accounts of the same class less the amounts referred to in (1)(ii) of this section;

(B) The value of any money, securities or property which must be allocated under § 190.08 to customer accounts of the same class; and

(C) The amount of any add-back required under paragraph (b)(4) of this section; and

* * * * *

(e) *Valuation.* In computing net equity, commodity contracts and other property held by or for a commodity broker must be valued as provided in this paragraph (e): *Provided, however,* that for all commodity contracts other than those listed in paragraph (e)(1) of this section, if identical commodity contracts, securities, or other property are liquidated on the same date, but cannot be liquidated at the same price, the trustee may use the weighted average of the liquidation prices in computing the net equity of each customer holding such contracts, securities, or property.

(1) *Commodity Contracts.* Unless otherwise specified in this paragraph (e), the value of an open commodity contract shall be equal to the settlement price as calculated by the clearing organization pursuant to its rules: *Provided,* that such rules must either be submitted to the Commission, pursuant to section 5c(c)(4) of the Act and be approved by the Commission, or such rules must be otherwise approved by the Commission (or its delegate pursuant to § 190.10(d) of this part) prior to their application; *Provided, further,* that if such contract is transferred its value shall be determined as of the end of the settlement cycle in which it is transferred; and *Provided, finally,* that if such contract is liquidated, its value shall be equal to the net proceeds of liquidation.

* * * * *

(4) *Securities.* The value of a listed security shall be equal to the closing price for such security on the exchange upon which it is traded. The value of all securities not traded on an exchange shall be equal in the case of a long position, to the average of the bid prices for long positions, and in the case of a short position, to the average of the asking prices for the short positions. If liquidated prior to the primary liquidation date, the value of such security shall be equal to the net proceeds of its liquidation. Securities which are not publicly traded shall be valued by the trustee, subject to approval of the court, using such professional assistance as the trustee deems necessary in its sole discretion under the circumstances.

* * * * *

11. In § 190.09, revise paragraph (b) to read as follows:

**§ 190.09 Member property.**

* * * * *

(b) *Scope of Member Property.* Member property shall include all money, securities and property received, acquired, or held by a clearing organization to margin, guarantee or secure, on behalf of a clearing member, the proprietary account, as defined in § 1.3 of this chapter, any account not belonging to a foreign futures or foreign options customer pursuant to the proviso in § 30.1(c), and any Cleared Swaps Proprietary Account, as defined in § 22.1: *Provided, however,* that any guaranty deposit or similar payment or deposit made by such member and any capital stock, or membership of such member in the clearing organization shall also be included in member property after payment in full of that portion of the net equity claim of the member based on its customer account and of any obligations due to the clearing organization which may be paid therefrom in accordance with the by-laws or rules of the clearing organization, including obligations due from the clearing organization to customers or other members.

12. In § 190.10, revise paragraph (a) to read as follows:

**§ 190.10 General.**

(a) *Notices.* Unless instructed otherwise by the Commission, all mandatory or discretionary notices to be given to the Commission under this part shall be directed by electronic mail to *bankruptcyfilings@cftc.gov*, with a copy sent by overnight mail to Director, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. For purposes of this part, notice to the Commission shall be deemed to be given only upon actual receipt.

* * * * *

13. Revise Appendix A to Part 190 to read as follows:

## Appendix A to Part 190—Bankruptcy Forms

**Bankruptcy Appendix Form 1—Operation of the Debtor's Estate—Schedule of Trustee's Duties**

For the convenience of a prospective trustee, the Commission has constructed an approximate schedule of important duties which the trustee should perform during the early stages of a commodity broker bankruptcy proceeding. The schedule includes duties required by this part, subchapter IV of chapter 7 of the Bankruptcy Code as well as certain practical suggestions, but it is only intended to highlight the more significant duties and is not an exhaustive description of all the trustee's responsibilities. It also assumes that the commodity broker being liquidated is an FCM. Moreover, it is important to note that the operating facts in a particular bankruptcy proceeding may vary the schedule or obviate the need for any of the particular activities.

All Cases

*Date of Order for Relief*

1. Assure that the commodity broker has notified the Commission, its designated self-regulatory organization ("DSRO") (if any), and all applicable clearing organizations of which it is a member that a petition or order for relief has been filed (§ 190.02(a)(1)).

2. Attempt to effectuate the transfer of entire customer accounts wherein the commodity contracts are transferred together with the money, securities, or other property margining, guaranteeing, or securing the commodity contracts (hereinafter the "transfer").

3. Attempt to estimate shortfall of customer funds segregated pursuant to sections 4d(a) and (b) of the Act; customer funds segregated pursuant to section 4f of the Act; and the foreign futures or foreign options secured amount, as defined in § 1.3 of this chapter.

a. The trustee should:

i. Contact the DSRO (if any) and the clearing organizations and attempt to effectuate a transfer with such shortfall under section 764(b) of the Code; notify the Commission for assistance (§ 190.02(a)(2) and (e)(1), § 190.06(b)(2), (e), (f)(3), (g)(2), and (h)) but recognize that if there is a substantial shortfall, a transfer of such funds or amounts is highly unlikely.

ii. If a transfer cannot be effectuated, liquidate all customer commodity contracts that are margined, guaranteed, or secured by funds or amounts with such shortfall, except dealer options and specifically identifiable commodity contracts which are bona fide hedging positions (as defined in § 190.01(kk)(2)) with instructions not to be liquidated. (See §§ 190.02(f) and 190.06(d)(1)). (In this connection, depending upon the size of the debtor and other complications of liquidation, the trustee should be aware of special liquidation rules, and in particular the availability under certain circumstances of book-entry liquidation (§ 190.04(d)(1)(ii)).

b. If there is a small shortfall in any of the funds or amounts listed in paragraph 2, negotiate with the clearing organization to effect a transfer; notify the Commission (§§ 190.02(a)(2) and (e)(1), 190.06(b)(2), (e), (f)(3), (g)(2), and (h)).

4. Whether or not a transfer has occurred, liquidate or offset open commodity contracts not eligible for transfer (*i.e.,* deficit accounts, accounts with no open positions) (§ 190.06(e)(1)).

5. Offset all futures contracts and cleared swaps contracts which cannot be settled in cash and which would otherwise remain open either beyond the last day of trading (if applicable) or the first day on which notice of intent to deliver may be tendered with respect thereto, whichever occurs first; offset all long options on a physical commodity which cannot be settled in cash, have value and would be automatically exercised or would remain open beyond the last day of exercise; and offset all short options on a physical commodity which cannot be settled in cash (§ 190.02(f)(1)).

6. Compute estimated funded balance for each customer commodity account containing open commodity contracts (§ 190.04(b)) (daily thereafter).

7. Make margin calls if necessary (§ 190.02(g)(1)) (daily thereafter).

8. Liquidate or offset any open commodity account for which a customer has failed to meet a margin call (§ 190.02(f)(1)) (daily thereafter).

9. Commence liquidation or offset of specifically identifiable property described in § 190.02(f)(2)(i) (property which has lost 10% or more of value) (and as appropriate thereafter).

10. Commence liquidation or offset of property described in § 190.02(f)(3) ("all other property").

11. Be aware of any contracts in delivery position and rules pertaining to such contracts (§ 190.05).

*First Calendar Day After the Entry of an Order for Relief*

1. If a transfer occurred on the date of entry of the order for relief:

a. Liquidate any remaining open commodity contracts, except any dealer option or specifically identifiable commodity contract [hedge] (See § 190.01(kk)(2) and § 190.02(f)(1)), and not otherwise transferred in the transfer.

b. Primary liquidation date for transferred or liquidated commodity contracts (§ 190.01(ff)).

2. If no transfer has yet been effected, continue attempt to negotiate transfer of open commodity contracts and dealer options (§ 190.02(c)(1)).

3. Provide the clearing house or carrying broker with assurances to prevent liquidation of open commodity contract accounts available for transfer at the customer's instruction or liquidate all open commodity contracts except those available for transfer at a customer's instruction and dealer options.

*Second Calendar Day After the Entry of an Order for Relief*

If no transfer has yet been effected, request directly customer instructions regarding transfer of open commodity contracts and publish notice for customer instructions regarding the return of specifically identifiable property other than commodity contracts (§§ 190.02(b) (1) and (2)).

*Third Calendar Day After the Entry of an Order for Relief*

1. Second publication date for customer instructions (§ 190.02(b)(1)) (publication is to be made on two consecutive days, whether or not the second day is a business day).

2. Last day on which to notify the Commission with regard to whether a transfer in accordance with section 764(b) of the Bankruptcy Code will take place (§ 190.02(a)(2) and § 190.06(e)).

*Sixth Calendar Day After the Entry of an Order for Relief*

Last day for customers to instruct the trustee concerning open commodity contracts (§ 190.02(b)(2)).

*Seventh Calendar Day After the Entry of an Order for Relief*

1. If not previously concluded, conclude transfers under § 190.06(e) and (f). (See § 190.02(e)(1) and § 190.06(g)(2)(i)(A)).

2. Transfer all open dealer option contracts which have not previously been transferred (§ 190.06(f)(3)(i)).

3. Primary liquidation date (§ 190.01(ff)) (assuming no transfers and liquidation effected for all open commodity contracts for which no customer instructions were received by the sixth calendar day).

4. Establishment of transfer accounts (§ 190.03(a)(1)) (assuming this is the primary liquidation date); mark such accounts to market (§ 190.03(a)(2)) (daily thereafter until closed).

5. Liquidate or offset all remaining open commodity contracts (§ 190.02(b)(2)).

6. If not done previously, notify customers of bankruptcy and request customer proof of claim (§ 190.02(b)(4)).

*Eighth Calendar Day After the Entry of an Order for Relief*

Customer instructions due to trustee concerning specifically identifiable property (§ 190.02(b)(1)).

*Ninth Calendar Day After the Entry of an Order for Relief*

Commence liquidation of specifically identifiable property for which no arrangements for return have been made in accordance with customer instructions (§§ 190.02(b)(1), 190.03(c)).

*Tenth Calendar Day After the Entry of an Order for Relief*

Complete liquidation to the extent reasonably possible of specifically identifiable property which has yet to be liquidated and for which no customer instructions have been received (§ 190.03(c)).

*Separate Procedures for Involuntary Petitions for Bankruptcy*

1. Within one business day after notice of receipt of filing of the petition in bankruptcy, the trustee should assure that proper notification has been given to the Commission, the commodity broker's designated self-regulatory organization (*§ 190.02(a)(1)*) (if any), and all applicable clearing organizations; margin calls should be issued if necessary (*§ 190.02(g)(2)*).

2. On or before the seventh calendar day after the filing of a petition in bankruptcy,

the trustee should use his best efforts to effect a transfer in accordance with *§ 190.06(e)* and (*f*) of all open commodity contracts and equity held for or on behalf of customers of the commodity broker (*§ 190.02(e)(2)*) unless the debtor can provide certain assurances to the trustee.

**Bankruptcy Appendix Form 2—Request for Instructions Concerning Non-Cash Property Deposited With (Commodity Broker)**

*Please take notice:* On (date), a petition in bankruptcy was filed by [against] (commodity broker). Those customers of (commodity broker) who deposited certain kinds of non-cash property (see below) with (commodity broker) may instruct the trustee of the estate to return their property to them as provided below.

As no customer may obtain more than his or her proportionate share of the property available to satisfy customer claims, if you instruct the trustee to return your property to you, you will be required to pay the estate, as a condition to the return of your property, an amount determined by the trustee. If your property is not margining an open contract, this amount will approximate the difference between the market value of your property and your *pro rata* share of the estate, as estimated by the trustee. If your property is margining an open commodity contract, this amount will be approximately the full fair market value of the property on the date of its return.

*Kinds of Property to Which This Notice Applies*

1. Any security deposited as margin which, as of (date petition was filed), was securing an open commodity contract and is:

—Registered in your name,
—Not transferrable by delivery, and
—Not a short-term obligation.

2. Any fully-paid, non-exempt security held for your account in which there were no open commodity contracts as of (date petition was filed). (Rather than the return, at this time, of the specific securities you deposited with (commodity broker), you may instead request now, or at any later time, that the trustee purchase "like-kind" securities of a fair market value which does not exceed your proportionate share of the estate).

3. Any warehouse receipt, bill of lading or other document of title deposited as margin which, as of (date petition was filed), was securing an open commodity contract and—can be identified in (commodity broker)'s records as being held for your account, and—is neither in bearer form nor otherwise transferable by delivery.

4. Any warehouse receipt bill of lading or other document of title, or any commodity received, acquired or held by (commodity broker) to make or take delivery or exercise from or for your account and which—can be identified in (commodity broker)'s records as received from or for your account as held specifically for the purpose of delivery or exercise.

5. Any cash or other property deposited to make or take delivery on a commodity contract may be eligible to be returned. The trustee should be contacted directly for further information if you have deposited such property with (commodity broker) and desire its return.

*Instructions must be received by (the 5th calendar day after 2d publication date)* or the trustee will liquidate your property. (If you own such property but fail to provide the trustee with instructions, you will still have a claim against (commodity broker) but you will not be able to have your specific property returned to you).

**Note:** Prior to receipt of your instructions, circumstances may require the trustee to liquidate your property, or transfer your property to another broker if it is margining open commodity contracts. If your property is transferred and your instructions were received within the required time, your instructions will be forwarded to the new broker.

*Instructions should be directed to:* (Trustee's name, address, and/or telephone).

*Even if you request the return of your property,* you must also pay the trustee the amount he specifies and provide the trustee with proof of your claim before (the 7th calendar day after 2d publication date) or your property will be liquidated. (Upon receipt of customer instructions to return property, the trustee will mail the sender a form which describes the information he must provide to substantiate his claim).

**Note:** The trustee is required to liquidate your property despite the timely receipt of your instructions, money, and proof of claim if, for any reason, your property cannot be returned by (close of business on the 7th business day after 2d publication date).

**Bankruptcy Appendix Form 3—Request For Instructions Concerning Transfer of Your Hedge Contracts Held by (Commodity Broker)**

United States Bankruptcy Court __District of _____In re _____, Debtor, No. _____.

*Please take notice:* On (date), a petition in bankruptcy was filed by [against] (commodity broker).

You indicated when your hedge account was opened that the commodity contracts in your hedge account should not be liquidated automatically in the event of the bankruptcy of (commodity broker), and that you wished to provide instructions at this time concerning their disposition.

*Instructions to transfer your commodity contracts and a cash deposit (as described below) must be received by the trustee by (the 6th calendar day after entry of order for relief)* or your commodity contracts will be liquidated.

*If you request the transfer of your commodity contracts,* prior to their transfer, you must pay the trustee in cash an amount determined by the trustee which will approximate the difference between the value of the equity margining your commodity contracts and your *pro rata* share of the estate plus an amount constituting security for the nonrecovery of any overpayments. In your instructions, you should specify the broker to which you wish your commodity contracts transferred.

Be further advised that prior to receipt of your instructions, circumstances may, in any event, require the trustee to liquidate or transfer your commodity contracts. If your commodity contracts are so transferred and your instructions are received, your instructions will be forwarded to the new broker.

Note also that the trustee is required to liquidate your positions despite the timely receipt of your instructions and money if, for any reason, you have not made arrangements to transfer and/or your contracts are not transferred by (7 calendar days after entry of order for relief).

*Instructions should be sent to:* (Trustee's or designee's name, address, and/or telephone). [Instructions may also be provided by phone].

**Bankruptcy Appendix Form 4—Proof of Claim**

[Note to trustee: As indicated in § 190.02(d), this form is provided as a guide to the trustee and should be modified as necessary depending upon the information which the trustee needs at the time a proof of claim is requested and the time provided for a response.]

**Proof of Claim**

United States Bankruptcy Court __District of _____In re _____, Debtor, No. _____. Return this form by _____ or your claim will be barred (unless extended, for good cause only).

I. [If claimant is an individual claiming for himself] The undersigned, who is the claimant herein, resides at _____.

[If claimant is a partnership claiming through a member] The undersigned, who resides at __, is a member of _____, a partnership, composed of the undersigned and _____, of _____, and doing business at __, and is duly authorized to make this proof of claim on behalf of the partnership.

[If claimant is a corporation claiming though a duly authorized officer] The undersigned, who resides at __ is the _____ of __, a corporation organized under the laws of __ and doing business at _____, and is duly authorized to make this proof of claim on behalf of the corporation.

[If claim is made by agent] The undersigned, who resides at _____, is the agent of _____, and is duly authorized to make this proof of claim on behalf of the claimant.

II. The debtor was, at the time of the filing of the petition initiating this case, and still is, indebted to this claimant for the total sum of $ _____.

III. List EACH account on behalf of which a claim is being made by number and name of account holder[s], and for EACH account, specify the following information:

a. Whether the account is a futures, foreign futures, leverage, option (if an option account, specify whether exchange-traded, dealer or cleared swap), "delivery" account, or a cleared swaps account. A "delivery" account is one which contains only documents of title, commodities, cash, or other property identified to the claimant and deposited for the purposes of making or taking delivery on a commodity underlying a commodity contract or for payment of the strike price upon exercise of an option.

b. The capacity in which the account is held, as follows (and if more than one is applicable, so state):

1. [The account is held in the name of the undersigned in his individual capacity];

2. [The account is held by the undersigned as guardian, custodian, or conservator for the benefit of a ward or a minor under the Uniform Gift to Minors Act];

3. [The account is held by the undersigned as executor or administrator of an estate];

4. [The account is held by the undersigned as trustee for the trust beneficiary];

5. [The account is held by the undersigned in the name of a corporation, partnership, or unincorporated association];

6. [The account is held as an omnibus customer account of the undersigned futures commission merchant];

7. [The account is held by the undersigned as part owner of a joint account];

8. [The account is held by the undersigned in the name of a plan which, on the date the petition in bankruptcy was filed, had in effect a registration statement in accordance with the requirements of § 1031 of the Employee Retirement Income Security Act of 1974 and the regulations thereunder]; or

9. [The account is held by the undersigned as agent or nominee for a principal or beneficial owner (and not described above in items 1–8 of this II, b)].

10. [The account is held in any other capacity not described above in items 1–9 of this II, b. Specify the capacity].

c. The equity, as of the date the petition in bankruptcy was filed, based on the commodity contracts in the account.

d. Whether the person[s] (including a general partnership, limited partnership, corporation, or other type of association) on whose behalf the account is held is one of the following persons OR whether one of the following persons, alone or jointly, owns 10% or more of the account:

1. [If the debtor is an individual—

A. Such individual;

B. Relative (as defined below in item 8 of this III,d) of the debtor or of a general partner of the debtor;

C. Partnership in which the debtor is a general partner;

D. General partner of the debtor; or

E. Corporation of which the debtor is a director, officer, or person in control];

2. [If the debtor is a partnership—

A. Such partnership;

B. General partner in the debtor;

C. Relative (as defined in item 8 of this III,d) of a general partner in, general partner of, or person in control of the debtor;

D. Partnership in which the debtor is a general partner;

E. General partner of the debtor; or

F. Person in control of the debtor];

3. [If the debtor is a limited partnership—

A. Such limited partnership;

B. A limited or special partner in such partnership whose duties include:

i. The management of the partnership business or any part thereof;

ii. The handling of the trades or customer funds of customers of such partnership;

iii. The keeping of records pertaining to the trades or customer funds of customers of such partnership; or

iv. The signing or co-signing of checks or drafts on behalf of such partnership];

4. [If the debtor is a corporation or association (except a debtor which is a futures commission merchant and is also a cooperative association of producers)—

A. Such corporation or association;

B. Director of the debtor;

C. Officer of the debtor;

D. Person in control of the debtor;

E. Partnership in which the debtor is a general partner;

F. General partner of the debtor;

G. Relative (as defined in item 8 of this III,d) of a general partner, director, officer, or person in control of the debtor;

H. An officer, director or owner of ten percent or more of the capital stock of such organization];

5. [If the debtor is a futures commission merchant which is a cooperative association of producers—

Shareholder or member of the debtor which is an officer, director or manager];

6. [An employee of such individual, partnership, limited partnership, corporation or association whose duties include:

A. The management of the business of such individual, partnership, limited partnership, corporation or association or any part thereof;

B. The handling of the trades or customer funds of customers of such individual, partnership, limited partnership, corporation or association;

C. The keeping of records pertaining to the trades or funds of customers of such individual, partnership, limited partnership, corporation or association; or

D. The signing or co-signing of checks or drafts on behalf of such individual, partnership, limited partnership, corporation or association];

7. [Managing agent of the debtor];

8. [A spouse or minor dependent living in the same household of ANY OF THE FOREGOING PERSONS, or any other relative, regardless of residency, (unless previously described in items 1–B, 2–C, or 4–G of this III, d) defined as an individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such degree];

9. ["Affiliate" of the debtor, defined as:

A. Entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

i. In a fiduciary or agency capacity without sole discretionary power to vote such securities; or

ii. Solely to secure a debt, if such entity has not in fact exercised such power to vote;

B. Corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

i. In a fiduciary or agency capacity without sole discretionary power to vote such securities; or

ii. Solely to secure a debt, if such entity has not in fact exercised such power to vote;

C. Person whose business is operated under a lease or operating agreement by the debtor, or person substantially all of whose property is operated under an operating agreement with the debtor;

D. Entity that otherwise, directly or indirectly, is controlled by or is under common control with the debtor];

E. Entity that operates the business or all or substantially all of the property of the debtor under a lease or operating agreement; or

F. Entity that otherwise, directly or indirectly, controls the debtor; or

10. [Any of the persons listed in items 1–7 above of this III, d if such person is associated with an affiliate (see item 9 above) of the debtor as if the affiliate were the debtor].

e. Whether the account is a discretionary account. (If it is, the name in which the "attorney in fact" is held).

f. If the account is a joint account, the amount of the claimant's percentage interest in the account. (Also specify whether participants in a joint account are claiming separately or jointly).

g. Whether the claimant's positions in security futures products are held in a futures account or securities account, as those terms are defined in § 1.3 of this chapter.

IV. Describe all claims against the debtor not based upon a commodity contract account of the claimant (*e.g.,* if landlord, for rent; if customer, for misrepresentation or fraud).

V. Describe all claims of the DEBTOR against the CLAIMANT not already included in the equity of a commodity contract account[s] of the claimant (see III, c above).

VI. Describe any deposits of money, securities or other property held by or for the debtor from or for the claimant, and indicate if any of this property was included in your answer to III, c above.

VII. Of the money, securities, or other property described in VI above, identify any which consists of the following:

a. With respect to property received, acquired, or held by or for the account of the debtor from or for the account of the claimant to margin, guarantee or secure an open commodity contract, the following:

1. Any security which as of the filing date is:

A. Held for the claimant's account;

B. Registered in the claimant's name;

C. Not transferable by delivery; and

D. Not a short term obligation; or

2. Any warehouse receipt, bill of lading or other document of title which as of the filing date:

A. Can be identified on the books and records of the debtor as held for the account of the claimant; and

B. Is not in bearer form and is not otherwise transferable by delivery.

b. With respect to open commodity contracts, and except as otherwise provided below in item g of this VII, any such contract which:

1. As of the date the petition in bankruptcy was filed, is identified on the books and records of the debtor as held for the account of the claimant;

2. Is a bona fide hedging position or transaction as defined in Rule 1.3 of the Commodity Futures Trading Commission ("CFTC") or is a commodity option transaction which has been determined by a registered entity to be economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise pursuant to rules which have been approved by the CFTC pursuant to section 5c(c) of the Commodity Exchange Act;

3. Is in an account designated in the accounting records of the debtor as a hedging account.

c. With respect to warehouse receipts, bills of lading or other documents of title, or physical commodities received, acquired, or held by or for the account of the debtor for the purpose of making or taking delivery or exercise from or for the claimant's account, any such document of title or commodity which as of the filing date can be identified on the books and records of the debtor as received from or for the account of the claimant specifically for the purpose of delivery or exercise.

d. Any cash or other property deposited prior to bankruptcy to pay for the taking of physical delivery on a long commodity contract or for payment of the strike price upon exercise of a short put or a long call option contract on a physical commodity, which cannot be settled in cash, in excess of the amount necessary to margin such commodity contract prior to the notice date or exercise date which cash or other property is identified on the books and records of the debtor as received from or for the account of the claimant within three or less days of the notice date or three or less days of the exercise date specifically for the purpose of payment of the notice price upon taking delivery or the strike price upon exercise.

e. The cash price tendered for any property deposited prior to bankruptcy to make physical delivery on a short commodity contract or for exercise of a long put or a short call option contract on a physical commodity, which cannot be settled in cash, to the extent it exceeds the amount necessary to margin such contract prior to the notice exercise date which property is identified on the books and records of the debtor as received from or for the account of the claimant within three or less days of the notice date or of the exercise date specifically for the purpose of a delivery or exercise.

f. Fully paid, non-exempt securities identified on the books and records of the debtor as held by the debtor for or on behalf of the commodity contract account of the claimant for which, according to such books and records as of the filing date, no open commodity contracts were held in the same capacity.

g. Open commodity contracts transferred to another futures commission merchant by the trustee.

VIII. Specify whether the claimant wishes to receive payment in kind, to the extent possible, for any claim for securities.

IX. Attach copies of any documents which support the information provided in this proof of claim, including but not limited to customer confirmations, account statements, and statements of purchase or sale.

This proof of claim must be filed with the trustee no later than _____, or your claim will be barred unless an extension has been granted, available only for good cause.

Return this form to:

(Trustee's name (or designee's) and address)

_____

Dated: _____

(Signed) _____

Penalty for Presenting Fraudulent Claim. Fine of not more than $5,000 or imprisonment for not more than five years or both—Title 18, U.S.C. 152.

(Approved by the Office of Management and Budget under control number 3038–0021)

14. Revise Appendix B to Part 190 to read as follows:

## Appendix B to Part 190—Bankruptcy Forms

### Special Bankruptcy Distributions Framework 1—Special Distribution of Futures Customer Funds When FCM Participated in Cross-Margining

The Commission has established the following distributional convention with respect to "futures customer funds" (as § 1.3 of this chapter defines such term) held by a futures commission merchant (FCM) that participated in a cross-margining (XM) program which shall apply if participating market professionals sign an agreement that makes reference to this distributional rule and the form of such agreement has been approved by the Commission by rule, regulation or order:

All futures customer funds held in respect of XM accounts, regardless of the product that customers holding such accounts are trading, are required by Commission order to be segregated separately from all other customer segregated funds. For purposes of this distributional rule, XM accounts will be deemed to be commodity interest accounts and securities held in XM accounts will be deemed to be received by the FCM to margin, guarantee or secure commodity interest contracts. The maintenance of property in an XM account will result in subordination of the claim for such property to certain non-XM customer claims and thereby will operate to cause such XM claim not to be treated as a customer claim for purposes of the Securities Investors Protection Act and the XM securities to be excluded from the securities estate. This creates subclasses of futures customer accounts, an XM account and a non-XM account (a person could hold each type of account), and results in two pools of segregated funds belonging to futures customers: An XM pool and a non-XM pool. In the event that there is a shortfall in the non-XM pool of customer class segregated funds and there is no shortfall in the XM pool of customer segregated funds, all futures customer net equity claims, whether or not they arise out of the XM subclass of accounts, will be combined and will be paid *pro rata* out of the total pool of available XM and non-XM futures customer funds. In the event that there is a shortfall in the XM pool of customer segregated funds and there is no shortfall in the non-XM pool of customer segregated funds, then futures customer net equity claims arising from the XM subclass of accounts shall be satisfied first from the XM pool of customer segregated funds, and futures customer net equity claims arising from the non-XM subclass of accounts shall be satisfied first from the non-XM customer segregated funds. Furthermore, in the event that there is a shortfall in both the non-XM and XM pools of customer segregated funds: (1) If the non-XM shortfall as a percentage of the segregation requirement in the non-XM pool is greater than or equal to the XM shortfall as a percentage of the segregation requirement in the XM pool, all futures customer net equity claims will be paid *pro rata;* and (2) if the XM shortfall as a percentage of the segregation requirement in the XM pool is greater than the non-XM shortfall as a percentage of the segregation requirement of the non-XM pool, non-XM futures customer net equity claims will be paid *pro rata* out of the available non-XM segregated funds, and XM futures customer net equity claims will be paid *pro rata* out of the available XM segregated funds. In this way, non-XM customers will never be adversely affected by an XM shortfall.

The following examples illustrate the operation of this convention. The examples assume that the FCM has two customers, one with exclusively XM accounts and one with exclusively non-XM accounts. However, the examples would apply equally if there were only one customer, with both an XM account and a non-XM account.

1. Sufficient Funds to Meet Non-XM and XM Customer Claims:

| | Non-XM | XM | Total |
|---|---|---|---|
| Funds in 4d(a) segregation | 150 | 150 | 300 |
| 4d(a) Segregation requirement | 150 | 150 | 300 |
| Shortfall (dollars) | 0 | 0 | ..... |
| Shortfall (percent) | 0 | 0 | ..... |
| Distribution | 150 | 150 | 300 |

There are adequate funds available and both the non-XM and the XM customer claims will be paid in full.

2. Shortfall in Non-XM Only:

| | Non-XM | XM | Total |
|---|---|---|---|
| Funds in 4d(a) segregation | 100 | 150 | 250 |
| 4d(a) Segregation requirement | 150 | 150 | 300 |
| Shortfall (dollars) | 50 | 0 | |
| Shortfall (percent) | 50/150 = 33.3 | 0 | |
| *Pro rata* (percent) | 150/300 = 50 | 150/300 = 50 | |
| *Pro rata* (dollars) | 125 | 125 | |
| Distribution | 125 | 125 | 250 |

Due to the non-XM account, there are insufficient funds available to meet both the non-XM and the XM customer claims in full. Each customer will receive his *pro rata* share of the funds available, or 50% of the $250 available, or $125.

3. Shortfall in XM Only:

| | Non-XM | XM | Total |
|---|---|---|---|
| Funds in 4d(a) segregation | 150 | 100 | 250 |
| 4d(a) Segregation requirement | 150 | 150 | 300 |
| Shortfall (dollars) | 0 | 50 | |
| Shortfall (percent) | 0 | 50/150 = 33.3 | |
| *Pro rata* (percent) | 150/300 = 50 | 150/300 = 50 | |
| *Pro rata* (dollars) | 125 | 125 | |
| Distribution | 150 | 100 | 250 |

Due to the XM account, there are insufficient funds available to meet both the non-XM and the XM customer claims in full. Accordingly, the XM funds and non-XM funds are treated as separate pools, and the non-XM customer will be paid in full, receiving $ 150 while the XM customer will receive the remaining $100.

4. Shortfall in Both, With XM Shortfall Exceeding Non-XM Shortfall:

| | Non-XM | XM | Total |
|---|---|---|---|
| Funds in 4d(a) segregation | 125 | 100 | 225 |
| 4d(a) Segregation requirement | 150 | 150 | 300 |
| Shortfall (dollars) | 25 | 50 | |
| Shortfall (percent) | 25/150 = 16.7 | 50/150 = 33.3 | |
| *Pro rata* (percent) | 150/300 = 50 | 150/300 = 50 | |
| *Pro rata* (dollars) | 112.50 | 112.50 | |
| Distribution | 125 | 100 | 225 |

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the XM shortfall exceeds the non-XM shortfall. The non-XM customer will receive the $125 available with respect to non-XM claims while the XM customer will receive the $100 available with respect to XM claims.

5. Shortfall in Both, With Non-XM Shortfall Exceeding XM Shortfall:

| | Non-XM | XM | Total |
|---|---|---|---|
| Funds in 4d(a) segregation | 100 | 125 | 225 |
| 4d(a) Segregation requirement | 150 | 150 | 300 |
| Shortfall (dollars) | 50 | 25 | |
| Shortfall (percent) | 50/150 = 33.3 | 25/150 = 16.7 | |
| *Pro rata* (percent) | 150/300 = 50 | 150/300 = 50 | |
| *Pro rata* (dollars) | 112.50 | 112.50 | |
| Distribution | 112.50 | 112.50 | 225 |

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the non-XM shortfall exceeds the XM shortfall. Each customer will receive 50% of the $225 available, or $112.50.

6. Shortfall in Both, Non-XM Shortfall = XM Shortfall:

| | Non-XM | XM | Total |
|---|---|---|---|
| Funds in 4d(a) segregation | 100 | 100 | 200 |
| 4d(a) Segregation requirement | 150 | 150 | 300 |
| Shortfall (dollars) | 50 | 50 | |
| Shortfall (percent) | 50/150 = 33.3 | 50/150 = 33.3 | |
| *Pro rata* (percent) | 150/300 = 50 | 150/300 = 50 | |

| | Non-XM | XM | Total |
|---|---|---|---|
| *Pro rata* (dollars) | 100 | 100 | |
| Distribution | 100 | 100 | 200 |

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the non-XM shortfall equals the XM shortfall. Each customer will receive 50% of the $200 available, or $100.

These examples illustrate the principle that *pro rata* distribution across both accounts is the preferable approach except when a shortfall in the XM account could harm non-XM customers. Thus, *pro rata* distribution occurs in Examples 1, 2, 5 and 6. Separate treatment of the XM and non-XM accounts occurs in Examples 3 and 4.

Special Bankruptcy Distributions Framework 2—Special Allocation of Shortfall to Customer Claims When Futures Customer Funds and Cleared Swaps Customer Collateral Are Held in a Depository Outside of the United States or in a Foreign Currency

The Commission has established the following allocation convention with respect to futures customer funds (as § 1.3 of this chapter defines such term) and Cleared Swaps Customer Collateral (as § 22.1 of this chapter defines such term) segregated pursuant to the Act and Commission rules thereunder held by a futures commission merchant ("FCM") or derivatives clearing organization ("DCO") in a depository outside the United States ("U.S.") or in a foreign currency. The maintenance of futures customer funds or Cleared Swaps Customer Collateral in a depository outside the U.S. or denominated in a foreign currency will result, in certain circumstances, in the reduction of customer claims for such funds. For purposes of this proposed bankruptcy convention, sovereign action of a foreign government or court would include, but not be limited to, the application or enforcement of statutes, rules, regulations, interpretations, advisories, decisions, or orders, formal or informal, by a Federal, state, or provincial executive, legislature, judiciary, or government agency. If an FCM enters into bankruptcy and maintains futures customer funds or Cleared Swaps Customer Collateral in a depository located in the U.S. in a currency other than U.S. dollars or in a depository outside the U.S., the following allocation procedures shall be used to calculate the claim of each futures customer or Cleared Swaps Customer (as § 22.1 of this chapter defines such term). The allocation procedures should be performed separately with respect to each futures customer or Cleared Swaps Customer.

**I. Reduction in Claims for General Shortfall**

*A. Determination of Losses not Attributable to Sovereign Action*

1. Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars at the exchange rate in effect on the Final Net Equity Determination Date, as defined in § 190.01(s) (the "Exchange Rate").

2. Determine the amount of assets available for distribution to futures customers or Cleared Swaps Customers. In making this calculation, *include* futures customer funds and Cleared Swaps Customer Collateral that would be available for distribution but for the sovereign action.

3. Convert the amount of futures customer funds and Cleared Swaps Customer Collateral available for distribution to U.S. Dollars at the Exchange Rate.

4. Determine the Shortfall Percentage that is *not* attributable to sovereign action, as follows:

$$Shortfall\ \text{Percentage} = \left(1 - \left[\frac{Total\ \text{Customer Assets}}{Total\ \text{Customer Claims}}\right]\right)$$

*B. Allocation of Losses Not Attributable to Sovereign Action*

1. Reduce the claim of each futures customer or Cleared Swaps Customer by the Shortfall Percentage.

**II. Reduction in Claims for Sovereign Loss**

*A. Determination of Losses Attributable to Sovereign Action ("Sovereign Loss")*

1. If any portion of the claim of a futures customer or Cleared Swaps Customer is required to be kept in U.S. dollars in the U.S., that portion of the claim is not exposed to Sovereign Loss.

2. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in only one location and that location is:

a. The U.S. or a location in which there is no Sovereign Loss, then that portion of the claim is not exposed to Sovereign Loss.

b. A location in which there is Sovereign Loss, then that entire portion of the claim is exposed to Sovereign Loss.

3. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in only one currency and that currency is:

a. U.S. dollars or a currency in which there is no Sovereign Loss, then that portion of the claim is not exposed to Sovereign Loss.

b. A currency in which there is Sovereign Loss, then that entire portion of the claim is exposed to Sovereign Loss.

4. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in more than one location and:

a. There is no Sovereign Loss in any of those locations, then that portion of the claim is not exposed to Sovereign Loss.

b. There is Sovereign Loss in one of those locations, then that entire portion of the claim is exposed to Sovereign Loss.

c. There is Sovereign Loss in more than one of those locations, then an equal share of that portion of the claim will be exposed to Sovereign Loss in each such location.

5. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in more than one currency and:

a. There is no Sovereign Loss in any of those currencies, then that portion of the claim is not exposed to Sovereign Loss.

b. There is Sovereign Loss in one of those currencies, then that entire portion of the claim is exposed to Sovereign Loss.

c. There is Sovereign Loss in more than one of those currencies, then an equal share of that portion of the claim will be exposed to Sovereign Loss.

*B. Calculation of Sovereign Loss*

1. The total Sovereign Loss for each location is the difference between:

a. The total futures customer funds or Cleared Swaps Customer Collateral deposited in depositories in that location and

b. The amount of futures customer funds or Cleared Swaps Customer Collateral in that location that is available to be distributed to futures customers or Cleared Swaps Customers, after taking into account any sovereign action.

2. The total Sovereign Loss for each currency is the difference between:

a. The value, in U.S. dollars, of the futures customer funds or Cleared Swaps Customer Collateral held in that currency on the day before the sovereign action took place and

b. The value, in U.S. dollars, of the futures customer funds or Cleared Swaps Customer Collateral held in that currency on the Final Net Equity Determination Date.

*C. Allocation of Sovereign Loss*

1. Each portion of the claim of a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a location will be reduced by:

$$\textit{Total}\ \text{Sovereign Loss} \times \frac{\text{Portion of the customer's claim exposed to loss in that location}}{\textit{All}\ \text{portions of customer claims exposed to loss in that location}}$$

2. Each portion of the claim of a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a currency will be reduced by:

$$\textit{Total}\ \text{Sovereign Loss} \times \frac{\text{Portion of the customer's claim exposed to loss in that currency}}{\textit{All}\ \text{portions of customer claims exposed to loss in that currency}}$$

3. A portion of the claim of a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a location or currency will not be reduced below zero. (The above calculations might yield a result below zero where the FCM kept more futures customer funds or Cleared Swaps Customer Funds in a location or currency than it was authorized to keep.)

4. Any amount of Sovereign Loss from a location or currency in excess of the total amount of futures customer funds or Cleared Swaps Customer Funds authorized to be kept in that location or currency (calculated in accord with section II.1 above) ("Total Excess Sovereign Loss") will be divided among all futures customers or Cleared Swaps Customer who have authorized funds to be kept outside the U.S., or in currencies other than U.S. dollars, with each such futures customer or Cleared Swaps Customer claim reduced by the following amount:

$$\textit{Total}\ \text{Excess Sovereign Loss} \times \left[\frac{\left(\begin{array}{c}\text{This customer's total claim} - \text{The portion of this Customer's claim}\\ \text{required to be kept in U.S. dollars, in the U.S.}\end{array}\right)}{\begin{array}{c}\textit{Total}\ \text{customer claims} - \text{Total of all customer claims}\\ \text{required to be kept in U.S. dollars, in the U.S.}\end{array}}\right]$$

The following examples illustrate the operation of this convention.

*Example 1.* No shortfall in any location.

| Customer | Claim | Location(s) customer has consented to having funds held |
|---|---|---|
| A | $50 | U.S. |
| B | €50 | U.K. |
| C | €50 | Germany. |
| D | £300 | U.K. |

| Location | Actual asset balance |
|---|---|
| U.S. | $50. |
| U.K. | £300. |
| U.K. | €50. |
| Germany | €50. |

**Note:** Conversion Rates: £1 = $1; £1=$1.5.

Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

| Customer | Claim | Conversion rate | Claim in U.S. dollars |
|---|---|---|---|
| A | $50 | 1.0 | $50 |
| B | €50 | 1.0 | 50 |
| C | €50 | 1.0 | 50 |
| D | £300 | 1.5 | 450 |
| Total | | | 600.00 |

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

| Location | Assets | Conversion rate | Assets in U.S. dollars | Shortfall due to sovereign action percentage | Actual shortfall due to sovereign action | Amount actually available |
|---|---|---|---|---|---|---|
| U.S. | $50 | 1.0 | $50 | | | $50 |
| U.K. | £300 | 1.5 | 450 | | | 450 |
| U.K. | €50 | 1.0 | 50 | | | 50 |
| Germany | €50 | 1.0 | 50 | | | 50 |
| Total | | | 600.00 | | 0 | 600.00 |

There are no shortfalls in funds held in any location. Accordingly, there will be no reduction of futures customer or Cleared Swaps Customer claims.

Claims:

| Customer | Claim in U.S. dollars after allocated non-sovereign shortfall | Allocation of shortfall due to sovereign action | Claim after all reductions |
|---|---|---|---|
| A | $50 | $0 | $50 |
| B | 50 | 0 | 50 |
| C | 50 | 0 | 50 |
| D | 450 | 0 | 450 |
| Total | 600.00 | 0.00 | 600.00 |

*Example 2.* Shortfall in funds held in the U.S.

| Customer | Claim | Location(s) customer has consented to having funds held |
|---|---|---|
| A | $100 | U.S. |
| B | €50 | U.K. |
| C | €100 | U.K., Germany, or Japan. |

| Location | Actual asset balance |
|---|---|
| U.S. | $50 |
| U.K. | €100 |
| Germany | €50 |

**Note:** Conversion Rates: €1 = $1.

Reduction in Claims for General Shortfall

There is a shortfall in the funds held in the U.S. such that only ½ of the funds are available. Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

Convert each customer's claim in each currency to U.S. Dollars:

| Customer | Claim | Conversion rate | Claim in US$ |
|---|---|---|---|
| A | $100 | 1.0 | $100 |
| B | €50 | 1.0 | 50 |
| C | €100 | 1.0 | 100 |
| Total | | | 250.00 |

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

| Location | Assets | Conversion rate | Assets in U.S. dollars | Shortfall due to sovereign action percentage | Actual shortfall due to sovereign action | Amount actually available |
|---|---|---|---|---|---|---|
| U.S. | $50 | 1.0 | $50.00 | | | $50 |
| U.K. | €100 | 1.0 | 100 | | | 100 |
| Germany | €50 | 1.0 | 50 | | | 50 |

| Location | Assets | Conversion rate | Assets in U.S. dollars | Shortfall due to sovereign action percentage | Actual shortfall due to sovereign action | Amount actually available |
|---|---|---|---|---|---|---|
| Total | | | 200.00 | | | 200.00 |

Determine the percentage of shortfall that is not attributable to sovereign action:

Shortfall Percentage = (1 − (200/250)) = (1 − 80%) = 20%.

Reduce each futures customer or Cleared Swaps Customer claim by the Shortfall Percentage:

| Customer | Claim in US$ | Allocated shortfall (non-sovereign) | Claim in U.S. dollars after allocated shortfall |
|---|---|---|---|
| A | $100 | $20.00 | $80.00 |
| B | 50 | 10.00 | 40.00 |
| C | 100 | 20.00 | 80.00 |
| Total | 250.00 | 50.00 | 200.00 |

Reduction in Claims for Shortfall Due to Sovereign Action

There is no shortfall due to sovereign action. Accordingly, the futures customer or Cleared Swaps Customer claims will not be further reduced.

Claims After Reductions

| Customer | Claim in U.S. dollars after allocated non-sovereign shortfall | Allocation of shortfall due to sovereign action | Claim after all reductions |
|---|---|---|---|
| A | $80 | | $80.00 |
| B | 40 | | 40.00 |
| C | 80 | | 80.00 |
| Total | 200.00 | 0 | 200.00 |

*Example 3.* Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, not due to sovereign action.

| Customer | Claim | Location(s) customer has consented to having funds held |
|---|---|---|
| A | $150 | U.S. |
| B | €100 | U.K. |
| C | €50 | Germany. |
| D | $100 | U.S. |
| D | €100 | U.K. or Germany. |

| Location | Actual asset balance |
|---|---|
| U.S. | $250 |
| U.K. | €50 |
| Germany | €100 |

**Note:** Conversion Rates: €1 = $1.

Reduction in Claims for General Shortfall

Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

| Customer | Claim | Conversion rate | Claim in US$ |
|---|---|---|---|
| A | $150 | 1.0 | 150 |
| B | €100 | 1.0 | 100 |
| C | €50 | 1.0 | 50 |
| D | $100 | 1.0 | 100 |
| D | €100 | 1.0 | 100 |
| Total | | | 500.00 |

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

| Location | Assets | Conversion rate | Assets in U.S. dollars | Shortfall due to sovereign action percentage | Actual shortfall due to sovereign action | Amount actually available |
|---|---|---|---|---|---|---|
| U.S. | $250 | 1.0 | $250 | ..... | ..... | $250 |
| U.K. | €50 | 1.0 | 50 | ..... | ..... | 50 |
| Germany | €100 | 1.0 | 100 | ..... | ..... | 100 |
| Total | ..... | ..... | 400.00 | ..... | 0 | 400.00 |

Determine the percentage of shortfall that is not attributable to sovereign action:

Shortfall Percentage = (1 − 400/500) = (1 − 80%) = 20%.

Reduce each futures customer or Cleared Swaps Customer by the shortfall percentage:

| Customer | Claim in US$ | Allocated shortfall (non-sovereign) | Claim in U.S. dollars after allocated shortfall |
|---|---|---|---|
| A | $150 | $30.00 | 120.00 |
| B | 100 | 20.00 | 80.00 |
| C | 50 | 10.00 | 40.00 |
| D | 200 | 40.00 | 160.00 |
| Total | 500.00 | 100.00 | 400.00 |

Reduction in Claims for Shortfall Due to Sovereign Action

There is no shortfall due to sovereign action. Accordingly, the claims will not be further reduced.

Claims After Reductions

| Customer | Claim in U.S. dollars after allocated non-sovereign shortfall | Allocation of shortfall due to sovereign action | Claim after all reductions |
|---|---|---|---|
| A | $120.00 | ..... | $120 |
| B | 80.00 | ..... | 80 |
| C | 40.00 | ..... | 40 |
| D | 160.00 | 0 | 160 |
| Total | 400.00 | 0 | 400 |

*Example 4.* Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action.

| Customer | Claim | Location(s) where customer has consented to have funds held |
|---|---|---|
| A | $50 | U.S. |
| B | €50 | U.K. |
| C | €50 | Germany. |
| D | $100 | U.S. |
| D | €100 | U.K. or Germany. |

| Location | Actual asset balance |
|---|---|
| U.S. | $150 |
| U.K. | 100 |
| Germany | 100 |

**Notice:** Conversion Rates: €1 = $1; ¥1 = $0.01, £1= $1.5.

Reduction in Claims for General Shortfall

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

| Customer | Claim | Conversion rate | Claim in US$ |
|---|---|---|---|
| A | $50 | 1.0 | $50 |
| B | €50 | 1.0 | 50 |
| C | €50 | 1.0 | 50 |
| D | $100 | 1.0 | 100 |
| D | €100 | 1.0 | 100 |
| Total | | | 350.00 |

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

| Location | Assets | Conversion rate | Assets in U.S. dollars | Shortfall due to sovereign action percentage | Actual shortfall due to sovereign action | Amount actually available |
|---|---|---|---|---|---|---|
| U.S | $150 | 1.0 | $150 | | | $150 |
| U.K | €100 | 1.0 | 100 | | | 100 |
| Germany | €100 | 1.0 | 100 | 50% | 50 | 50 |
| Total | | | 350.00 | | 50.00 | 300.00 |

Determine the percentage of shortfall that is not attributable to sovereign action:

Shortfall Percentage = (1 − 350/350) = (1 − 100%) = 0%.

Reduce each futures customer or Cleared Swaps Customer claim by the shortfall percentage:

| Customer | Claim in US$ | Allocated shortfall (non-sovereign) | Claim in U.S. dollars after allocated shortfall |
|---|---|---|---|
| A | $50 | 0 | $50.00 |
| B | 50 | 0 | 50.00 |
| C | 50 | 0 | 50.00 |
| D | 200 | 0 | 200.00 |
| Total | 350.00 | 0.00 | 350.00 |

Reduction in Claims for Shortfall Due to Sovereign Action

Due to sovereign action, only ½ of the funds in Germany are available.

| Customer | Presumed location of funds | | |
|---|---|---|---|
| | U.S. | U.K. | Germany |
| A | $50 | | |
| B | | $50 | |
| C | | | $50 |
| D | 100 | | 100 |
| Total | 150.00 | 50.00 | 150.00 |

Calculation of the allocation of the shortfall due to sovereign action—Germany ($50 shortfall to be allocated):

| Customer | Allocation share | Allocation share of actual shortfall | Actual shortfall allocated |
|---|---|---|---|
| C | $50/$150 | 33.3% of $50 | $16.67 |
| D | $100/$150 | 66.7% of $50 | 33.33 |
| Total | | | 50.00 |

Claims After Reductions:

| Customer | Claim in U.S. dollars after allocated non-sovereign shortfall | Allocation of shortfall due to sovereign action from Germany | Claim after all reductions |
|---|---|---|---|
| A | $50 | ..... | $50 |
| B | 50 | ..... | 50 |
| C | 50 | $16.67 | 33.33 |
| D | 200 | 33.33 | 166.67 |
| Total | 350.00 | 50.00 | 300.00 |

*Example 5.* Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action and a shortfall in funds held in the U.S.

| Customer | Claim | Location(s) customer has consented to having funds held |
|---|---|---|
| A | $100 | U.S. |
| B | €50 | U.K. |
| C | €150 | Germany. |
| D | $100 | U.S. |
| D | £300 | U.K. |
| D | €150 | U.K. or Germany. |

| Location | Actual asset balance |
|---|---|
| U.S. | $100 |
| U.K. | £300 |
| U.K. | €200 |
| Germany | €150 |

*Conversion Rates:* €1 = $1; £1 = $1.5.

Reduction in Claims for General Shortfall

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

| Customer | Claim | Conversion rate | Claim in U.S.$ |
|---|---|---|---|
| A | $100 | 1.0 | $100 |
| B | €50 | 1.0 | 50 |
| C | €150 | 1.0 | 150 |
| D | $100 | 1.0 | 100 |
| D | £300 | 1.5 | 450 |
| D | €150 | 1.0 | 150 |
| Total | ..... | ..... | 1,000.00 |

Determine assets available for distribution to futures customers or Cleared Swaps.

Customers, converting to U.S. dollars:

| Location | Assets | Conversion rate | Assets in U.S. dollars | Shortfall due to sovereign action percentage | Actual shortfall due to sovereign action | Amount actually available |
|---|---|---|---|---|---|---|
| U.S. | $100 | 1.0 | $100 | ..... | ..... | $100 |
| U.K. | £300 | 1.5 | 450 | ..... | ..... | 450 |
| U.K. | €200 | 1.0 | 200 | ..... | ..... | 200 |
| Germany | €150 | 1.0 | 150 | 100% | $150 | 0 |
| Total | ..... | ..... | 900.00 | ..... | 150.00 | 750.00 |

Determine the percentage of shortfall that is not attributable to sovereign action:

Shortfall Percentage = (1 − 900/1000) = (1 − 90%) = 10%. Reduce each futures customer or Cleared Swaps Customer claim by the shortfall percentage:

| Customer | Claim in U.S.$ | Allocated shortfall (non-sovereign) | Claim in U.S. dollars after allocated shortfall |
|---|---|---|---|
| A | $100 | $10.00 | $90.00 |
| B | 50 | 5.00 | 45.00 |
| C | 150 | 15.00 | 135.00 |
| D | 700 | 70.00 | 63.00 |
| Total | 1,000.00 | 100.00 | 900.00 |

Reduction in Claims for Shortfall Due to Sovereign Action

Due to sovereign action, none of the money in Germany is available.

| Customer | Presumed location of funds | | |
|---|---|---|---|
| | U.S. | U.K. | Germany |
| A | $100 | | |
| B | | $50 | |
| C | | | $150 |
| D | 100 | 450 | 150 |
| Total | 200.00 | 500.00 | 300.00 |

Calculation of the allocation of the shortfall due to sovereign action Germany ($150 shortfall to be allocated):

| Customer | Allocation share | Allocation share of actual shortfall | Actual shortfall allocated |
|---|---|---|---|
| C | $150/$300 | 50% of $150 | $75 |
| D | 150/300 | 50% of $150 | 75 |
| Total | | | 150.00 |

Claims After Reductions

| Customer | Claim in U.S. dollars after allocated non-sovereign shortfall | Allocation of shortfall due to sovereign action from Germany | Claim after all reductions |
|---|---|---|---|
| A | $90 | | $90 |
| B | 45 | | 45 |
| C | 135 | $75 | 60 |
| D | 630 | 75 | 555 |
| Total | 900.00 | 150.00 | 750.00 |

*Example 6.* Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action, shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, not due to sovereign action, and a shortfall in funds held in the U.S.

| Customer | Claim | Location(s) customer has consented to having funds held |
|---|---|---|
| A | $50 | U.S. |
| B | €50 | U.K. |
| C | $20 | U.S. |
| C | €50 | Germany. |
| D | $100 | U.S. |
| D | £300 | U.K. |
| D | €100 | U.K., Germany, or Japan. |
| E | $80 | U.S. |
| E | ¥10,000 | Japan. |

| Customer | Claim | Location(s) customer has consented to having funds held |
|---|---|---|
| Location | | Actual asset balance |
| U.S. | | $200 |
| U.K. | | £200 |
| U.K. | | €100 |
| Germany | | €50 |
| Japan | | ¥10,000 |

*Conversion Rates:* £1 = $1; ¥1=$0.01, £1=$1.5.

Reduction in Claims for General Shortfall

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

| Customer | Claim | Conversion rate | Claim in U.S.$ |
|---|---|---|---|
| A | $50 | 1.0 | $50 |
| B | €50 | 1.0 | 50 |
| C | $20 | 1.0 | 20 |
| C | €50 | 1.0 | 50 |
| D | $100 | 1.0 | 100 |
| D | €300 | 1.5 | 450 |
| D | £100 | 1.0 | 100 |
| E | $80 | 1.0 | 80 |
| E | ¥10,000 | 0.01 | 100 |
| Total | | | 1,000.00 |

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

| Location | Assets | Conversion rate | Assets in U.S. dollars | Shortfall due to sovereign action percentage | Actual shortfall due to sovereign action | Amount actually available |
|---|---|---|---|---|---|---|
| U.S. | $200 | 1.0 | $200 | | | $200 |
| U.K. | £200 | 1.5 | 300 | | | 300 |
| U.K. | €100 | 1.0 | 100 | | | 100 |
| Germany | €50 | 1.0 | 50 | 100% | $50 | 0 |
| Japan | ¥10,000 | 0.01 | 100 | 50% | 50 | 50 |
| Total | | | 750 | | 100.00 | 650.00 |

Determine the percentage of shortfall that is not attributable to sovereign action:

Shortfall Percentage = (1–750/1000) = (1–75%) = 25%.

Reduce each futures customer or Cleared Swaps Customer claim by the shortfall percentage:

| Customer | Claim in U.S.$ | Allocated shortfall (non-sovereign) | Claim in U.S. dollars after allocated shortfall |
|---|---|---|---|
| A | $50 | $12.50 | $37.50 |
| B | 50 | 12.50 | 37.50 |
| C | 70 | 17.50 | 52.50 |
| D | 650 | 162.50 | 487.50 |
| E | 180 | 45.00 | 135.00 |
| Total | 1,000.00 | 250.00 | 750.00 |

Reduction in Claims for Shortfall Due to Sovereign Action

Due to sovereign action, none of the money in Germany and only ½ of the funds in Japan are available.

| Customer | Presumed location of funds | | | |
|---|---|---|---|---|
| | U.S. | U.K. | Germany | Japan |
| A | $50 | | | |
| B | | $50 | | |
| C | 20 | | $50 | |
| D | 100 | 450 | 50 | $50 |
| E | 80 | | | 100 |
| Total | 250.00 | 500.00 | 100.00 | 150.00 |

Calculation of the allocation of the shortfall due to sovereign action—Germany ($50 shortfall to be allocated):

| Customer allocation | Allocation share | Allocation share of actual shortfall | Actual shortfall allocated |
|---|---|---|---|
| C | $50/$100 | 50% of $50 | $25 |
| D | 50/100 | 50% of 50 | 25 |
| Total | | | 50 |

Japan ($50 shortfall to be allocated):

| Customer | Allocation share | Allocation share of actual shortfall | Actual shortfall allocated |
|---|---|---|---|
| D | $50/$150 | 33.3% of $50 | $16.67 |
| E | 100/150 | 66.6% of 50 | 33.33 |
| Total | | | 50.00 |

Claims After Reductions

| Customer | Claim in US dollars after allocated non-sovereign shortfall | Allocation of shortfall due to sovereign action from Germany | Allocation of shortfall due to sovereign action from Japan | Claim after all reductions |
|---|---|---|---|---|
| A | $37.50 | | | 37.50 |
| B | 37.50 | | | 37.50 |
| C | 52.50 | $25 | | 27.50 |
| D | 487.50 | 25 | 16.67 | 445.83 |
| E | 135.00 | | 33.33 | 101.67 |
| Total | 750.00 | 50.00 | 50.00 | 650.00 |

*Example 7.* Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action, where the FCM kept more funds than permitted in such location or currency.

| Customer | Claim | Location(s) customer has consented to having funds held |
|---|---|---|
| A | $50 | U.S. |
| B | 50 | U.S. |
| B | €50 | U.K. |
| C | €50 | Germany. |
| D | 100 | U.S. |
| D | €100 | U.K. or Germany. |
| E | 50 | U.S. |
| E | €50 | U.K. |

| Location | Actual asset balance |
|---|---|
| U.S. | $250 |
| U.K. | €50 |
| Germany | €200 |

*Conversion Rates:* 1 = $1.

Reduction in Claims for General Shortfall

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. dollars:

| Customer | Claim | Conversion rate | Claim in U.S.$ |
|---|---|---|---|
| A | $50 | 1.0 | 50 |
| B | 50 | 1.0 | 50 |
| B | €50 | 1.0 | 50 |
| C | €50 | 1.0 | 50 |
| D | €100 | 1.0 | 100 |
| D | €100 | 1.0 | 100 |
| E | 50 | 1.0 | 50 |
| E | €50 | 1.0 | 50 |
| Total | | | 500.00 |

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

| Location | Assets | Conversion rate | Assets in U.S. dollars | Shortfall due to sovereign action percentage | Actual shortfall due to sovereign action | Amount actually available |
|---|---|---|---|---|---|---|
| U.S. | $250 | 1.0 | $250 | | | $250 |
| U.K. | €50 | 1.0 | 50 | | | 50 |
| Germany | €200 | 1.0 | 200 | 100% | 200 | 0 |
| Total | | | 500.00 | | 200 | 300.00 |

Determine the percentage of shortfall that is not attributable to sovereign action.

Shortfall Percentage = (1 − 500/500) = (1 − 100%) = 0%.

Reduce each futures customer or Cleared Swaps Customer claim by the shortfall percentage:

| Customer | Claim in U.S.$ | Allocated shortfall (non-sovereign) | Claim in U.S. dollars after allocated shortfall |
|---|---|---|---|
| A | $50 | $0 | $50.00 |
| B | 100 | 0 | 100.00 |
| C | 50 | 0 | 50.00 |
| D | 200 | 0 | 200.00 |
| E | 100 | 0 | 100.00 |
| Total | 500.00 | 0.00 | 500.00 |

Reduction in Claims for Shortfall Due to Sovereign Action

Due to sovereign action, none of the money in Germany is available.

| Customer | Presumed location of funds | | |
|---|---|---|---|
| | U.S. | U.K. | Germany |
| A | $50 | | |
| B | 50 | 50 | |
| C | | | 50 |
| D | 100 | | 100 |
| E | 50 | 50 | |
| Total | 250.00 | 100.00 | 150.00 |

Calculation of the allocation of the shortfall due to sovereign action—Germany ($200 shortfall to be allocated):

| Customer | Allocation share | Allocation share of actual shortfall | Actual shortfall allocated |
|---|---|---|---|
| C | $50/$150 | 33.3% of $200 | $66.67 |
| D | $100/$150 | 66.7% of $200 | 133.33 |
| Total | ..... | ..... | 200.000 |

This would result in the claims of customers C and D being reduced below zero.

Accordingly, the claims of customer C and D will only be reduced to zero, or $50 for C and $100 for D. This results in a Total Excess Shortfall of $50.

| Actual shortfall | Allocation of shortfall for customer C | Allocation of shortfall for customer D | Total excess shortfall |
|---|---|---|---|
| $200 | $50 | $100 | $50 |

This shortfall will be divided among the remaining futures customers or Cleared Swaps Customers who have authorized funds to be held outside the U.S. or in a currency other than U.S. dollars.

| Customer | Total claims of customers permitting funds to be held outside the U.S. | Portion of claim required to be in the U.S. | Allocation share (column B–C/column B Total—all customer claims in U.S.) | Allocation share of actual total excess shortfall | Actual total excess shortfall allocated |
|---|---|---|---|---|---|
| B | $100 | $50 | $50/$200 | 25% of $50 | $12.50 |
| C | 50 | 0 | ([1]) | ..... | 0 |
| D | 200 | 100 | 100/200 | 50% of $50 | 25 |
| E | 100 | 50 | 50/100 | 25% of $50 | 12.50 |
| Total | 450.00 | ..... | ..... | ..... | 50.00 |

[1] Claim already reduced to $0.

Claims After Reductions

| Customer | Claim in U.S. dollars after allocated non-sovereign shortfall | Allocation of shortfall due to sovereign action Germany | Allocation of total excess shortfall | Claim after all reductions |
|---|---|---|---|---|
| A | $50 | ..... | ..... | $50.00 |
| B | 100 | ..... | 12.50 | 87.50 |
| C | 50 | 50 | ..... | 0 |
| D | 200 | 100 | 25 | 75.00 |
| E | 100 | ..... | 12.50 | 87.50 |
| Total | 500.00 | 150.00 | 50.00 | 300.00 |

Issued in Washington, DC, on April 27, 2011, by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

## Appendices to Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions—Commission Voting Summary and Statements of Commissioners

**Note:** The following appendices will not appear in the Code of Federal Regulations.

## Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn, Chilton and O'Malia voted in the affirmative; Commissioner Sommers voted in the negative.

## Appendix 2—Statement of Chairman Gary Gensler

I support the proposed rule on protection of cleared swaps customer contracts and collateral and the associated conforming amendments. The proposal carries out the Dodd-Frank Act's mandate that futures commission merchants (FCMs) and derivatives clearing organizations (DCOs) segregate customer collateral supporting cleared swaps. FCMs and DCOs must hold customer collateral in an account that is separate from that belonging to the FCMs or DCOs.

Under the Dodd-Frank Act, an FCM or DCO must not use the collateral of one swaps customer to cover the obligations of another swaps customer or itself. Under the proposed rule, in the event that an FCM defaults simultaneously with one or more of its cleared swaps customers, the DCO may access the collateral of the FCM's defaulting cleared swaps customers to cure the default, but not the collateral of the FCM's non-defaulting cleared swaps customers. The

proposal also asks a variety of questions regarding alternative means of implementing protection of customer collateral.

This proposed rulemaking benefited from public input received during the CFTC staff roundtable on segregation and in other meetings and from the 32 comments received in response the Commission's advanced notice of proposed rulemaking. I look forward to further hearing from the public on this proposed rulemaking.

[FR Doc. 2011–10737 Filed 6–2–11; 11:15 am]

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Part III

## Department of the Interior

Fish and Wildlife Service

50 CFR Part 17
Endangered and Threatened Wildlife and Plants; Revised Endangered Status, Revised Critical Habitat Designation, and Taxonomic Revision for *Monardella linoides* ssp. *viminea*; Proposed Rule

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[Docket No. FWS–R8–ES–2010–0076]**

**RIN 1018–AX18**

## Endangered and Threatened Wildlife and Plants; Revised Endangered Status, Revised Critical Habitat Designation, and Taxonomic Revision for *Monardella linoides* ssp. *viminea*

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to recognize the recent change to the taxonomy of the currently endangered plant taxon, *Monardella linoides* ssp. *viminea,* in which the subspecies was split into two distinct full species, *Monardella viminea* (willowy monardella) and *Monardella stoneana* (Jennifer's monardella). Because the original subspecies, *Monardella linoides* ssp. *viminea,* was listed as endangered under the Endangered Species Act of 1973, as amended (Act), we are reviewing and updating the threats analysis that we completed for the taxon in 1998, when it was listed as a subspecies, to determine if any of that analysis has changed based on this revised taxonomy. We are also reviewing the status of the new species, *Monardella stoneana.* We propose that *Monardella viminea's* current listing status should be retained as endangered, and we propose to delist the portion of the old listed taxon that has been split off into the new species, *Monardella stoneana,* because it does not meet the definition of endangered or threatened under the Act. We also propose to designate critical habitat for *Monardella viminea* (willowy monardella). Approximately 348 acres (141 hectares) are proposed for designation as critical habitat for *M. viminea,* in San Diego County, California. We are not proposing to designate critical habitat for *Monardella stoneana* at this time because we do not believe this species warrants listing under the Act. However, should we determine, after review of the best available scientific information and public comment, that *Monardella stoneana* does warrant listing, we will propose critical habitat for *Monardella stoneana,* should it be determined to be prudent, in a separate proposed rule.

**DATES:** We will accept comments received or postmarked on or before August 8, 2011. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by July 25, 2011.

**ADDRESSES:** You may submit comments by one of the following methods:

(1) *Electronically*: Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Keyword box, enter Docket No. FWS–R8–ES–2010–0076, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on "Send a Comment or Submission."

(2) *By hard copy*: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R8–ES–2010–0076; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone 760–431–9440; facsimile 760–431–5901. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### Public Comments

We intend any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned government agencies, the scientific community, industry, or any other interested party concerning this proposed rule. Please note that throughout the remainder of this document we will use the currently recognized names, *Monardella viminea,* for references to willowy monardella, and *Monardella stoneana,* for references to Jennifer's monardella. We particularly seek comments concerning:

(1) Specific information regarding our recognition of *Monardella viminea* and *M. stoneana* at the species rank, on the segregation of ranges of *M. stoneana* and *M. viminea,* and on our proposals that *M. viminea* should remain listed as endangered and that *M. stoneana* does not warrant listing under the Act (16 U.S.C. 1531 *et seq.*).

(2) Any available information on known or suspected threats and proposed or ongoing development projects with the potential to threaten either *Monardella viminea* or *M. stoneana.*

(3) The effects of potential threat factors to both *Monardella viminea* and *M. stoneana* that are the basis for a listing determination under section 4(a) of the Act, which are:

(a) The present or threatened destruction, modification, or curtailment of the species' habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

(4) Specific information regarding impacts of fire on *Monardella viminea* or *M. stoneana* individuals or their habitat.

(5) The reasons why we should or should not designate habitat as "critical habitat" under section 4 of the Act for *Monardella viminea* including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threats outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(6) Specific information on:

(a) The amount and distribution of *Monardella viminea* or *M. stoneana* habitat,

(b) What areas, that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of these species, should be included in the designation and why,

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change, and

(d) What areas not occupied at the time of listing are essential for the conservation of the species and why.

(7) Information that may assist us in identifying or clarifying the physical and biological features essential to the conservation of *Monardella viminea.*

(8) How the proposed critical habitat boundaries could be refined to more closely or accurately circumscribe the areas identified as containing the

physical and biological features essential to the conservation of *Monardella viminea.*

(9) How we could improve or modify our design of critical habitat units, particularly our criteria for width of essential habitat for *Monardella viminea.* We especially request information on West Sycamore Canyon and Unit 2 (where two groups of *M. viminea* were not included under the criteria used to draw proposed critical habitat boundaries) and areas such as Elanus, Lopez, and Rose Canyons that we have identified as not meeting the definition of critical habitat.

(10) Information on pollinators of *Monardella viminea* or *M. stoneana* that may be essential for the conservation of these species, including information on areas that provide habitat for these pollinators.

(11) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(12) Information on the projected and reasonably likely impacts of climate change on the two species and the proposed critical habitat.

(13) Information on any quantifiable economic costs or benefits of the proposed designation of critical habitat.

(14) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular, any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(15) Whether any specific areas we are proposing for critical habitat designation for *Monardella viminea* should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act, in particular for those lands covered by the County of San Diego Subarea Plan or the City of San Diego Subarea Plan under the Multiple Species Conservation Program (MSCP). Information on obtaining copies of these plans will be provided by the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

(16) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

You may submit your comments and materials concerning this proposed revised rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section. We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov.* You may request at the top of your document that we withhold personal information such as your street address, phone number, or e-mail address from public review; however, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule, will be available for public inspection on *http://www.regulations.gov* (under Docket Number FWS–R8–ES–2010–0076), or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

## Public Hearing

The Act provides for one or more public hearings on this proposal, if requested. Requests must be received by the date listed in the **DATES** section. Such requests must be made in writing and be addressed to the Field Supervisor at the address provided in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

## Background

It is our intent to discuss only those topics directly relevant to our recognition of the taxonomic split of *Monardella linoides* ssp. *viminea* into two distinct taxa: *Monardella viminea* (willowy monardella) and *Monardella stoneana* (Jennifer's monardella); the retention of *M. viminea* as endangered; the proposed critical habitat for *M. viminea;* and our conclusion that *M. stoneana* is not endangered or threatened. This proposed rule incorporates new information specific to *M. viminea* and *M. stoneana* including species descriptions, distributions, taxonomic rank, and nomenclature. We also provide information on current threats to the two species, potential pollinators, and additional information on soil not included in our listing rule for *Monardella linoides* ssp. *viminea* published in the **Federal Register** on October 13, 1998 (63 FR 54938), and our critical habitat designation published in the **Federal Register** on November 8, 2006 (71 FR 65662).

### *Previous Federal Action*

*Monardella linoides* ssp. *viminea* was listed as endangered in 1998 (63 FR 54938; October 13, 1998). An account of Federal actions prior to listing may be found in the listing rule (63 FR 54938; October 13, 1998). On November 9, 2005, we published a proposed rule to designate critical habitat for *M. linoides* ssp. *viminea* (70 FR 67956). On November 8, 2006 (71 FR 65662), we published our final rule designating critical habitat for *M. linoides* ssp. *viminea.* On January 14, 2009, the Center for Biological Diversity filed a complaint in the U.S. District Court for the Southern District of California challenging our designation of critical habitat for *M. linoides* ssp. *viminea* (*Center for Biological Diversity* v. *United States Fish and Wildlife Service and Dirk Kempthorne, Secretary of the Interior,* Case No. 3:09–CV–0050–MMA–AJB). A settlement agreement was reached with the plaintiffs dated November 14, 2009, in which we agreed to submit a proposed revised critical habitat designation to the **Federal Register** for publication by February 18, 2011, and a final revised critical habitat designation to the **Federal Register** for publication by February 17, 2012. By order dated February 10, 2011, the district court approved a modification to the settlement agreement that extended the deadline for **Federal Register** submission to June 18, 2011, for the proposed revised critical habitat designation. The deadline for submission of a final revised critical habitat designation to the **Federal Register** remains February 17, 2012.

### *Taxonomic and Nomenclatural Changes Affecting Monardella linoides ssp. viminea*

In 2001, Kelly and Burrascano (2001, p. 4) noted that "multiple biologists" had observed differences in the southernmost occurrences of *Monardella linoides* ssp. *viminea.* Kelly and Burrascano (2001, p. 4) also stated that Andrew Sanders of the University of California at Riverside believed the plants were a separate species. Elvin and Sanders (2003, pp. 425–432) subsequently segregated the southern occurrences of willowy monardella as a distinct taxon and recognized it at the species rank as *M. stoneana* (see Figure 1). Elvin and Sanders (2003, p. 430) also returned willowy monardella to its original specific rank as *M. viminea.* The Service initially disagreed with the segregation and classification of *M. stoneana* due to lack of sufficient

supportive evidence presented by Elvin and Sanders (Bartel and Wallace 2004, pp. 1–3), a view continued in our 5-year review (Service 2008, pp. 6–7).

Further genetic investigation of *Monardella* has recently been conducted using ISSR (Inter-Simple Sequence Repeats). ISSR is a general term for a genome region between microsatellite loci that can be used for DNA fingerprinting and delimiting species. ISSR analysis can have multiple application uses, including taxonomic studies of closely related species (Prince 2010, pers. comm.). Using ISSRs, Prince (2009, pp. 22–31) performed an extensive survey of *Monardella* taxa and found that *M. stoneana* and *M. viminea* were both more closely related to different subspecies of *M. linoides* than to each other. These data are supportive of the earlier recognition by the California Department of Fish and Game (CDFG), California Natural Diversity Database (CNDDB), and the California Native Plant Society (CNPS) of *M. viminea* and *M. stoneana* as two separate taxa. Moreover, *M. viminea* and *M. stoneana* are treated as full species in the recently available online unpublished treatment of *Monardella* (Brunell *et al.,* in press) that will be published in the forthcoming revision of the Jepson Manual, the standard guide to the flora of California. According to the authors (Brunell *et al.,* in press), the two species can be morphologically differentiated based on slight differences in leaf width, bract length and width, and flower cluster width. Reportedly, *M. viminea* and *M. stoneana* will be similarly treated as separate species in the future treatment of the genus for the Flora of North America project (G. Wallace, Service 2010, pers. obs.). As a result of the new data and supportive references noted above, we propose to recognize the change in the taxonomic rank and nomenclature of the listed entity as two distinct species, *M. viminea* and *M. stoneana.* We have included those proposed changes in the Proposed Regulation Promulgation section of this rule, and we expect to adopt them when we publish a final determination for this action.

When we listed *Monardella linoides* ssp. *viminea,* we considered 20 occurrences to be extant in the United States (see Table 1) (63 FR 54938; October 13, 1998). As of 2008, 9 occurrences were considered to be extirpated, leaving 11 extant occurrences (Service 2008, p. 5). All 9 extirpated occurrences were in central San Diego County, in the range of what is now considered to be *M. viminea.* Based on updated information from Marine Corps Air Station (MCAS) Miramar (Kassebaum 2010, pers. comm.), two additional occurrences have since been extirpated, again in the range of *M. viminea.* Additionally, as a result of taxonomic changes, the two southernmost occurrences were reclassified as *M. stoneana* after the 2008 5-year review (see Table 1). Therefore, we believe there are now only seven occurrences of *M. viminea,* and these seven were extant at the time of listing. We are not aware of any new occurrences of *M. viminea,* other than those planted in 2007 as a conservation measure to offset impacts associated with the development of the Carroll Canyon Business Park. More information on the four translocated occurrences is discussed in the *Geographic Range and Status* section below. In addition to two occurrences now considered to be *M. stoneana* (but considered at listing to be *M. linoides* ssp. *viminea*), we now know of an additional 7 occurrences of *M. stoneana,* all in what was once the southern range of *M. linoides* ssp. *viminea* (Figure 1). We presume those occurrences were extant at the time *M. linoides* ssp. *viminea* was listed. The single plant in the *M. stoneana* occurrence at Otay Lakes (*M. stoneana* EO 4, former *M. viminea* EO 28) was extirpated by the 2007 Harris fire. Therefore, we consider eight extant occurrences of *M. stoneana.*

TABLE 1—A DESCRIPTION OF WHEN OCCURRENCES WERE FIRST RECOGNIZED BY THE SERVICE, WHEN THEY WERE FIRST CONSIDERED EXTIRPATED, AND WHICH OCCURRENCES THE SERVICE CURRENTLY CONSIDERS EXTANT

| Location | CNDDB element occurrence number (EO) | Known and extant at listing | Extant at 2008 5-yr review | Currently extant |
|---|---|---|---|---|
| *Monardella viminea:* | | | | |
| Lopez Canyon | 1 | x | x | x |
| Cemetery Canyon | 3 | x | ..... | ..... |
| Carroll Canyon | 4 | x | ..... | ..... |
| Sycamore Canyon | 8 | x | x | x |
| San Clemente Canyon | 11 | x | ..... | ..... |
| San Clemente Canyon | 12, 18, 19 | x | ..... | ..... |
| San Clemente Canyon | 13 | x | ..... | ..... |
| Murphy Canyon | 14 | x | ..... | ..... |
| Murphy Canyon | 15 | x | x | ..... |
| San Clemente Canyon | 16 | x | ..... | ..... |
| San Clemente Canyon | 17 | x | ..... | ..... |
| West Sycamore Canyon | 21 | x | x | x |
| Elanus Canyon | 24 | x | x | x |
| Carroll Canyon | 25 | x | ..... | ..... |
| Spring Canyon | 26 | x | x | x |
| San Clemente Canyon | 27 | x | x | x |
| Otay Lakes | 28 | x | x | Now considered *M. stoneana* EO4 |
| Sycamore Canyon | 29 | x | x | x |
| Miramar NAS | 31 | x | x | ..... |
| Marron Valley | none | x | x | Now considered *M. stoneana* EO1 |
| *Monardella stoneana:* | | | | |
| Marron Valley | 1 | x | x | x |
| N.W. Otay Mountain | 2 | ..... | x | x |

TABLE 1—A DESCRIPTION OF WHEN OCCURRENCES WERE FIRST RECOGNIZED BY THE SERVICE, WHEN THEY WERE FIRST CONSIDERED EXTIRPATED, AND WHICH OCCURRENCES THE SERVICE CURRENTLY CONSIDERS EXTANT—Continued

| Location | CNDDB element occurrence number (EO) | Known and extant at listing | Extant at 2008 5-yr review | Currently extant |
|---|---|---|---|---|
| N.W. Otay Mountain | 3 | ..... | x | x |
| Otay Lakes | 4 | x | x | x |
| Buschalaugh Cove | 5 | ..... | x | ..... |
| Cottonwood Creek | 6 | ..... | x | x |
| Copper Canyon | 7 | ..... | x | x |
| S. of Otay Mountain | 8 | ..... | x | x |
| Tecate Peak | 9 | ..... | x | x |

*Sources:* CNDDB 1998, 2007, 2010a, 2010b; Service 2008, Kassebaum 2010.

Throughout this document, we refer to previous reports and documents, including **Federal Register** publications. When evaluating information contained in documents issued prior to the present document, the reader must bear in mind that information may reference *Monardella viminea* as *M. linoides* ssp. *viminea* and may include statements or data referring to plants or populations now known as *M. stoneana.*

Only information relevant to actions described in this proposed rule is provided below. For additional information on *Monardella viminea,* including a detailed description of its life history and habitat, refer to the final listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54938), the final rule designating critical habitat published in the **Federal Register** on November 8, 2006 (71 FR 65662), and the 5-year review completed in March 2008 (Service 2008). Actions described below include status reviews of *M. viminea* and *M. stoneana,* and a proposed revision of the critical habitat designation for *M. viminea.*

**Status Review—*Monardella viminea***

*History of the Action*

Federal actions taken prior to listing are described in the listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54938). On November 9, 2005, we published a proposed rule to designate critical habitat for *Monardella linoides* ssp. *viminea* (70 FR 67956). On November 8, 2006 (71 FR 65662), we published our final rule designating critical habitat for *M. linoides* ssp. *viminea.*

As described in the *Taxonomic and Nomenclatural Changes Affecting Monardella linoides* ssp. *viminea* section, genetic investigations conducted since the listing in 1998 and completed after our 2008 5-year review have provided the needed additional support for the recognition of *Monardella viminea* and *M. stoneana* as separate taxa at the species rank. This necessitates a review of the listing status of the remaining *M. viminea* occurrences and an assessment of the potential listing status of the newly segregated *M. stoneana.*

*Species Description*

*Monardella viminea* is a perennial herb or subshrub in the Lamiaceae (mint family) with a woody base and aromatic foliage. The waxy, green, hairy stems bear conspicuously gland-dotted linear or lance-shaped leaves, and dense, terminal clusters of white to rose-colored flowers. The leaves are 0.1–0.2 inch (in) (2–4 millimeters (mm)) wide at the base. The middle flower bracts are 0.4–0.6 in (10–15 mm) long (Elvin and Sanders 2003, p. 431). *Monardella viminea* grows in clumps of 1 to 4 individual plants (Ince and Krantz 2008, p. 2). As the number of plants within a clump cannot be reliably distinguished without exposing the roots, *M. viminea* is usually counted by clumps rather than as individual plants. Please see the Discussion of the Four Species section of the listing rule (63 FR 54938; October 13, 1998) and the Life History section of the 2005 proposed critical habitat rule (70 FR 67956; November 9, 2005) for more information on this species description.

*Habitat*

*Monardella viminea* occurs in coastal sage scrub and riparian scrub in sandy bottoms and on banks of ephemeral washes in canyons where surface water flows for usually less than 48 hours after a rain event (Scheid 1985, p. 3; Elvin and Sanders 2003, p. 430; Kelly and Burrascano 2006, p. 51). These semi-open washes and drainage areas typically have little to no canopy cover (Reiser 1994, p. 139). The species is commonly found with *Eriogonum fasciculatum* (California buckwheat) and *Baccharis sarothroides* (broom baccharis) in habitats characterized by low herbaceous cover and some shrub cover (Scheid 1985, p. 38). It is most commonly found in canyon bottoms, north-facing slopes, and along bends of meandering drainages (Elvin and Sanders 2003, p. 426; Rebman and Dossey 2006a, p. 5). Many of these areas maintain water longer than other portions of the drainage, although they do not have long-term standing water (Elvin and Sanders 2003, p. 426). At Marine Corps Air Station (MCAS) Miramar, *M. viminea* is absent from steeper portions of the canyons and prevalent in secondary stream channels, which suggests *M. viminea* presence is correlated with reaches where flow is relatively slow-moving or standing water is present (Rebman and Dossey 2006a, pp. 5–8).

*Monardella viminea* is found on soils characterized by a high content of coarse sandy grains and sediments and cobble deposits (Scheid 1985, p. 35). The larger sandy particles that make up *M. viminea* habitat soils are transported downstream by flood events (Scheid 1985, p. 36). Soil series that support *M. viminea* include Stony Land, Redding Gravelly Loam, Visalia Sandy Loam, and Riverwash (Scheid 1985, p. 35; Rebman and Dossey 2006a, pp. 5–6).

The 5-year review (Service 2008, p. 13) concluded that *Monardella viminea* requires a natural or managed regime of periodic, small fires. The coastal sage habitat that *M. viminea* favors benefits from small or managed fires that clear out dead or encroaching scrub vegetation and reduce nonnative species (Minnich 1983, p. 1290). However, there are two ways in which fire can negatively impact *M. viminea* habitat: (1) increased frequency of fires of all sizes, which can result in type conversion; or (2) invasion of nonnative grasses into riparian or coastal sage scrub habitats, which can choke out native vegetation, including shrubs associated with *M. viminea.* Additionally, large or unmanaged fires (sometimes referred to as "megafires")

can be a particular threat to a narrow endemic species like *M. viminea* because a single megafire could eliminate a large proportion of individual plants within the extant range of the species, although *M. viminea* is capable of resprouting after fire (Rebman and Dossey 2006b, p. 2). Additional information is needed regarding the role of fire in *M. viminea* habitat, particularly within riparian portions of canyons. Please see our request for information in the Public Comments section above. For more information on and discussion of the species' description and its habitat see the Discussion of the Four Species section of the listing rule (63 FR 54938; October 13, 1998) and the Distribution and Status section of the proposed critical habitat rule (70 FR 67956; November 9, 2005). However, we ask the reader to keep in mind that plants now treated as *M. stoneana* and their habitat were included in the discussion at the time those documents were published.

*Life History*

Very little is known about the germination and establishment of *Monardella viminea.* Mature plants flower readily, with inflorescences (flower heads) persisting for 10 to 12 weeks (Elvin and Sanders 2003, pp. 430–431). Plants are short-lived perennials, producing a new cohort of aerial stems each year from a persisting perennial root structure. Plants of this species are not known to be rhizomatous (connected by creeping underground stems); however, root masses may become detached over time, resulting in adjacent genetically identical but spatially separate plants. Rebman and Dossey (2006a, p. 10) reported that the peak flowering period at MCAS Miramar is early June to mid-July, with occasional flowering from May through August and, more rarely, into September.

No pollination studies are known to exist for *Monardella viminea;* however, other *Monardella* taxa are visited by butterfly and bee species (Elvin 2004, p. 2). Bees collected from the closely related *M. linoides* include wasp-like bees (*Hylaeus* sp.), mason bees (*Osmia* spp. or *Chalicodoma* spp.), and miner bees (*Anthophora* spp.) (Hurd 1979, pp. 1762, 1765, 2042, 2073, and 2164). Several observers report European honeybees (*Apis mellifera*) and bumblebees (*Bombus* spp.) as frequent visitors to *M. viminea* flowers (Kelly and Burrascano 2001, p. 7; Kelly and Burrascano 2006, pp. 7–8; Rebman and Dossey 2006a, pp. 10–11). Wasps and bees from the Bembicine and Andrenid families were collected from *M. viminea* plants on MCAS Miramar (Kelly and Burrascano 2001, p. 8). Butterflies known to visit *M. viminea* flowers include painted ladies (*Vanessa cardui*) (Rebman and Dossey 2006a, p. 11), gray hairstreaks (*Strymon melinus*), and funereal duskywing skippers (*Erynnis funeralis*) (University of California, Berkeley, CalPhotos database 2009). Successful sexual reproduction of flowering plants often depends on pollinator abundance and effectiveness (Javorek *et al.* 2002, p. 350). Therefore, adequate numbers of pollinators and sufficient pollinator movement through the habitat should be considered when assessing likely population distributions and survival, and habitat needs of *M. viminea.*

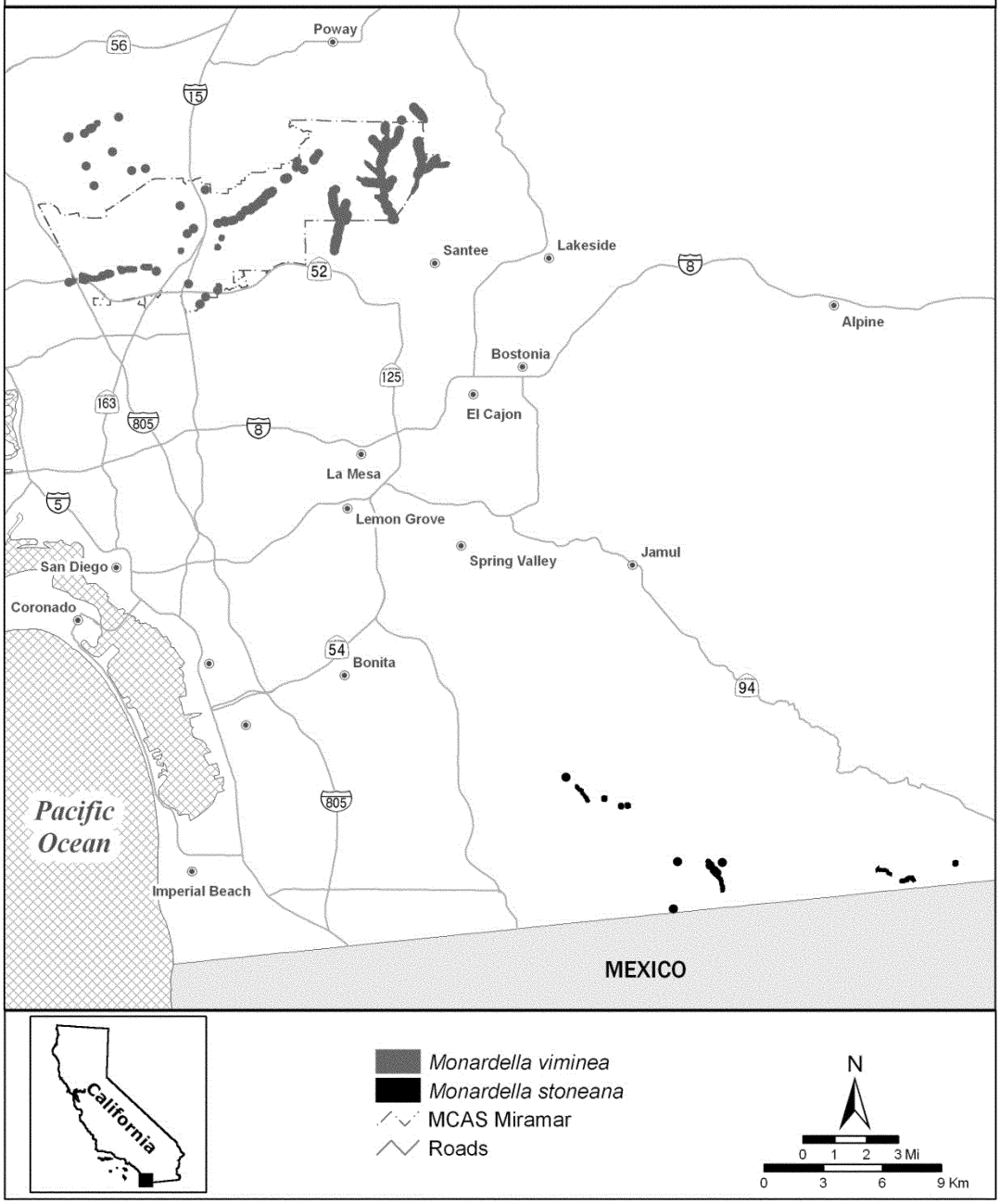
*Geographic Range and Status*

*Monardella viminea* is a geographically narrow endemic species restricted to three watersheds north of Kearny Mesa in San Diego County, California (Elvin and Sanders 2003, p. 431). The occurrences now considered to be *M. viminea* are entirely in the northern range of the originally listed entity *M. linoides* ssp. *viminea* (Figure 1). The portions of the watersheds where *M. viminea* occurs are found on lands owned by the Department of Defense at MCAS Miramar, and lands owned by the City of San Diego, lands owned by the County of San Diego, and lands under private ownership. In this proposed critical habitat we use the word "occurrence" when describing the location of plants (*e.g.,* in a critical habitat unit). In this context, we are referring to point locations or polygons representing observations of one or more *M. viminea* individuals. This may include one or more of the "element occurrences" (EOs) as described by CDFG in the CNDDB. Proposed critical habitat for *M. viminea* recognizes the importance of ecosystem processes that create and maintain suitable habitat for this species. Consequently, in the Critical Habitat sections of this document, our critical habitat units follow linear drainages that may include one or more of the "element occurrences" described by CNDDB. Because of the potentially transient nature of suitable habitat for this species, any reach along these drainages may be occupied at a given time. In all other respects in this document, "element occurrence" or "occurrence" references are those from the cumulative data of the CNDDB (2010a, EOs 1–31).

Figure 1. Range of *Monardella viminea* and *M. stoneana.*

**BILLING CODE 4310–55–P**

Figure 1
*Monardella linoides* ssp. *viminea* after taxonomic split




BILLING CODE 4310–55–C

As of 2008, all eleven known occurrences of *Monardella viminea* were considered declining in size (this total includes two occurrences known to be extirpated by 2010 and two occurrences now considered *M. stoneana*), as are four additional transplanted occurrences (see *Transplants* below) (Ince and Krantz 2008, p. 9; Service 2008 p. 5). On MCAS Miramar, the species has declined by 45 percent since the 2002 surveys, from 3,379 individual plants to 1,809 individual plants (Tierra Data 2011, p. 12). In the past 2 years, multiple clumps of *M. viminea* that burned in the 2003 Cedar Fire have resprouted (Kassebaum 2010, pers. comm.). The most recent survey of MCAS Miramar, conducted in 2009, found juveniles or seedlings present in all canyons except for Elanus (Tierra Data 2011, pp. 17–18). Prior to this survey, juveniles were only confirmed present in West Sycamore Canyon (Kassebaum 2010, pers. comm.).

*Transplants*

In addition to the seven currently remaining natural occurrences, in 2007, *Monardella viminea* was transplanted to four sites within the historical range of the species as a conservation measure to offset impacts associated with development of the Carroll Canyon Business Park. Three of the transplanted sites were in Carroll Canyon and the fourth in San Clemente Canyon (Ince 2010, p. 3). Most of the *M. viminea*

transplants have experienced low survival rates, generally less than 20 percent, although one Carroll Canyon transplanted occurrence was reported to have a 44 percent survival rate (Service 2003, p. 25; Ince 2010, p. 8).

**Summary of Factors Affecting *Monardella viminea***

Section 4 of the Act and its implementing regulations (50 CFR 424) set forth the criteria for determining whether a species is endangered or threatened under the Act. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act: (A) The present or threatened destruction, modification or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors for *Monardella viminea* is discussed below.

*A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range*

Urbanization/Development

The original listing rule identified urban and residential development as a threat to *Monardella linoides* ssp. *viminea* (63 FR 54938; October 13, 1998). Prior to 1992, San Diego had grown by "a factor of 10 over the last 50 years" (Soule *et al.* 1992, p. 39). At the time of listing, two large occurrences were located on private property and development proposals existed for one of these two parcels. Since listing, one of those two occurrences has been extirpated due to construction activities: EO 25 from the Carroll Canyon Business Park (CNDDB 2010a). Additionally, EO 14 in Murphy Canyon was believed extirpated after listing due to lingering impacts from construction activity near Highway 15 (CNDDB 2010a). Two occurrences at MCAS Miramar have been partially destroyed by road construction since the time of listing.

The Cities of San Diego and Santee have purchased private property as reserve land for *Monardella viminea.* Most occurrences are now found on land conserved or owned by MCAS Miramar, the City of San Diego, and the County of San Diego. Lands owned by the City and County of San Diego are covered by the MSCP, which is a habitat conservation plan (HCP) intended to maintain and enhance biological diversity in the San Diego region, and to conserve viable populations of endangered, threatened, and key sensitive species and their habitats (including *M. viminea*). The MSCP plan designates lands to be set aside for biological preserves. However, 20 percent of habitat for *M. viminea* occurs on privately owned land outside of the reserve areas. This habitat includes *M. viminea* occurrences in Sycamore and Spring Canyons (portions of EOs 8 and 26), and a transplanted occurrence where plants were removed for construction of the Carroll Canyon Business Park (Ince and Krantz 2008, p. 1). Any sites outside of the MSCP reserve areas are vulnerable to development; portions of Sycamore Canyon where *M. viminea* occurs were previously slated for development (Service 2003, pp. 1–23), though the project has been put on hold due to bankruptcy issues, and no development is scheduled (San Diego Business Journal 2011, pp. 1–3).

However, the occurrences discussed above represent only a small proportion of habitat that contains clumps of *Monardella viminea.* Seventy percent of land where *M. viminea* occurs is owned and managed by MCAS Miramar, and all remaining large occurrences (with more than 100 clumps of *M. viminea*) are found on MCAS Miramar. All canyon areas on the base are protected from development. Therefore, although urbanization does threaten some occurrences of *M. viminea,* the threat to the species' habitat is not significant across the range of the species, now or in the foreseeable future.

Sand and Gravel Mining

Sand and gravel mining has broad-scale disruptive qualities to native ecosystems (Kondolf *et al.* 2002, p. 56). Sand and gravel mining was identified at the time of listing as adversely affecting *Monardella linoides* ssp. *viminea* (63 FR 54938; October 13, 1998). The larger of two occurrences (340 individuals) found on private land at the time of listing was identified as being threatened by sand and gravel mining, which was a threat that had the potential to eliminate or disrupt these local populations through changes in hydrology and elimination of individual plants. Since listing, all occurrences vulnerable to mining impacts have since been extirpated, either by altered drainage patterns or construction unrelated to mining operations (CNDDB 2010, EOs 3 and 25). Currently, we are not aware of any ongoing mining activities or any plans for future mining activities that would impact the species. While we may not be fully aware of all potential gravel mining activities on private lands, few *M. viminea* occurrences are on private land. Therefore, we do not consider sand and gravel mining to currently be a threat to *M. viminea,* nor a threat in the foreseeable future.

Altered Hydrology

The original listing rule identified altered hydrology as a threat to *Monardella linoides* ssp. *viminea,* particularly to portions of the habitat now considered to be in the range of *M. viminea* (63 FR 54938; October 13, 1998). *Monardella viminea* requires a natural hydrological system to maintain the secondary benches and streambeds on which it grows (Scheid 1985, pp. 30–31, 34–35). Upstream development can disrupt this regime, increasing storm runoff which can in turn erode the sandy banks and secondary benches upon which *M. viminea* grows. Floods also have the potential to wash away plants much larger than *M. viminea,* as has occurred in Lopez Canyon during heavy runoff following winter storms (Kelly and Burrascano 2001, pp. 2–3). This flood severely impacted the *M. viminea* occurrences in Lopez Canyon (Kelly and Burrascano 2006, pp. 65–69). Additionally, areas where altered hydrology caused decreased flows may experience an increase in invasion by nonnative species into creek beds, which can smother seedling and mature plants, and prevent natural growth of *M. viminea* (Rebman and Dossey 2006a, p. 12).

Changes in local and regional hydrology have had detrimental effects on *Monardella viminea.* Increases in surface and subsurface soil moisture (via direct effects to the water table associated with watershed urbanization) and changing streams from ephemeral to perennial adversely affect native plants adapted to a drier Mediterranean climate (cool moist winters and hot dry summers), such as *M. viminea.* Watershed urbanization alters the riparian vegetation community through changes in median and minimum daily discharges, dry season run-off, and flood magnitudes, specifically for Los Peñasquitos Creek and other locations (White and Greer 2006, pp. 133–136). Nonnative species incursion has been exacerbated by the changing water regime (underground hydrology), and *M. viminea* has been unable to adapt to the increased soil moisture (Burrascano 2007, pers. comm.).

Since listing, three occurrences have been extirpated due to altered hydrological patterns: Cemetery Canyon, Carroll Canyon, and western

San Clemente Canyon. All three of these occurrences are on city-owned or private land (CNDDB 2010a, EOs 3, 4, 11). On MCAS Miramar, watersheds on the undeveloped eastern half of the base, where most large occurrences of *Monardella viminea* are found, appear to have retained their natural hydrological regime (Rebman and Dossey 2006, p. 37). The only canyon on MCAS Miramar with substantial development and a historic occurrence of *M. viminea* is Rose Canyon. This location has lost all but one individual *M. viminea* (Rebman and Dossey 2006, p. 37).

Considering synergistic and cumulative effects of these combined hydrological threats, exacerbated by heavy development surrounding several canyons, we expect that altered hydrology will continue to pose a significant threat to habitats that support *Monardella viminea,* particularly outside the border of MCAS Miramar. We anticipate that this threat will continue into the foreseeable future.

Fire and Type Conversion

The listing rule mentioned that fuel modification to exclude fire could affect *Monardella linoides* ssp. *viminea* (63 FR 54938; October 13, 1998); the same is true of the reclassified *M. viminea* and its habitat. Otherwise, fire was not considered a severe threat to the species at the time of listing.

Our understanding of fire in fire-dependent habitat has changed since *Monardella linoides* ssp. *viminea* was listed in 1998 (Dyer 2002, pp. 295–296). Fire is a natural component for regeneration and maintenance of *M. viminea* habitat. The species' habitat needs concerning fire seem contradictory: A total lack of fire for long periods is undesirable, because the fires that eventually will occur can be catastrophic; yet re-introduction of fire (either accidentally or purposefully) is also undesirable, because such fires often become catastrophic as a result of previous lack of fire (*i.e.,* megafires). This conflicting situation has resulted from a disruption of the natural fire regime.

Fire frequency has increased in North American Mediterranean Shrublands in California since about the 1950s, and studies indicate that southern California has demonstrated the greatest increase in wildfire ignitions, primarily due to an increase in population density beginning in the 1960s, and thus increasing the amount of human-caused fires (Keeley and Fotheringham 2003, p. 240). Increased wildfire frequency and decreased return fire interval, in conjunction with other effects of urbanization, such as increased nitrogen deposition and habitat disturbance due to foot and vehicle traffic, are believed to have resulted in the conversion of large areas of coastal sage scrub to nonnative grasslands in southern California (Service 2003, pp. 57–62; Brooks *et al.* 2004, p. 677; Keeley *et al.* 2005, p. 2109; Marschalek and Klein 2010, p. 8). This type conversion (conversion of one type of habitat to another) produces a positive feedback mechanism resulting in more frequent fires and increasing nonnative plant cover (Brooks *et al.* 2004, p. 677; Keeley *et al.* 2005, p. 2109).

However, threats to the habitat from fire exclusion, which impacts processes that historically created and maintained suitable habitat for *Monardella viminea,* may make it even more vulnerable to extinction. The long-term ecological effects of fire exclusion have not been specifically detailed for *M. viminea;* however, we believe the effects of fire, fire suppression, and fire management in southern California habitats will be similar to that at locations in the Rockies, Cascades, and Sierra Nevada Mountains (Keane *et al.* 2002, pp. 15–16). Fire exclusion in southern California habitat likely affects: (1) Nutrient recycling, (2) natural regulation of succession via selecting and regenerating plants, (3) biological diversity, (4) biomass, (5) insect and disease populations, (6) interaction between plants and animals, and (7) biological and biogeochemical processes (*i.e.,* soil property alteration) (after Keane *et al.* 2002, p. 8). Where naturally occurring fire is excluded, species that are adapted to fire (such as *M. viminea*) are often replaced by nonnative, invasive species that are better suited to the same areas in the absence of fire (Keane *et al.* 2002, p. 9).

Some fire management is provided by CAL FIRE, which is an emergency response and resource protection department. CAL FIRE creates fire management plans to identify prevention measures that reduce risk, inform and involve the local communities in the area, and provide a framework to diminish potential wildfire losses and implement all applicable fire management regulations and policies (CAL FIRE 2011b; County of San Diego 2011a). CAL FIRE has signed a document to assist in management of backcountry areas in San Diego County, including Sycamore Canyon Ranch and its *Monardella viminea* occurrence (DPR 2009, p. 14; County of San Diego 2011, p. 1). However, the land protected under this agreement is only two percent of all *M. viminea* habitat.

Therefore, given the conversion of coastal sage scrub to nonnative grasses and the changing fire regime of southern California, we consider type conversion and the habitat effects of altered fire regime, particularly from increased frequency of fire, to be a significant threat to *M. viminea's* habitat both now and in the foreseeable future.

Summary of Factor A

*Monardella viminea* continues to be threatened by habitat loss and degradation by altered hydrological regimes that can result in uncontrollable flood events. Habitat of this species is also threatened by an unnatural fire regime resulting from manmade disturbance and activities, which in turn can cause invasion of the area by nonnative plants. Of the seven natural and four transplanted occurrences, those that are in areas where continued development is expected to occur may experience further alterations to hydrology and fire regimes. These threats to habitat are occurring now and are expected to continue into the foreseeable future.

*B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

To our knowledge, no commercial use exists for *Monardella viminea.* The listing rule suggested that professional and private botanical collecting could exacerbate the extirpation threat to the species due to botanists favoring rare or declining species (63 FR 54938; October 13, 1998). However, we are not currently aware of any interest by botanists in collecting *M. viminea.* Therefore, we do not believe that overutilization for commercial, recreational, scientific, or educational purposes constitutes a threat to this species now or in the foreseeable future.

*C. Disease or Predation*

Neither disease nor predation was known to be a threat affecting *Monardella linoides* ssp. *viminea* (63 FR 54938; October 13, 1998) at the time of listing. Volunteers have since noted grazing impacts to occurrences of *M. viminea* in Lopez Canyon (Kelly and Burrascano 2001, p. 5). However, this occurrence is the only documented location where grazing has occurred, and impacts were minimal. Therefore, based on the best available scientific and commercial information, neither disease nor herbivory constitute threats to *M. viminea* now or in the foreseeable future.

*D. The Inadequacy of Existing Regulatory Mechanisms*

At the time of listing, regulatory mechanisms that provided some protection for *Monardella linoides* ssp. *viminea* that apply to *Monardella viminea* included: (1) The Act in cases where *M. viminea* co-occurred with a Federally listed species; (2) the California Endangered Species Act (CESA); (3) the California Environmental Quality Act (CEQA); (4) implementation of conservation plans pursuant to California's Natural Community Conservation Planning Act; (5) land acquisition and management by Federal, State, or local agencies, or by private groups and organizations; and (6) local laws and regulations. The listing rule analyzed the potential level of protection provided by these regulatory mechanisms (63 FR 54938; October 13, 1998).

Currently, *Monardella linoides* ssp. *viminea* is listed as endangered under the Act (63 FR 54938; October 13, 1998). Provisions for its protection and recovery are outlined in sections 4, 7, 9 and 10 of the Act. This law is the primary mechanism for protecting *M. viminea,* which, as part of the original listed entity, currently retains protection under the Act. However, the protections afforded to *M. viminea* under the Act as part of *M. linoides* ssp. *viminea,* the currently listed entity, would continue to apply only if we determine to retain listed status for *M. viminea.* Therefore, for purposes of our analysis, we do not include the Act as an existing regulatory mechanism that protects *M. viminea.* We do note that *M. viminea* would likely continue to receive protection indirectly through habitat conservation plans (HCPs) approved under section10 of the Act and Natural Community Conservation Plans (NCCPs) approved under the State of California that will cover *M. viminea* even if the species is not Federally listed.

Federal Protections

National Environmental Policy Act (NEPA)

All Federal agencies are required to adhere to the National Environmental Policy Act (NEPA) of 1970 (42 U.S.C. 4321 *et seq.*) for projects they fund, authorize, or carry out. The Council on Environmental Quality's regulations for implementing NEPA (40 CFR 1500–1518) state that in their environmental impact statements agencies shall include a discussion on the environmental impacts of the various project alternatives (including the proposed action), any adverse environmental effects which cannot be avoided, and any irreversible or irretrievable commitments of resources involved (40 CFR 1502). The NEPA itself is a disclosure law that provides an opportunity for the public to submit comments on a particular project and propose other conservation measures that may directly benefit listed species; however, it does not impose substantive environmental mitigation obligations on Federal agencies. Any such measures are typically voluntary in nature and are not required by the statute. Activities on non-Federal lands are also subject to NEPA if there is a Federal nexus.

Sikes Act

In 1997, section 101 of the Sikes Act (16 U.S.C. 670a(a)) was revised by the Sikes Act Improvement Act to authorize the Secretary of Defense to implement a program to provide for the conservation and rehabilitation of natural resources on military installations. To do so, the Department of Defense was required to work with Federal and State fish and wildlife agencies to prepare an integrated natural resources management plan (INRMP) for each facility with significant natural resources. The INRMPs provide a planning tool for future improvements; provide for sustainable multipurpose use of the resources, including activities such as hunting, fishing, trapping, and non-consumptive uses; and allow some public access to military installations. At MCAS Miramar and other military installations, INRMPs provide direction for project development and for the management, conservation, and rehabilitation of natural resources, including *M. viminea* and its habitat.

Approximately 70 percent of the remaining habitat for *Monardella viminea* occurs within MCAS Miramar. The Marine Corps completed an INRMP (2006–2010) with the advice of the Service (Gene Stout and Associates 2006, p. ES–2). The 2011–2014 INRMP is expected to be published by the military in the upcoming weeks. This new INRMP continues to benefit the species by spatially and temporally protecting known populations on MCAS Miramar, most of which are not fragmented. Over 99 percent of all *M. viminea* occurrences on the base occur in Type I or II management areas, where conservation of listed species, including *M. viminea,* is a priority (Gene Stout and Associates 2006, pp. 5–2, 5–5). MCAS Miramar manages invasive species, a significant threat to *M. viminea,* in compliance with Executive Order 13112, which states that Federal agencies must provide for the control of invasive species (Gene Stout and Associates 2006, p. 7–3). Invasive species management is a must-fund project to be carried out annually, following guidelines established in the National Invasive Species Management Plan (Gene Stout and Associates 2006, p. 7–7). This plan mandates control measures for invasive species through a combination of measures including pesticides and mechanical removal (National Invasive Species Council 2001, p. 37), thus providing a benefit by addressing type conversion that results following fires (see Factor A above). It also provides wildland fire management, including creation of fuelbreaks, a prescribed burning plan, and research on the effects of wildfire on local habitat types (Gene Stout and Associates 2006, pp. 7–8—7–9). As a result, MCAS Miramar is addressing threats related to the potential stress of fire on individual plants (see Factor E). Despite the benefits to *M. viminea* provided through the INRMP, the species continues to decline on MCAS Miramar, due likely to the synergistic effects of flood, reduced shrub numbers, and exotic species encroachment (type conversion) following the 2003 Cedar wildfire (Tierra Data 2011, p. 26).

State and Local Regulations

California's Native Plant Protection Act (NPPA) and Endangered Species Act (CESA)

Under provisions of NPPA (Division 2, chapter 10 section 1900 *et seq.* of the California Fish and Game Code (CFG code)) and CESA (Division 3, chapter 1.5, section 2050 *et seq.* of CFG code), the CDFG Commission listed *Monardella linoides* ssp. *viminea* as endangered in 1979. Currently, the State of California recognizes the State-listed entity as *M. viminea.*

Both the CESA and NPPA include prohibitions forbidding the "take" of State endangered and listed species (Chapter 10, Section 1908 and Chapter 1.5, Section 2080, CFG code). With regard to prohibitions of unauthorized take under NPPA, landowners are exempt from this prohibition for plants to be taken in the process of habitat modification. When landowners are notified by the State that a rare or endangered plant is growing on their land, the landowners are required to notify CDFG 10 days in advance of changing land use in order to allow salvage of listed plants. Sections 2081(b) and (c) of CESA allow CDFG to issue incidental take permits for State-listed threatened species if:

(1) The authorized take is incidental to an otherwise lawful activity;

(2) The impacts of the authorized take are minimized and fully mitigated;

(3) The measures required to minimize and fully mitigate the impacts of the authorized take are roughly proportional in extent to the impact of the taking of the species, maintain the applicant's objectives to the greatest extent possible, and are capable of successful implementation;

(4) Adequate funding is provided to implement the required minimization and mitigation measures and to monitor compliance with and the effectiveness of the measures; and

(5) Issuance of the permit will not jeopardize the continued existence of a State-listed species.

The relationship between the NPPA and CESA has not been clearly defined under state law. The NPPA, which has been characterized as an exception to the take prohibitions of CESA, exempts a number of activities from regulation including: clearing of land for agricultural practices or fire control measures; removal of endangered or rare plants when done in association with an approved timber harvesting plan, or mining work performed pursuant to Federal or State mining laws, or by a public utility providing service to the public; or when a landowner proceeds with changing the use on their land in a manner that could result in take, provided the landowner notifies CDFG at least 10 days in advance of the change. These exemptions indicate that CESA and NPPA may be inadequate to protect *Monardella viminea* and its habitat, including from activities such as development/urbanization, altered hydrology or fuel modification.

California Environmental Quality Act (CEQA)

The California Environmental Quality Act (CEQA) (Public Resources Code 21000–21177) and the CEQA Guidelines (California Code of Regulations, Title 14, Division 6, Chapter 3, Sections 15000–15387) require State and local agencies to identify the significant environmental impacts of their actions and to avoid or mitigate those impacts, if feasible. The CEQA applies to projects proposed to be undertaken or requiring approval by State and local government agencies, and the lead agency must complete the environmental review process required by CEQA, including conducting an initial study to identify the environmental impacts of the project and determine whether the identified impacts are significant; if significant impacts are determined, then an environmental impact report must be prepared to provide State and local agencies and the general public with detailed information on the potentially significant environmental effects (California Environmental Resources Evaluation System 2010). "Thresholds of Significance" are comprehensive criteria used to define environmental significant impacts based on quantitative and qualitative standards and include impacts to biological resources such as candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the CDFG or the Service; or any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations, or by the CDFG or Service (CEQA Handbook, Appendix G, 2010). Defining these significance thresholds helps ensure a "rational basis for significance determinations" and provides support for the final determination and appropriate revisions or mitigation actions to a project in order to develop a mitigated negative declaration rather than an environmental impact report (Governor's Office of Planning and Research 1994, p. 5). Under CEQA, projects may move forward if there is a statement of overriding consideration. If significant effects are identified, the lead agency has the option of requiring mitigation through changes in the project or to decide that overriding considerations make mitigation infeasible (CEQA section 21002). Protection of listed species through CEQA is, therefore, dependent upon the discretion of the lead agency involved.

California's Natural Community Conservation Planning (NCCP) Act

The NCCP program is a cooperative effort between the State of California and numerous private and public partners with the goal of protecting habitats and species. An NCCP identifies and provides for the regional or area-wide protection of plants, animals, and their habitats, while allowing compatible and appropriate economic activity. The program began in 1991, under the State's NCCP Act (CFG Code 2800–2835). The primary objective of the NCCP program is to conserve natural communities at the ecosystem scale while accommodating compatible land uses (*http://www.dfg.ca.gov/habcon/nccp/*). Regional NCCPs provide protection to Federally listed species, and often unlisted species, by conserving native habitats upon which the species depend. Many NCCPs are developed in conjunction with HCPs prepared pursuant to the Act. The City and County of San Diego Subarea Plans under the MSCP are discussed below.

City of San Diego and County of San Diego Subarea Plans under the Multiple Species Conservation Plan (MSCP)

The MSCP is a sub-regional HCP and NCCP made up of several subarea plans that have been in place for more than a decade. Under the umbrella of the MSCP, each of the 12 participating jurisdictions is required to prepare a subarea plan that implements the goals of the MSCP within that particular jurisdiction. The sub-regional MSCP covers 582,243 ac (235,625 ha) within the county of San Diego. Habitat conservation plans and multiple species conservation plans approved under section 10 of the Act are intended to protect covered species by avoidance, minimization, and mitigation of impacts.

The MSCP Subarea Plan for the City of San Diego includes *Monardella viminea* (denominated as *M. linoides* ssp. *viminea*) as a covered species. The City's subarea plan designates land to be set aside for a biological preserve (City of San Diego 1997, p. 1–1). As of January 2011, less than 20 percent of all *M. viminea* occurrences were in the City of San Diego MSCP plan area (Service 2008, p. 10); the majority of the other occurrences are on lands owned by MCAS Miramar, with small numbers of clumps occurring on private and county-owned lands. Almost all occurrences that occur within the City of San Diego's MSCP Subarea Plan area have been protected in MSCP reserves and are annually monitored (City of San Diego 2010, p. 1). However, the management plan for the City of San Diego MSCP Subarea Plan has not been finalized; thus long-term management and monitoring provisions for this plant are not in place. Although management needs are frequently identified for *M. viminea,* the actions are not carried out on a regular basis to decrease threats to the plants, such as presence of nonnative vegetation and altered hydrology.

Within the City of San Diego MSCP Subarea Plan, further protections are afforded by the Environmentally Sensitive Lands ordinance (ESL). The ESL provides protection for sensitive biological resources (including *Monardella viminea* and its habitat), by ensuring that development occurs "in a manner that protects the overall quality of the resources and the natural and topographic character of the area, encourages a sensitive form of development, retains biodiversity and interconnected habitats, maximizes physical and visual public access to and along the shoreline, and reduces hazards due to flooding in specific areas

while minimizing the need for construction of flood control facilities," thus providing protection against alteration of hydrology, a significant threat to *M. viminea.* The ESL was designed to act as an implementing tool for the City of San Diego Subarea Plan (City of San Diego 1997, p. 98).

The County of San Diego MSCP Subarea Plan covers 252,132 ac (102,035 ha) of unincorporated county lands in the southwestern portion of the MSCP plan area. Only two percent of *Monardella viminea* habitat occurs on County lands. The entirety of this habitat is included within the Sycamore Canyon Preserve established under the County of San Diego MSCP Subarea Plan. In 2009, a management plan was published for the preserve, with monitoring anticipated to begin in 2013. The plan specifically addresses *M. viminea* through removal of nonnative vegetation, habitat restoration, and implementation of a managed fire regime with a priority of protecting biological resources (DPR 2009, pp. 71, 76–77). Additionally, the plan mandates management to address the "natural history of the species and to reduce the risk of catastrophic fire," possibly including prescribed fire (DPR 2009, p. 71); these measures address the stressor of fire on individual plants (Factor E) and the threat of type conversion due to frequent fire (Factor A).

Summary of Factor D

In determining whether *Monardella viminea* should be retained as a listed species under the Act, we analyze the adequacy of existing regulatory mechanisms without regard to current protections afforded under the Act. The majority (greater than 70 percent) of *M. viminea* occurrences are on MCAS Miramar. The base has developed and is implementing an INRMP under the Sikes Act to protect these occurrences (Factor E) and is addressing threats from type conversion due to frequent fire (Factor A). However, notwithstanding the benefit to *M. viminea* provided by the INRMP, the synergistic effects of flood, reduced shrub numbers, frequent fire, and nonnative species encroachment are resulting in a decline of *M. viminea* on the base (Factor E). While the INRMP does not eliminate threats to the species from megafire, we do not believe megafire impacts are susceptible to a regulatory fix.

The majority of *Monardella viminea* occurrences outside of MCAS Miramar are located within land owned by the City of San Diego, and they receive protection under the City of San Diego's MSCP Subarea Plan, which was approved under CESA and NCCP Act. The City of San Diego's MSCP Subarea plan provides protective mechanisms for *M. viminea* for proposed projects; these protective mechanisms are intended to address potential impacts that could threaten the species, such as development or actions that could result in altered hydrology. One such plan was developed for the city-owned land within West Sycamore Canyon. This land, a total of 21 ac (9 ha), was included within the development project entitled Sycamore Estates. This plan included monitoring of *M. viminea* occurrences within West Sycamore Canyon and provisions to prevent altered hydrology to areas containing *M. viminea* through construction of mechanisms such as silt fences to prevent erosion and subsequent alteration of channel structure (T&B Planning Consultants 2001, pp. 136, 166). However, Sycamore Estates was never completed (see Factor A), and no monitoring has taken place in West Sycamore Canyon. Therefore, the plan addressing construction on Sycamore Estates is not currently protecting *M. viminea.*

The City of San Diego Subarea Plan also includes provisions for monitoring and management through development of location-specific management plans for preserve land. However, the City of San Diego MSCP Subarea Plan has not developed final monitoring and management plans for *M. viminea.* As a result, even though occurrences of *M. viminea* are monitored on a yearly basis and management needs for *M. viminea* habitat are identified, conservation measures to ameliorate immediate and significant threats to the species from nonnative species and alteration of hydrology are not actively being implemented because the management plans are not yet in place. With regards to lands covered by the County of San Diego MSCP Subarea Plan (two percent of the species' habitat), regulatory mechanisms are in place to conserve and manage *Monardella viminea.*

Despite the protections afforded to *Monardella viminea* under the Sikes Act through the INRMP for MCAS Miramar and the protections afforded under the City of San Diego and County of San Diego plans, we conclude that existing regulatory mechanisms at this time are inadequate to alleviate the threats to this species in the absence of the protections afforded by the Act.

*E. Other Natural or Manmade Factors Affecting Its Continued Existence*

Trampling

Trampling was identified as a threat to *Monardella linoides* ssp. *viminea* in the listing rule (63 FR 54938; October 13, 1998). Trampling of *M. viminea* occurs via human travel through the habitat of the species. This factor has not been quantified, and to date is only suspected to be a threat to *M. viminea* via direct mortality and increasing rates of erosion (Service 2008, p. 11). Trampling on private lands cannot currently be controlled and could impact populations located on private lands; however, few occurrences are located on private lands, and we have no evidence of trampling-related mortality. Therefore, we do not consider trampling to be a significant threat across the range of the species.

Nonnative Plant Species

The listing rule identifies nonnative plants as a threat to *Monardella linoides* ssp. *viminea* (63 FR 54938; October 13, 1998); this threat is ongoing for the occurrences of the listed entity now considered to be *M. viminea.* San Diego County habitats have been altered by invasion of nonnative species (Soule *et al.* 1992, p. 43). Nonnative grasses, which frequently out-compete native species for limited resources and grow more quickly, can smother seedling and mature *M. viminea* and prevent natural growth (Rebman and Dossey 2006a, p. 12). Nonnative plants also have the potential to lower water tables and alter rates of sedimentation and erosion by altering soil chemistry, nutrient levels, and the physical structure of soil. As such, they can often out-compete native species such as *M. viminea* (Kassebaum 2007, pers. comm.). Nonnative plants also alter frequencies, size, and intensity of fires (flame duration and length, soil temperature during a fire, and after-effects of long-term porosity and soil glassification, in which high heat causes silica particles in the soil to fuse together to form an impermeable barrier) (Vitousek *et al.* 1997, pp. 8–9; Arno and Fielder 2005, p. 19).

When the processes of natural disturbance, such as fire regime and normal storm flow events, are altered, native and nonnative plants can overcome otherwise suitable habitat for *Monardella viminea* (Kassebaum 2007, pers. comm.). At least four occurrences of *M. viminea* are believed to have been extirpated since listing due in part to invasion of native and nonnative plant species (CNDDB 2010a; EOs 11, 12, 13, and 15). Nonnative plants are present throughout all canyons on MCAS Miramar where *M. viminea* occurs, occupying areas that might instead be colonized by *M. viminea* seedlings (Tierra Data 2011, p. 29). Areas heavily invaded by nonnative grasses have fewer adult *M. viminea* plants than areas

free from invasion, or feature adult plants that have been reduced in size after the encroachment of nonnative species (Tierra Data 2011, p. 29). Additionally, one occurrence monitored by the City of San Diego has undergone a rapid increase in nonnative plant cover, climbing from 26 percent in 2008 to 71 percent in 2010 (City of San Diego 2008, p. 1; City of San Diego 2010, p. 11).

Due to the absence or alteration of the natural disturbance processes within the range of *Monardella viminea* that has caused competition for space and nutrients, increased fire intensity, and extirpation of *M. viminea* occurrences since listing, we consider nonnative plant species to be a significant factor threatening the continued existence of the species, both now and in the foreseeable future.

Small Population Size and Restricted Range

The listing rule identified the restricted range and small population size of *Monardella linoides* ssp. *viminea* as threats. These conditions increase the possibility of extinction due to chance events, such as floods, fires, or drought, beyond the natural variability of the ecosystem (Lande 1993, p. 912; 60 FR 40549, August 9, 1995). Chance or stochastic events have occurred in the range of *M. viminea,* and it is very possible that these events may continue to make *M. viminea* vulnerable to extinction, because of *M. viminea's* small numbers and limited range. Of the 20 occurrences of *M. viminea* known at the time of listing, 5 had fewer than 100 individuals. None of the smallest five populations were protected at the time of listing, and all have since been extirpated due to competition with nonnative grasses, construction, or unknown reasons (CNDDB 2010). As stated earlier, only 7 natural occurrences remain. Currently, despite their protection on reserve lands, many of the largest occurrences with multiple clumps and the healthiest-looking leaves and flowers are still declining in number.

In particular, small population size makes it difficult for *Monardella viminea* to persist while sustaining the impacts of fire, altered hydrologic regimes, and competition with nonnative plants. Prior to the 2008 5-year review, monitoring of the MCAS Miramar occurrences indicated that the population had declined significantly for unknown reasons that could not be clearly linked to the cumulative impacts of fire, herbivory, or hydrological regimes (Rebman and Dossey 2006a, p. 14). Since the 2006 surveys by Rebman and Dossey at MCAS Miramar, plants damaged in the 2003 fire have resprouted from the root. Despite the fact that plants have resprouted, biological monitors at MCAS Miramar report that the decline continues and the cause is unknown, with 45 percent of the population on MCAS Miramar lost since 2002 (Kassebaum 2010, pers. comm.; Tierra Data 2011, p. 12). No empirical information is readily available to estimate the rate of population decrease or time to extinction for *M. viminea;* however, its habitat and population have decreased since the time of listing. Therefore, based on the best available scientific information, we consider that small population size and the declining trend of *M. viminea* exacerbate the threats attributable to other factors.

Fire

Although the habitat occupied by *Monardella viminea* is dependent upon some form of disturbance to reset succession processes (such as periodic fire and scouring floods), we considered whether megafire events have the potential to severely impact or eliminate populations by killing large numbers of individual plants, their underground rhizomes (stems), and the soil seed bank. Also, severe fire could leave the soil under hydrophobic conditions, in which the soil becomes water-repellant, often resulting in plants receiving an inadequate amount of water (Agee 1996, pp. 157–158; Keane *et al.* 2002, p. 8; Keeley 2001, p. 87; Arno and Fiedler 2005, p. 19).

Recently, San Diego County has been impacted by multiple large fire events, a trend that is expected to continue. A model by Snyder *et al.* (2002, p. 9–3) suggests higher average temperatures for every month in every part of California, which would create drier, more combustible fuel types. Also, Miller and Schlegel (2006, p. 6) suggest that Santa Ana conditions (characterized by hot dry winds and low humidity) may significantly increase during fire season under global climate change scenarios. Small escaped fires have the potential to turn into large fires due to wind, weather conditions of temperature and humidity, lack of prescribed fires to control fuels, invasive vegetation, and inadequate wildfire control/prevention. For example, the October 2007 Harris fire in San Diego County burned 20,000 acres (ac) (8,094 hectares (ha)) within 4 hours of ignition (California Department of Forestry 2008, p. 57). Another fire near Orange, California, turned into a large size-class fire in less than 12 hours, and an unattended campfire set off the June 2007 Angora fire near Lake Tahoe in northern California, which spread 4 miles (6.4 kilometers) in its first 3 hours, and burned over 3,000 ac (1,214 ha) (USDA 2007, p. 1).

A narrow endemic such as *Monardella viminea* could be especially sensitive to megafire events. One large fire could impact all or a large proportion of the entire area where the species is found, as occurred in the 2003 Cedar Fire, where 98 percent of occurrences on MCAS Miramar and *M. viminea* clumps in the privately owned portions of Sycamore Canyon burned. However, despite the overlap of the Cedar Fire with *M. viminea* occurrences on MCAS Miramar, the decline of the burned occurrences of *M. viminea* was not as severe as initially expected, as plants were later able to resprout from the root. Additionally, new juveniles and seedlings documented by the 2009 survey occurred primarily on lands burned by the 2003 Cedar Fire (Tierra Data 2011, p. 16).

Given the increased frequency of megafires within Southern California ecosystems, and the inability of regulatory mechanisms to prevent or control megafire, we find that megafire does have the potential to impact occurrences of *Monardella viminea.* However, given *M. viminea's* persistence through past fires and its ability to recover from direct impact by fires, we do not find that megafire is a significant threat to individual *M. viminea* plants now, nor is likely to become a significant threat in the foreseeable future. However, as noted in the Factor A discussion above, we do find that type conversion due to altered fire regime and megafire are threats to the habitat that supports *M. viminea.*

Climate Change

A broad consensus exists among scientists that the earth is in a warming trend caused by anthropogenic greenhouse gases such as carbon dioxide (IPCC 2007). Researchers have documented climate-related changes in California (Croke *et al.* 1998, pp. 2128, 2130; Breshears *et al.* 2005, p. 15144). Predictions for California indicate prolonged drought and other climate-related changes will continue in the future (Field *et al.* 1999, pp. 8–10; Lenihen *et al.* 2003, p. 1667; Hayhoe *et al.* 2004, p. 12422; Breshears *et al.* 2005, p. 15144; Seager *et al.* 2007, p. 1181; IPCC 2007, p. 9). Models are not yet powerful enough to predict what will happen in localized regions, such as southern California, but many scientists believe warmer, wetter winters and warmer, drier summers will occur within the next century (Field *et al.* 1999, pp. 2–3, 20). The impacts on

species like *Monardella viminea,* which depend on specific hydrological regimes, may be more severe (Graham 1997, p. 2).

Since approximately the time of listing in 1998, an extended drought in the region (San Diego County Water Authority 2010, p. 2) created unusually dry habitat conditions. From 2000 to 2009, at one of the closer precipitation gauges to the species' range (Lake Cuyamaca, San Diego County, California), 8 of 10 years had precipitation significantly below normal (San Diego County Water Authority 2010, p. 2). This extended drought has cumulatively affected moisture regimes, riparian habitat, and vegetative conditions in and around suitable habitat for *Monardella viminea,* and thus increased the stress on individual plants. As stated above, predictions indicate that future climate change may lead to similar, if not more severe, drought conditions.

The predicted future drought could impact the dynamic of the streambeds where *Monardella viminea* grows. Soil moisture and transportation of sediments by downstream flow have been identified as key habitat features required by *M. viminea.* The species is characterized as being associated with areas of standing water after rainfall (Elvin and Sanders 2003, p. 426). Monitors for the City of San Diego have observed decreased plant health and increased dormancy of *Monardella* species in years with low rainfall (City of San Diego 2003, p. 3; City of San Diego 2004, p. 3). Specific analyses of population trends as correlated to rainfall are difficult due to inconsistent plant count methods (City of San Diego 2004, p. 67).

Additionally, drier conditions may result in increased fire frequency. As discussed under Factors A and E, this could make the ecosystems in which *Monardella viminea* currently grows more vulnerable to the threats of subsequent erosion and invasive species. In a changing climate, conditions could change in a way that would allow both native and nonnative plants to invade the habitat where *M. viminea* currently occurs (Graham 1997, p. 10).

While we recognize that climate change and increased drought associated with climate change are important issues with potential effects to listed species and their habitats, the best available scientific information does not currently give evidence specific enough for us to formulate accurate predictions regarding its effects to particular species, including *Monardella viminea.* Therefore, we do not consider global climate change a current threat to *M. viminea,* now or in the foreseeable future.

Summary of Factor E

Based on a review of the best available scientific and commercial data regarding trampling, nonnative plant species, megafire, climate change, and small population size and restricted range, we found that nonnative plant species pose a significant threat to *Monardella viminea.* Additionally, the small population size and restricted range of *M. viminea* could exacerbate threats to the species. We found no other evidence that trampling or other natural or manmade factors pose a significant threat to *M. viminea,* either now or in the foreseeable future. We conclude based on the best available scientific information that *M. viminea* could be affected by fire impacts associated with the death of individual plants; however, we do not consider this a significant threat to the continued existence of the species. Finally with regard to the direct and indirect effects of climate change on individual *M. viminea* plants and its habitat, we have no information at this point to demonstrate that predicted climate changes poses a significant threat to the species either now or in the foreseeable future.

**Proposed Determination—*Monardella viminea***

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to *Monardella viminea.* As described above, we find that threats attributable to Factor A (The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range) represent significant threats to *M. viminea,* particularly through severe alteration of hydrology in Carroll, Lopez, and San Clemente Canyons. Additionally, type conversion and habitat degradation due to frequent fire represent a significant and immediate threat to the species across its range. We also find that, in the absence of the Act, other existing regulatory mechanisms as described under Factor D would not provide protections adequate to alleviate threats to *M. viminea.* Finally, we find that threats attributable to Factor E (Other Natural or Manmade Factors Affecting Its Continued Existence) represent significant threats to the species throughout its range, including impacts from nonnative plant species invading canyons where *M. viminea* exists. Additionally, the small population size of *M. viminea* could exacerbate the threats to the species. Furthermore, the synergistic effects of flood, reduced shrub numbers, frequent fire, and nonnative species encroachment pose an increased risk to the species, resulting in continued population decline such as that seen on MCAS Miramar in recent years.

When the species was listed in 1998, there were 18 extant occurrences of what we now consider to be *Monardella viminea;* currently, there are only 7 known natural occurrences of *M. viminea.* All seven of these occurrences have continued to decline since listing and since the most recent (2008) 5-year review. Since the recent taxonomic revision of *Monardella linoides* ssp. *viminea* into two separate species, we now know that both the number of clumps and the limited geographic range of *M. viminea* are substantially less than originally thought, as two of the occurrences at time of listing are now considered to be *M. stoneana.* As discussed above, natural occurrences of *M. viminea* occur in only six watersheds in a very limited area of San Diego County. Transplanted occurrences occur in two additional canyons; however, over the past 3 years, survival of three of the transplanted sites is below 20 percent, with the fourth at only 44 percent (Ince 2010, p. 8). Additionally, the most recent surveys from MCAS Miramar, which holds the majority of the largest occurrences, have shown a rapid decline of the species over the past 7 years (Tierra Data 2011, p. 12).

The Act defines an endangered species as any species that is "in danger of extinction throughout all or a significant portion of its range" and a threatened species as any species "that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future." Given the rapid population decline (particularly the decline of 45 percent of the population on MCAS Miramar since 2002), the species' limited range and small population size, and continuing significant threats, we find that *Monardella viminea* is in danger of extinction throughout its range. Therefore, endangered status under the Act continues to be warranted for *M. viminea.*

**Status Review—*Monardella stoneana***

*Species Description*

*Monardella stoneana* is a perennial herb or subshrub in the Lamiaceae (mint family) with a woody base and aromatic leaves. The sparsely pubescent multiple stems bear sparsely gland-dotted broadly lanceolate to lance-ovate leaves, and dense, terminal clusters of pale

pink flowers. The leaves are 0.6–1.2 in (15–30 mm) long by 0.2–0.4 in (4–10 mm) wide, and the middle flower bracts are 0.3–0.4 in (7–10 mm) long (Elvin and Sanders 2003, pp. 426, 431–432). *Monardella stoneana* often grows together in clumps of one to four individual plants. As the number of plants within a clump cannot be reliably distinguished without exposing the roots, the species is usually counted by clumps rather than as individual plants.

*Habitat*

*Monardella stoneana* occurs in cypress forest and chaparral habitats on banks of ephemeral washes in canyons where surface water flows for usually less than 48 hours after a rain event (Elvin and Sanders 2003, p. 430; SANDAG 1995). It is often found with *Baccharis sarothroides* (broom baccharis) and Cupressus (cypress) species (CNDDB 2010b). It is most commonly found in canyon bottoms and north-facing slopes, and along bends of meandering drainages (Elvin and Sanders 2003, p. 426). Many of the streams where *M. stoneana* grows hold water for up to several months during the rainy season (Elvin and Sanders 2003, p. 426). *Monardella stoneana* is found on rockier substrate than *M. viminea,* often between spaces in stones or boulders along the creek bed (Elvin and Sanders 2003, p. 426; City of San Diego 2005, p. 3; City of San Diego 2008, p. 4).

The chaparral habitat that *Monardella stoneana* favors benefits from small or managed fires that clear out dead or encroaching scrub vegetation and reduce nonnative species (Minnich 1983, p. 1290). Chaparral is more resistant to fire than coastal sage scrub, due to strong recruitment and effective germination after repeated fire events (Keeley 1987, p. 439; Tyler 1995, p. 1009). As with *M. viminea,* there are two ways in which fire can negatively impact *M. stoneana.* First, an increased frequency of fires of all sizes can result in type conversion or invasion of nonnative grasses into chaparral habitats that can choke out native vegetation, including shrubs associated with *M. stoneana.* This is a habitat-based effect. Second, large or unmanaged fires (megafire) can be a particular threat to a narrow endemic species like *M. stoneana* because a single megafire could eliminate a large proportion of individual plants within the extant range of the species. Rebman and Dossey (2006b, p. 2) reported that *M. viminea* is capable of resprouting after fire; we expect the same to be true of *M. stoneana.* Additional information is needed on the role of fire in *M. stoneana* habitat, particularly within riparian portions of canyons, and the effects of fire on clumps of *M. stoneana.* Please see our request for information in the Public Comments section above.

*Life History*

Very little is known about the germination and establishment of *Monardella stoneana.* Mature plants of the closely related *M. viminea* flower readily, with inflorescences persisting for 10 to 12 weeks (Elvin and Sanders 2003, pp. 430–431). Plants are short-lived perennials producing a new cohort of aerial stems each year from a persisting perennial root structure. Plants of this species are not known to be rhizomatous; however, root masses may become separated over time, resulting in adjacent genetically identical but separate plants.

No pollination studies are known to exist for *Monardella stoneana;* however, other *Monardella* taxa are visited by butterfly and bee species (Elvin 2003, p. 2). Bees collected from the closely related *M. linoides* include wasp-like bees (*Hylaeus* sp.), mason bees (*Osmia* spp. or *Chalicodoma* spp.), and miner bees (*Anthophora* spp.) (Hurd 1979, pp. 1762, 1765, 2042, 2073, and 2164). Successful reproduction of flowering plants depends on pollinator abundance and effectiveness (Javorek *et al.* 2002, p. 350). Therefore, pollinator movement and availability should be considered when assessing likely population distributions and survival, and habitat needs of *M. stoneana.*

*Geographic Range and Status*

*Monardella stoneana* is a geographically narrow endemic restricted to southwestern San Diego County, in the United States, and to northern portions of Baja California, Mexico (Figure 1). All eight extant occurrences and one extirpated occurrence (Table 1) are found in the vicinity of Otay Mesa, Otay Mountain, and Tecate Peak (CNDDB 2010b). *Monardella stoneana* occurs on lands owned by the BLM, the City of San Diego, the State of California, the CDFG, and lands under private ownership. The use of the word occurrence, as described in the *Geographic Range and Status* section for *M. viminea,* also applies to *M. stoneana.*

A total of two occurrences now considered *Monardella stoneana* were known and extant at the time of listing (63 FR 54938; October 13, 1998). According to the most recent report from the CNDDB, eight occurrences of *M. stoneana* are currently extant, with additional clumps easily visible in Mexico just across the border from California (CNDDB 2010b, EOs 7, 8). Due to the rarity of juveniles of this species and the closely related *M. viminea,* and the fact that most occurrences were discovered less than 5 years after listing, we believe all occurrences were extant at the time of listing.

There is little information available on the population trends of most *Monardella stoneana* occurrences since listing. Only two EOs receive regular monitoring, EO 1 (Marron Valley) and EO 5 (Buschalaugh Cove). The Buschalaugh Cove occurrence, located on land owned by the City of San Diego, declined from two clumps in 2004 to one clump in 2006, and then no clumps in 2008 (City of San Diego 2004, p. 3; City of San Diego 2006, p. 8; City of San Diego 2008, p. 2). The last remaining clump at this occurrence was burned as a result of the 2007 Harris Fire and has not been located by monitors since that time (City of San Diego 2008, p. 2; City of San Diego 2009, p. 2; City of San Diego 2010, p. 256). The Marron Valley occurrence, also located on land owned by the City of San Diego, appears to have declined slightly from 120 individuals in 2002, to 95 in 2010 (City of San Diego 2010a, p. 238; City of San Diego 2010b, p. 2). However, the City of San Diego acknowledges that its monitoring methods are not always consistent across years (City of San Diego 2005, pp. 2–3), so the differences could be an artifact of inconsistencies in monitoring. Since 2005, the population has remained steady at 95 plants (City of San Diego 2010b, p. 2).

Little information is available on the other occurrences. Reports from the CNDDB state that the Otay Lakes occurrence declined from 200 clumps in 1989, to 25 plants in 2005 (EO 4; CNDDB 2010b, p. 4); these are the only two surveys we are aware of for this occurrence. According to the CNDDB, all other occurrences are still extant (CNDDB 2010b). No surveys have been conducted in Mexico; the only known occurrences in Mexico are those visible across the border, as discussed above.

**Summary of Factors Affecting *Monardella stoneana***

As stated above in the Summary of Factors Affecting *Monardella viminea* section, the original listing rule for the *M. linoides* ssp. *viminea* contained a discussion of these five factors, as did the 2008 5-year review. However, the reader must bear in mind that both of these documents included discussions regarding *M. linoides* ssp. *viminea,* without separation, or recognition of *M. stoneana* or *M. viminea.* Below, each of

the five listing factors is discussed for *M. stoneana* specifically.

*A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range*

Urbanization/Development

The original listing rule identified urban development as one of the most important threats to *Monardella linoides* ssp. *viminea* (63 FR 54938; October 13, 1998). However, the urbanization and development threats described in the 1998 listing rule apply only to those occurrences now attributable to *M. viminea.*

*Monardella stoneana* occurs almost entirely on publicly owned land managed by the BLM (approximately 34 percent), CDFG (approximately 55 percent), or City of San Diego (approximately 7 percent). These occurrences are protected from habitat destruction or modification due to urban development because they are conserved and managed within the BLM's Otay Mountain Wilderness or the City of San Diego's and CDFG's preserves under the MSCP; this contrasts with *M. viminea* occurrences conserved by the City of San Diego that do not have management plans (see also Factor D discussion below and Factor D discussion for *M. viminea*).

The *Monardella stoneana* occurrences located on the two sections of land owned by the City of San Diego have been set aside for conservation purposes and are undevelopable. The one occurrence located on private land at the Otay Lakes site is contained within lands set aside as part of the Otay Ranch Preserve, and thus protected from development. Based on the lack of threats from development on land currently occupied by *M. stoneana,* we do not believe that urban development is a threat to this species now, nor will it be in the foreseeable future, within the United States. While we are not aware of any proposed development in areas occupied by *M. stoneana* in Mexico, we are also not aware of the extent of the species' distribution in Mexico. Thus, the best scientific evidence does not support urbanization as a significant threat to *M. stoneana* in Mexico.

Sand and Gravel Mining

Sand and gravel mining activities were identified as threats to *Monardella linoides* ssp. *viminea* in the 1998 listing rule and the recent 5-year review (63 FR 54938, October 13, 1998; Service 2008). As was the case for urban development, the threats described in the 1998 listing rule apply only to those occurrences now attributable to *M. viminea.* We are not aware of any historical mining that has impacted occurrences of *M. stoneana,* nor are we aware of any plans for future mining activities that may impact the species. Therefore, we believe that sand and gravel mining activities do not pose a threat to the continued persistence of *M. stoneana.*

Altered Hydrology

The original listing rule identified altered hydrology as a threat to *Monardella linoides* ssp. *viminea* (63 FR 54938; October 13, 1998). *Monardella viminea* depends on a natural hydrological system to maintain the secondary alluvial benches and streambeds on which it grows (Scheid 1985, pp. 30–31, 34–35); we believe the closely related *M. stoneana* does as well. Upstream development can disrupt this regime by increasing storm runoff, which can result in erosion of stream banks and rocky cobble upon which *M. stoneana* grow. Floods also have the potential to wash away plants much larger than *M. stoneana,* as has occurred with *M. viminea* in Lopez Canyon (Kelly and Burrascano 2001, pp. 2–3). On the other hand, decreased flows increase the possibility of invasion by nonnative species into the creek bed, which can smother seedling and mature plants and disrupt growth processes (Rebman and Dossey 2006a, p. 12).

Habitat characteristics for *Monardella stoneana* have not been described in detail, but, as with *M. viminea,* alteration of hydrology may disrupt the natural processes and habitat characteristics that support *M. stoneana.* However, *M. stoneana* reportedly "most often grows among boulders, stones, and in cracks of the bedrock of these intermittent streams in rocky gorges" (Elvin and Sanders 2003, p. 429), which suggests the habitat of *M. stoneana* may be largely resistant to erosion events. More importantly, given the lack of urban development in the Otay area where the majority of the plants occur, substantial alteration of hydrology has not occurred to date and is not expected to occur in the foreseeable future, and is thus not a threat to *M. stoneana.*

Fire and Type Conversion

As discussed under Factor A for *Monardella viminea,* our understanding of the role of fire in fire-dependent habitat has changed since the time of listing, and the intensity of wildfire and frequency of megafires has increased compared to historical regimes. However, *M. stoneana* is associated with different habitat types than *M. viminea.* While *M. viminea* occurs in coastal sage scrub and riparian scrub, *M. stoneana* is found primarily in chaparral habitats.

Chaparral is more resistant to fire than coastal sage scrub, due to strong recruitment and effective germination after repeated fire events (Keeley 1987, p. 439; Tyler 1995, p. 1009). Chaparral is considered a crown-fire ecosystem, meaning ecosystems which "have endogenous mechanisms for recovery that include resprouting from basal burrs and long-lived seed banks that are stimulated to germinate by fire" (Keane *et al.* 2008, p. 702). These ecosystems are also resilient to high-intensity burns (Keeley *et al.* 2008, p. 1545).

The fire regime in Baja California, Mexico, where some *Monardella stoneana* occurs, has not undergone the same fire suppression activities that have occurred in the United States. Some researchers claim that the fire regime of chaparral growing in Baja California is thus not affected by megafires due to a lack of fire suppression activities (Minnich and Chou 1997, Minnich 2001). Nevertheless, Keeley and Zedler (2009, p. 86) believe that the fire regime in Baja California still mirrors that of Southern California, similarly consisting of "small fires punctuated at periodic intervals by large fire events" Therefore, we expect that impacts from fire in Baja California will be similar to that in San Diego County.

Despite the resiliency of chaparral ecosystems to fire events, chaparral, like coastal sage scrub, has been experiencing type conversion in many areas in southern California. As with coastal sage scrub, chaparral habitat is also being invaded by nonnative species (Keeley 2006, p. 379). Nonnative grasses sprout more quickly after a fire than chaparral species; this process is exacerbated by increased fire intervals (Keeley 2001, pp. 84–85).

However, monitoring data from the MSCP Rare Plant Field Surveys by the City of San Diego indicate that type conversion is not taking place in chaparral habitats surrounding occurrences of *Monardella stoneana.* For the past decade, the City of San Diego has been monitoring the occurrences of *M. stoneana* on City lands, documenting their general habitats and assessing disturbances and threats. In the City of San Diego 2006 report, the Otay Lakes occurrence of *M. stoneana* (one clump comprised of two individuals) was reported as having "fair to good" habitat, with monitors noting that threats occurred, such as encroachment of tamarisk (*Tamarisk* spp.) and other nonnative plants (10 percent cover), and immigrant trails

(City of San Diego 2006, p. 8). This occurrence was lost after the 2006 survey, as described in the *Geographic Range and Status* section of this proposed rule. Although the 2008 and 2010 survey reports for the Otay Lakes site describe habitat disturbances such as type conversion due to fire frequency and invasive species (particularly nonnative grasses) (City of San Diego 2008, p. 2; City of San Diego 2010, p. 5), the surveys also indicate that the percent cover of native species has increased from 2008 to 2010 (from 23 to 42 percent), while the percent cover of nonnative species has increased (from 30 to 44 percent) (City of San Diego 2008, p. 1; City of San Diego 2010; p. 5). The most recent survey report (2010) described the habitat at this site as "fair to good" (City of San Diego 2010, p. 254).

For the Marron Valley site, the MSCP Rare Plant Field Surveys conducted by the City of San Diego recorded 95 individuals of *Monardella linoides* ssp. *viminea* (now *M. stoneana*) in its 2006 survey report, which was unchanged in survey results from 2008 to 2010 (City of San Diego 2006, p. 1; City of San Diego 2008, p. 1; City of San Diego 2009, p.1; City of San Diego, p. 5). Habitat at the Marron Valley site was characterized as "fair to good" for 2008 through 2010 (City of San Diego 2008, p. 2; City of San Diego 2010, p. 11). As with the Otay Lakes location, type conversion due to frequent fire (Factor A) and invasion of nonnative grasses was described as a disturbance/stressor to the *M. stoneana* habitat (City of San Diego 2008, p. 2; City of San Diego 2009, p. 2). Nonetheless, recent surveys indicate that the percent ground cover by native species at the Marron Valley site (EO 1) has increased from 2008 to 2010 (from 26 to 32 percent), while the percent ground cover by nonnative species has also increased (from 15 to 22 percent) (City of San Diego 2008, p. 1; City of San Diego 2010; p. 5). While no habitat assessment surveys are available for other *M. stoneana* occurrences on Otay Mountain or near Tecate Peak, we would expect the results to be similar to those from the Marron Valley and Otay Lakes occurrences, as they occur in the same or similar habitat types (SANDAG 1995).

Zedler *et al.* (1983, p. 816) concluded that short-interval fires on Otay Mountain will lead to an increase in herbs and subshrubs given their observation that the "common pattern after chaparral fires, like that of 1979 [on Otay Mountain], is for native and introduced annual herbs to dominate for the 1st yr and then gradually decline as the cover of shrub and subshrubs inceases [sic]." Additionally, monitoring data for *Monardella stoneana* has not recorded the same rapid increases in nonnative vegetation as have occurred in habitat where *M. viminea* grows (City of San Diego 2008, p. 1; City of San Diego 2009; p. 1). While several *M. viminea* occurrences have been extirpated due to invasion of nonnative vegetation (see Factor A discussion for *M. viminea* above), no occurrences of *M. stoneana* have been similarly affected.

Nonetheless, fire is still a stressor to *Monardella stoneana* habitat and many other sensitive habitats throughout southern California. To this end, on land owned and managed by the CDFG and BLM, which contain approximately 88 percent of all occurrences of *M. stoneana,* fire management is provided by CAL FIRE. CAL FIRE is an emergency response and resource protection department. The CAL FIRE protects lives, property, and natural resources from fire, and it protects and preserves timberlands, wildlands, and urban forests. The CAL FIRES's varied programs work together to plan protection strategies incorporating concepts of the National Fire Plan, the California Fire Plan, individual CAL FIRE Unit Fire Plans, and Community Wildfire Protection Plans (CWPPs). Fire Plans outline the fire situation within each CAL FIRE Unit, and CWPPs do the same for communities (CAL FIRE 2011a, p. 1; County of San Diego 2011a). Each plan identifies prevention measures to reduce risks, informs and involves the local communities in the area, and provides a framework to diminish potential wildfire losses and implement all applicable fire management regulations and policies (CAL FIRE 2011b; County of San Diego 2011a). Planning includes other State, Federal, and local government agencies as well as Fire Safe Councils (CAL FIRE 2011a, p. 1). Cooperative efforts via contracts and agreements between State, Federal, and local agencies are essential to respond to wildland fires (CAL FIRE 2011a, p. 1). Because of these types of cooperative efforts, fire engines and crews from many different agencies may respond at the scene of an emergency (CAL FIRE 2011a, p. 1); however, CAL FIRE typically takes the lead with regard to planning for megafire prevention, management, and suppression, and CAL FIRE is in charge of incident command during a wildfire.

The San Diego County Fire Authority (SDCFA), local governments, and CAL FIRE cooperatively protect 1.42 million ac (0.6 million ha) of land with 54 fire stations throughout San Diego County (County of San Diego 2011b, p. 1). Wildfire management plans and associated actions can help to reduce the impacts of type conversion due to frequent fire on natural resources, including *M. stoneana.*

Therefore, based on the best available scientific and commercial information, type conversion due to more frequent fire does not pose a threat to *M. stoneana* or its associated plant communities now or in the foreseeable future. The stress of frequent fire on *M. stoneana* is further alleviated by management actions undertaken by CAL FIRE. More intense fire, however, could pose a threat to individual clumps of *M. stoneana;* impacts to clumps of *M. stoneana* from intense fire events are discussed below under Factor E.

Summary of Factor A

We evaluated several factors with the potential to destroy, modify, or curtail *Monardella stoneana*'s habitat or range, including urban development, sand and gravel mining, type conversion due to frequent fire, and altered hydrology. Based on our review of the best available scientific and commercial information, we conclude that *M. stoneana* is not threatened by the present or threatened destruction, modification, or curtailment of its habitat or range, either now or in the foreseeable future.

*B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

To our knowledge, no commercial use exists for *Monardella stoneana.* The 1998 listing rule for *Monardella linoides* ssp. *viminea* suggested that professional and private botanical collecting could exacerbate the extirpation threat to the subspecies due to botanists favoring rare or declining species (63 FR 54938; October 13, 1998). However, we are not currently aware of any interest by botanists in collecting *M. stoneana.* Therefore, we do not believe that overutilization for commercial, recreational, scientific, or educational purposes constitutes a threat to this species, either now or in the foreseeable future.

*C. Disease or Predation*

Neither disease nor predation was known to be a threat affecting *Monardella linoides* ssp. *viminea* (63 FR 54938; October 13, 1998) at the time of listing. Data from the CNDDB (CNDDB 2010b) list grazing as a potential threat for the *M. stoneana* occurrence located on the Otay Ranch Preserve (EO 4). However, we have no other information quantifying the extent of this grazing and its impact on this occurrence. Therefore, based on the best available

scientific and commercial information, neither disease nor herbivory constitutes a threat to *M. stoneana,* either now or in the foreseeable future.

*D. The Inadequacy of Existing Regulatory Mechanisms*

At the time of listing, regulatory mechanisms identified as providing some level of protection for *Monardella linoides* ssp. *viminea* included: (1) The Act in cases where *M. linoides* ssp. *viminea* co-occurred with a Federally listed species; (2) California Endangered Species Act (CESA), as the species was listed as endangered in California in 1979; (3) the California Environmental Quality Act (CEQA); (4) implementation of conservation plans pursuant to California's Natural Community Conservation Planning Act; (5) local laws and regulations; and (6) enforcement of Mexican laws (63 FR 54938; October 13, 1998). The listing rule provided an analysis of the potential level of protection provided by these regulatory mechanisms (63 FR 54938; October 13, 1998). With the proposed separation of *M. viminea* from *M. stoneana,* we have re-evaluated current protective regulatory mechanisms for *M. stoneana,* as discussed below. However, as with *M. viminea,* protections afforded to *M. stoneana* under the Act as part of *M. linoides* ssp. *viminea,* the currently listed entity, would continue to apply only if we determine to retain listed status for *M. stoneana.* Therefore, for purposes of our analysis, we do not include the Act as an existing regulatory mechanism that protects *M. stoneana.* We do note that *M. stoneana* would likely continue to receive protection indirectly through habitat conservation plans approved under section 10 of the Act and Natural Community Conservation Plans (NCCPs) approved under the State of California that will cover *M. stoneana* even if the species is not Federally listed.

Federal Regulations

National Environmental Policy Act (NEPA)

All Federal agencies are required to adhere to the National Environmental Policy Act (NEPA) of 1970 for projects they fund, authorize, or carry out. The Council on Environmental Quality's regulations for implementing NEPA (40 CFR 1500–1518) state that in their environmental impact statements agencies shall include a discussion on the environmental impacts of the various project alternatives (including the proposed action), any adverse environmental effects which cannot be avoided, and any irreversible or irretrievable commitments of resources involved (40 CFR 1502). NEPA itself is a disclosure law that provides an opportunity for the public to submit comments on a particular project and propose other conservation measures that may directly benefit listed species; however, it does not impose substantive environmental mitigation obligations on Federal agencies. Any such measures are typically voluntary in nature and are not required by the statute. Activities on non-Federal lands are also subject to NEPA if there is a Federal nexus.

Wilderness Act and Federal Land Policy and Management Act

*Monardella stoneana* is a BLM-designated sensitive species (BLM 2010, p. 8). BLM-designated sensitive species are those species requiring special management consideration to promote their conservation and reduce the likelihood and need for future listing under the Act. This status makes conservation of *M. stoneana* a management priority in the Otay Mountain Wilderness, in which approximately 34 percent of *M. stoneana* occurs.

The Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1701 *et seq.*) governs the management of public lands under the jurisdiction of the BLM. The legislative goals of FLPMA are to establish public land policy; to establish guidelines for its [BLM's] administration; and to provide for the management, protection, development, and enhancement of the public lands. While FLPMA generally directs that public lands be managed on the basis of multiple use, the statute also directs that such lands be managed to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; * * * [ to] preserve and protect certain public lands in their natural condition; [and to] * * * provide food and habitat for fish and wildlife * * * ." (43 U.S.C. 1701(a)(8)). Although the BLM has a multiple-use mandate under the FLPMA which allows for grazing, mining, and off-road vehicle use, the BLM also has the ability under the FLPMA to establish and implement special management areas such as Areas of Critical Environmental Concern, wilderness areas, research areas, and so forth. BLM's South Coast Resource Management Plan covers the San Diego County area.

The Otay Mountain Wilderness Act (1999) (Pub. L. 106–145) and BLM management policies provide protection for all *Monardella stoneana* occurring within the Otay Mountain Wilderness. The Otay Mountain Wilderness Act provides that the Otay Mountain designated wilderness area (*i.e.,* Otay Mountain Wilderness; 18,500 ac (7,486 ha)) will be managed in accordance with the provisions of the Wilderness Act of 1964 (16 U.S.C. 1131 *et seq.*). The Wilderness Act of 1964 strictly limits the use of wilderness areas, imposing restrictions on vehicle use, new developments, chainsaws, mountain bikes, leasing, and mining, in order to protect the natural habitats of the areas, maintain species diversity, and enhance biological values. Lands acquired by BLM within the Otay Mountain Wilderness boundaries become part of the designated wilderness area and are managed in accordance with all provisions of the Wilderness Act and regulations pertaining to the Wilderness Act.

The Memorandum of Understanding (MOU) between the Service, the BLM, the County of San Diego, the City of San Diego, SANDAG, and the CDFG, was issued in 1994 in conjunction with the development of the County of San Diego Subarea Plan under the MSCP for cooperation in habitat conservation planning and management (BLM 1994, pp. 1–8), and applies to the Otay Mountain Wilderness because it falls entirely within the boundary of this subarea plan. The MOU (BLM 1994, p. 3) details BLM's commitment to manage lands to "conform with" the County of San Diego Subarea Plan, which in turn requires protection of *M. stoneana* (see Habitat Conservation Plans section below). Additionally, pursuant to the MOU, private lands acquired by BLM will be evaluated for inclusion within the designated wilderness area, and if the lands do not meet wilderness qualifications, these lands would be included in the MSCP conservation system (BLM 1994, p. 3). Therefore, protections provided by the County of San Diego Subarea Plan under the MSCP (see Habitat Conservation Plans section below) also apply to the Otay Mountain Wilderness.

Protections for *Monardella stoneana* are also included in the BLM's draft of the South Coast Resource Management Plan (SCRMP). Fire management activities occur on Otay Mountain as part of the BLM's current (1994) South Coast Resource Management Plan. In addition, at some point in the future on an as-needed basis, additional brush clearing and other fuels modifications, including burning, may occur.

The BLM is collaborating with the Service to revise the South Coast Resource Management Plan, which covers the Otay Mountain Wilderness.

The draft revised plan specifically includes a goal of restoring fire frequency to 50 years through fire prevention or suppression and prescribed burns; once an area has not burned for 50 years, the plan allows for annual prescribed burning of up to 500 ac (200 ha) in the Otay Mountain Wilderness (BLM 2010, pp. 4–171—4–172). We believe the management regime undertaken by BLM under the SCRMP is adequate to protect the species and its habitat from the threat of type conversion due to frequent fire (Factor A).

State and Local Regulations

Native Plant Protection Act (NPPA) and California Endangered Species Act (CESA)

Under provisions of NPPA (Division 2, chapter 10 section 1900 *et seq.* of the CFG code) and CESA (Division 3, chapter 1.5, section 2050 *et seq.* of the CFG code), the CDFG Commission listed *Monardella linoides* ssp. *viminea* as endangered in 1979. Currently, the State of California recognizes the State-listed entity as *M. viminea.* No such recognition is afforded *M. stoneana* under CESA. Though not listed under CESA, the CDFG does recognize *M. stoneana* as a rare and imperiled plant (lists S1.2 and 1B.2).

California Environmental Quality Act (CEQA)

The California Environmental Quality Act (CEQA) (Public Resources Code 21000–21177) and the CEQA Guidelines (California Code of Regulations, Title 14, Division 6, Chapter 3, Sections 15000–15387) requires State and local agencies to identify the significant environmental impacts of their actions and to avoid or mitigate those impacts, if feasible. CEQA applies to projects proposed to be undertaken or requiring approval by State and local government agencies, and the lead agency must complete the environmental review process required by CEQA, including conducting an Initial Study to identify the environmental impacts of the project and determine whether the identified impacts are significant; if significant impacts are determined, then an Environmental Impact Report must be prepared to provide State and local agencies and the general public with detailed information on the potentially significant environmental effects (California Environmental Resources Evaluation System, 2010). "Thresholds of Significance" are comprehensive criteria used to define environmentally significant impacts based on quantitative and qualitative standards and include impacts to biological resources such as candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the CDFG or the Service; or any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by the CDFG or Service (CEQA Handbook, Appendix G, 2010). Defining these significance thresholds helps ensure a "rational basis for significance determinations" and provides support for the final determination and appropriate revisions or mitigation actions to a project in order to develop a mitigated negative declaration rather than an Environmental Impact Report (Governor's Office of Planning and Research, 1994, p. 5). Under CEQA, projects may move forward if there is a statement of overriding consideration. If significant effects are identified, the lead agency has the option of requiring mitigation through changes in the project or to decide that overriding considerations make mitigation infeasible (CEQA section 21002). Protection of listed species through CEQA is, therefore, dependent upon the discretion of the lead agency involved.

Otay Mountain Ecological Reserve

Fifty-five percent of *Monardella stoneana* occurrences are found on the Otay Mountain Ecological Reserve, which is owned by the State of California and managed by CDFG. The Reserve is managed in a manner consistent with protections applying to the Otay Mountain Wilderness Area (T. Nelson 2011, pers. comm.). In the case of Otay Mountain Ecological Reserve, those measures include protection from development, watershed alteration, and fire management. Fire management prevents stress on *M. stoneana* habitat due to type conversion caused by too frequent fires (Factor A).

The Natural Community Conservation Planning (NCCP) Act

The NCCP program is a cooperative effort between the State of California and numerous private and public partners with the goal of protecting habitats and species. An NCCP identifies and provides for the regional or area-wide protection of plants, animals, and their habitats, while allowing compatible and appropriate economic activity. The program began in 1991 under the State's NCCP Act (CFG Code 2800–2835). The primary objective of the NCCP program is to conserve natural communities at the ecosystem scale while accommodating compatible land uses (*http://www.dfg.ca.gov/habcon/nccp/*). Regional NCCPs provide protection to Federally listed species by conserving native habitats upon which the species depend. Many NCCPs are developed in conjunction with HCPs prepared pursuant to the Act. The City and County of San Diego Subarea Plans under the MSCP are discussed below under the discussion of the Act.

San Diego Multiple Species Conservation Plan (MSCP)

*Monardella linoides ssp. viminea* is a covered species under the San Diego Multiple Species Conservation Program (MSCP) (City of San Diego 1997, Table 3–5). The most recent revision of the Rare Plant Monitoring Review lists *M. stoneana* as a covered species and recognized narrow endemic (McEachern *et al.* 2007, p. 33). The MSCP is a regional conservation plan covering 582,000 acres in southwestern San Diego County and is designed to protect sensitive species and habitats within the boundaries of the plan. The MSCP covers 582,243 ac (235,625 ha) and 12 jurisdictions. Each jurisdiction is responsible for developing its own subarea plan to implement the regional MSCP within that jurisdiction.

Known occurrences of *Monardella stoneana* located within the City of San Diego Subarea Plan under the MSCP include the occurrence just east of Buschalaugh Cove on the lower Otay Reservoir (EO 5) and a portion of the occurrence in an unnamed tributary of Cottonwood Creek east of Marron Valley (EO 6). The City of San Diego MSCP Subarea Plan requires preservation of 100 percent of the occurrences on city-owned lands in the Otay area. City-owned lands represent a total of 7 percent of habitat for the species. Additional impact avoidance and other measures are required under the City's plan to protect narrow endemic species, such as *M. stoneana,* and the subarea plan includes area-specific management directives designed to maintain long-term survival in the planning area (Service 1997, pp. 104–105). Under the City of San Diego Subarea Plan, impacts to narrow endemic plants, including *M. stoneana,* inside the MHPA (Multi-Habitat Protection Area) will be avoided. Additionally, the City has completed a fire management plan for the Marron Valley area. This plan outlines as major goals the reduction of too-short fire return intervals. It also provides for protection of native plant community structure and biodiversity, including protection for *M. stoneana* and the canyon where it is found (EO 1) (Tierra Data 2006, pp. 4–1–4–2).

The County of San Diego Subarea Plan covers 252,132 ac (102,035 ha) in

the southwestern portion of the County's unincorporated lands, and is implemented in part by the Biological Mitigation Ordinance (BMO). As discussed in the Wilderness Act and Federal Land Policy and Management Act section above, protections provided by the County of San Diego Subarea Plan under the MSCP also apply to the Otay Mountain Wilderness, and thus are discussed here. The County of San Diego Subarea plan outlines the specific criteria and requirements for projects within the MSCP subarea plan's boundaries to alleviate threats from development and increased fire frequency (see MSCP, County of San Diego Subarea Plan (2007) and County of San Diego Biological Mitigation Ordinance (Ord. Nos. 8845, 9246) 1998). The BMO requires that all impacts to narrow endemic plant species, including *Monardella stoneana,* be avoided to the maximum extent practicable (City of San Diego 2007, p. 11). All projects within the County's MSCP subarea plan boundaries must comply with both the MSCP requirements and the County's policies under CEQA.

The private land on Otay Mountain where *Monardella stoneana* is known to occur is part of Otay Ranch; this land is zoned as "Open Space" by the County of San Diego and identified as part of the County of San Diego's preserve for the MSCP. Only 4 percent of *M. stoneana* habitat occurs on private land. This land is also covered by the Otay Ranch Phase 2 Resource Management Plan (Otay Ranch 2002), approved by the County in 2002. This plan provides for the phased conservation and development of lands in southern San Diego County. A large portion of land is identified for conservation and will be dedicated as associated development occurs. The Otay Ranch Phase 2 Management Plan provides protection for 100 percent of *M. stoneana* occurring on the preserve (Otay Ranch 2002, p. 144) and includes provisions to manage the 4 percent of *M. stoneana* habitat that is on private land in a way that will benefit this species (Otay Ranch 2002, pp. 18–19, 52–53).

Additionally, the County of San Diego Resource Protection Ordinance (RPO) (County of San Diego 2007) applies to unincorporated lands in the County, both within and outside of the MSCP subarea plan boundaries. The RPO identifies restrictions on development to reduce or eliminate impacts to natural resources, including wetlands, wetland buffers, floodplains, steep slope lands, and sensitive habitat lands. Sensitive habitat lands are those that support unique vegetation communities or those that either are necessary to support a viable population of sensitive species (such as *M. stoneana*), are critical to the proper functioning of a balanced natural ecosystem, or serve as a functioning wildlife corridor (County of San Diego, 2007, p. 3). They can include areas that contain maritime succulent scrub, southern coastal bluff scrub, coastal and desert dunes, calcicolous scrub, and maritime chaparral, among others. Impacts to RPO sensitive habitat lands are only allowed when all feasible measures have been applied to reduce impacts and when mitigation provides an equal or greater benefit to the affected species (County of San Diego, 2007, p. 13).

Summary of Factor D

On City and County lands occupied by *Monardella stoneana* or containing its habitat, we believe the County of San Diego Resource Protection Ordinance, the Biological Mitigation Ordinance, and the Subarea plans for the City and County of San Diego provide mechanisms to conserve *M. stoneana* in association with new development or other proposed projects, and they provide mechanisms for the creation of biological reserves. The County of San Diego subarea plan provides protective mechanisms for the small percentage of *M. stoneana* on private land for new development or other proposed projects, and includes provisions for monitoring and management through development of location-specific management plans. Unlike for habitat containing *M. viminea,* the City of San Diego has developed final monitoring and management plans for *M. stoneana.* Conservation measures addressing stressors from type conversion due to frequent fire are thus identified, and are being carried out at the Marron Valley occurrence, which is the only city-owned land where *M. stoneana* is extant. However, as only a small percentage of *M. stoneana* occurs on city-owned lands, these actions on their own, although providing a benefit to the one occurrence on city-owned land, are not enough to protect the species as a whole.

On land owned and managed by the CDFG and BLM, which contain approximately 88 percent of all occurrences of *Monardella stoneana,* fire management is provided by CAL FIRE, and further protection of natural resources on state lands is provided by management conducted consistent with the Wilderness Act.

Based on our review of the best available scientific and commercial information, we conclude *M. stoneana* is not threatened by inadequate existing regulatory mechanisms. Federal, State, and local regulatory mechanisms help to reduce wildfire impacts, primarily to property and human safety; they do not adequately protect *M. stoneana* from direct mortality caused by megafires. However, the impact of megafire on wildlands is not a threat that is susceptible to elimination by regulatory mechanisms. Therefore, we do not find existing regulations inadequate to protect *M. stoneana,* now or in the foreseeable future.

*E. Other Natural or Manmade Factors Affecting Its Continued Existence*

Trampling

Trampling was identified as a threat to *Monardella linoides* ssp. *viminea* in the original listing rule (63 FR 54938; October 13, 1998). Trampling by pedestrians may result in damage or death to *M. stoneana* plants. The City of San Diego MSCP previously identified Off-Highway Vehicle (OHV) activity and disturbance from illegal immigrant activity as a major management issue (City of San Diego 1997, p. 52). All *M. stoneana* clusters occur in close proximity to the Mexico border, where historically many illegal immigrants cross on foot. Monitoring reports previously noted immigrant trails through *M. stoneana* habitat at the Otay Lakes location (City of San Diego 2006, p. 8). However, the recent border fence construction and other enforcement activities in the Otay Mountain Wilderness area have reduced illegal immigrant traffic (Ford 2010, p. 1), and thus potential impacts of trampling at the Otay Lakes, Marron Valley, and Otay Mountain locations. So while there may be some impacts due to trampling to individual plants, it is unlikely to occur at levels that would affect the status of the species. Based on the best scientific information, we believe that trampling (human disturbance activities) does not pose a significant risk to the persistence of *M. stoneana* now or in the foreseeable future.

Nonnative Plant Species

The listing rule identifies nonnative plants as a threat to *Monardella linoides* ssp. *viminea* (63 FR 54938; October 13, 1998). San Diego County habitats have been altered by invasion of nonnative species (Soule *et al.* 1992, p. 43). Nonnative grasses, which frequently grow more quickly than native species, can smother seedling and mature *M. viminea* and prevent natural growth (Rebman and Dossey 2006a, p. 12). The same effect is likely for *M. stoneana.* Monitors for the City of San Diego MSCP recorded invasive plants at the Marron Valley location in the 2008 and

2009 survey reports (City of San Diego 2008, p. 2; City of San Diego 2009, p. 1). At the Otay Lakes location, the invasive plant tamarisk was documented in 2006 (City of San Diego 2006, p. 8), and nonnative grasses were documented in 2008 and 2009 (City of San Diego 2008, p. 2; City of San Diego 2009, p. 2).

However, despite the presence of nonnative plants in the range of *Monardella stoneana,* monitoring reports have not recorded the same level of invasion by nonnative grasses that has occurred in the vicinity of *M. viminea.* As discussed under Factor A, the percent ground cover of nonnative and native plant species has increased between 2008 and 2010 at both Otay Lakes and Marron Valley. Additionally, the number of individual plants of *M. stoneana* at Marron Valley has not changed since 2006 (City of San Diego 2006, p. 1; City of San Diego 2008, p. 1; City of San Diego 2009, p. 1; City of San Diego 2010, p. 11). These observations are consistent with the observation of Minnich and Bahre (1995, p. 17) that generally, the ground cover of all herbaceous plants, including that of nonnative grasses, was absent or consisted of thinly scattered plants within the chaparral along the California-Baja California boundary. Furthermore, these monitored occurrences have not undergone the same increase in nonnative vegetation recorded at *M. viminea* occurrences in Sycamore Canyon and on MCAS Miramar. Therefore, based on the best available scientific information, we find that nonnative species do not constitute a threat to the continued existence of *M. stoneana.*

Small Population Size

The original listing rule identified the restricted range and small population size of *Monardella linoides* ssp. *viminea* as a threat as it increases the possibility of extinction due to chance events such as floods, fires, or drought, outside the natural variability of the ecosystem (63 FR 54938; October 13, 1998; Lande 1993, p. 912). With the split of *M. linoides* ssp. *viminea* into two entities, the magnitude of this threat would likely increase; however, we note that several additional *M. stoneana* occurrences have been discovered. Similarly, Prince (2009, p. 2) suggests that multiple undiscovered occurrences of *M. stoneana* may exist in the vicinity of Tecate Peak. This area has not been extensively surveyed, as it is difficult to access. Additional habitat may exist in Mexico; however, we are unaware of any surveys confirming the presence or absence of *M. stoneana* in Mexico, apart from plants seen directly across the border. Based on information in our files, these are the only occurrences in Mexico of which we are aware. However, suitable habitat and landscape conditions exist in Mexico, close to the current range of the species in the United States.

Of the 20 known occurrences of *Monardella linoides* ssp. *viminea* at the time of listing, only 2 were later considered to be *M. stoneana.* Subsequent surveys have identified additional occurrences, and *M. stoneana* is currently known from approximately eight occurrences in the Otay Mountains area (CNDDB 2010b). The number of plants in Mexico is unknown and has been minimally investigated. Plants across the border in Mexico are visible from at least two occurrences south of Otay Mountain, but these occurrences have not been formally surveyed. Additionally, the most recent survey for this area was in 2005 (CNDDB 2010a), so the continued existence of these Mexico occurrences and the number of clumps present cannot be confirmed.

Any decrease in occurrences may result in decreased reproductive opportunities and genetic exchange between canyons through pollination. However, effects from this threat may be less severe if more occurrences exist in Mexico than are currently known. However, we do not consider small population size alone sufficient to meet the information threshold indicating that the species warrants listing. In the absence of information identifying threats to the species and linking those threats to the rarity of the species, the Service does not consider rarity or small populations alone to be a threat. For example, the habitat supporting *M. viminea* faces significant threats from the impacts of fire, altered hydrologic regimes, and competition with nonnative plants. As discussed above, *M. stoneana* does not face such threats. A species that has always had small population sizes or been rare, yet continues to survive, is likely well equipped to continue to exist into the future. Many naturally rare species have persisted for long periods within small geographic areas, and many naturally rare species exhibit traits that allow them to persist despite their small population sizes. *Monardella stoneana* appears to have persisted for over two decades in the two occurrences known since the 1970s and 1980s, respectively (CNDDB 2010b; EOs 1 and 4); this is in contrast to *M. viminea* occurrences, many of which have undergone population declines during the same time period. The other seven occurrences were discovered in 2003 or later, so long-term data are not available; one of those seven occurrences has since been extirpated (EO 5). *Monardella stoneana* has not experienced a significant population decline since listing, nor have multiple occurrences been extirpated. One of two occurrences monitored by the City of San Diego (EO 1) has remained stable throughout the past decade of monitoring, though one occurrence (EO 5) containing one clump was extirpated (although the EO 5 occurrence contained a maximum of only two clumps since monitoring began in 2000). This is in contrast to *M. viminea,* which has experienced a loss of several populations since listing. Consequently, the fact that this species is rare and has small populations does not indicate that it is in danger of extinction now or in the foreseeable future. Therefore, though small population size may pose a threat to *M. stoneana,* it is not alone enough to cause the extinction of the species within the foreseeable future.

Fire

As discussed under Factor E for *Monardella viminea,* fire can impact individual plants. This is especially true of megafire events that cannot be controlled or ameliorated through management efforts. A narrow endemic such as *M. stoneana* could be especially sensitive to megafire events. One large fire could impact all or a large proportion of the entire area where the species is found, as occurred for *M. viminea* in the 2003 Cedar fire. However, as discussed in Factor E for *M. viminea,* the decline of the burned occurrences of *M. viminea* was not as severe as initially expected. We expect that *M. stoneana* would experience the same ability to sprout from the roots, as it is closely related to *M. viminea.*

Furthermore, despite the increased frequency of fire, *M. stoneana* has persisted through all large fires in the region. The GIS fire boundaries show that each occurrence of *M. stoneana* has been burned at least once in the past decade. In the past two decades, 8 of 9 EOs burned two or more times, and 4 occurrences burned three or more times. The only reports of damage are from EO 5, which lost its one remaining plant, and EO 4, which was "damaged" in a recent (unspecified) fire, but not extirpated (CNDDB 2010b). In the occasion that a fire impacts all of the occurrences, we anticipate that the effects to *M. stoneana* individuals would be comparable to *M. viminea,* where the best available information show individuals are recovering from having 98 percent of the occurrences on MCAS Miramar being burned in the 2003 Cedar Fire.

Given the increased frequency of megafires within Southern California ecosystems, and the inability of regulatory mechanisms to prevent or control megafire, we find that megafire does have the potential to impact occurrences of *Monardella stoneana.* However, given the species' persistence through past fires, and the ability of a closely related species to recover from direct impact by fires, we do not expect that megafire is a significant threat to individual *M. stoneana* plants now, nor is likely to become a threat in the foreseeable future.

Climate Change

As noted above in our status determination for *Monardella viminea,* a broad consensus exists among scientists that the earth is in a warming trend caused by anthropogenic greenhouse gases such as carbon dioxide (IPCC 2007). Researchers have documented climate-related changes in California (Croke *et al.* 1998, pp. 2128, 2130; Breshears *et al.* 2005, p. 15144). Predictions for California indicate prolonged drought and other climate-related changes will continue in the future (*e.g.,* Field *et al.* 1999, pp. 8–10; Lenihen *et al.* 2003, p. 1667; Hayhoe *et al.* 2004, p. 12422; Breshears *et al.* 2005, p. 15144; Seager *et al.* 2007, p. 1181; IPCC 2007, p. 9). Models are not yet powerful enough to predict what will happen in localized regions such as southern California and northern Baja California, but many scientists believe warmer, wetter winters and warmer, drier summers will occur within the next century (Field *et al.* 1999, pp. 2–3, 20). The impacts on species like *M. stoneana,* which depend on specific hydrological regimes, may be more severe (Graham 1997, p. 2).

Since approximately the time of listing in 1998, an extended drought in the region (San Diego County Water Authority 2010, p. 2) created unusually dry habitat conditions. From 2000 to 2009, at one of the closer precipitation gauges to the *Monardella stoneana* occurrences (Lake Cuyamaca, San Diego County, California), 8 of 10 years had precipitation significantly below normal (San Diego County Water Authority 2010, p. 2). This extended drought has cumulatively affected moisture regimes, riparian habitat, and vegetative conditions in and around suitable habitat for *M. stoneana,* increasing the stress on individual plants. As stated above, future climate changes may lead to similar, if not more severe, conditions.

The predicted drought could impact the dynamics of the streambeds where *Monardella stoneana* grows. Soil moisture and transportation of sediments by downstream flow have been identified as key habitat features required by *M. stoneana.* The species is characterized as being associated with areas of standing water after rainfall (Elvin and Sanders 2003, p. 426). Monitors for the City of San Diego have observed decreased plant health and increased dormancy of *Monardella* species in years with low rainfall (City of San Diego 2003, p. 3; City of San Diego 2004, p. 3). Specific analyses of population trends as correlated to rainfall are difficult due to inconsistent plant count methods (City of San Diego 2004, p. 67).

While drier conditions associated with climate change may result in increased fire frequency within some plant communities as discussed under Factor A, the effect of more arid conditions is not known on chaparral, the plant community associated with *Monardella stoneana.* According to Minnich and Bahre (1997, p. 20), fires in the chaparral of northern Baja California, Mexico, are smaller and more frequent than those observed across the border in southern California. Nonetheless, despite these differences in the present fire regimes within chaparral in California and Mexico, Minnich and Bahre (1997, p. 20) concluded that their "repeat photographs of the monument markers, field samples, repeat aerial photography, and fire history maps show that chaparral succession is similar across the international boundary between Jacumba [in California] and Tecate [in Mexico] and that chaparral succession along the border is similar to that found elsewhere in California." Except for a statistically significant correlation that early autumn rains cut short the fire season at its peak, Keeley and Fotheringham (2003, p. 235) did not find patterns between rainfall and burning for chaparral and coastal sage shrublands. As a result, increased aridity may have little effect on chaparral.

Preliminary information for *Monardella stoneana* does show that the effects of climate change on chaparral may be less than the effects on coastal sage scrub (see Climate Change section for *M. viminea* above). While we recognize that climate change and increased drought associated with climate change are important issues with potential effects to listed species and their habitats, the best available scientific evidence does not give specific evidence for us to formulate accurate predictions regarding climate change's effects to particular species, including *M. stoneana,* at this time. Therefore, we do not consider global climate change a current threat to *M. stoneana,* either now or in the foreseeable future.

Summary of Factor E

We found no evidence that other natural or manmade factors pose a significant threat to *M. stoneana.* Based on a review of the best available scientific and commercial data, trampling and nonnative invasive plant species are not a significant threat. We conclude based on the best available scientific information that *M. stoneana* could be affected temporarily by fire impacts associated with the death of individual plants; however, we do not consider this a threat to the continued existence of the species. Small population size could exacerbate other threats, but as there are none, this is not a factor; small population size in itself does not cause *M. stoneana* to be warranted for listing. In addition, BLM conducts ongoing management that provides a benefit to *M. stoneana.* Finally, with regard to the direct and indirect effects of climate change on individual *M. stoneana* plants, we have no information at this point to demonstrate that predicted climate changes pose a significant threat to the species now or in the foreseeable future.

**Proposed Determination—*Monardella stoneana***

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to *Monardella stoneana.* Unlike *M. viminea, M. stoneana* has not undergone a dramatic decline in population size. While megafire and small population size may impact *M. stoneana,* these factors do not pose a threat to the continued existence of the species. Apart from those factors, we found no significant threats to *M. stoneana* related to Factors A, B, C, D, or E, as described above. We find that the best available information for Factor A (The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range), including information on the potential effects of urban development, sand and gravel mining, type conversion due to frequent fire, and altered hydrology, indicates that listing *M. stoneana* as endangered or threatened under the Act is not warranted based on the present or threatened destruction, modification, or curtailment of its habitat or range. To the extent that *M. stoneana* may be experiencing localized impacts, analysis of recent and current surveys of *M. stoneana* habitat in the Otay Mountain locations indicate that its habitat is

under protective status and remains in relatively good condition, with active management and monitoring activities. We found no available information concerning Factors B (Overutilization) and C (Disease or Predation) to indicate that listing *M. stoneana* as endangered or threatened under the Act is warranted. We find that the best available information concerning Factor D (Inadequacy of Existing Regulatory Mechanisms) indicates that listing the *M. stoneana* as endangered or threatened under the Act is not warranted based on inadequacy of existing regulations. We find that the best available information concerning Factor E (Other Natural or Manmade Factors Affecting Its Continued Existence) indicates that trampling and nonnative plants are not currently threats to the continued existence of *M. stoneana,* nor are they expected to be in the foreseeable future. We do not consider *M. stoneana's* small population size in and of itself a threat such that the species warrants listing, nor is it expected to be in the foreseeable future. A species like *M. stoneana* that has always had small population sizes or been rare, yet continues to survive, is likely well equipped to continue to exist into the future. Additionally, unlike *M. viminea, M. stoneana* has not undergone a dramatic decline in population size. We have no information to demonstrate that predicted climate changes will result in a significant threat to the species now or in the foreseeable future. Even though *M. stoneana* could be affected by megafire, we do not believe that megafire poses a significant threat to the existence of the species now or in the foreseeable future.

In conclusion, we have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by *Monardella stoneana.* Our review of the information pertaining to the five threat factors does not support a conclusion that threats of sufficient imminence, intensity, or magnitude exist—either singly or in combination—to the extent that the species is in danger of extinction, or likely to become so within the foreseeable future, throughout all or a significant portion of its range. Therefore, based on the best available scientific information, we find *M. stoneana* does not warrant listing at this time. However, if we receive new information that alters our analysis, we will revisit and re-evaluate the status of *M. stoneana.* We are specifically seeking public comment on this determination. Please refer to the **ADDRESSES** section of this rule for information on where to submit your comments and materials concerning this proposed rule.

**Critical Habitat—*Monardella viminea***

Due to the taxonomic split of *Monardella linoides* ssp. *viminea* into two distinct taxa (*Monardella viminea* (willowy monardella) and *Monardella stoneana* (Jennifer's monardella); see *Taxonomic and Nomenclatural Changes Affecting* Monardella linoides *ssp.* viminea section above), and our conclusions that *M. viminea* is endangered and *M. stoneana* is not warranted for listing, we are proposing revising critical habitat for *M. viminea.* If we subsequently determine based on the best available information that *M. stoneana* should be listed, we will propose critical habitat, if prudent, for *M. stoneana.*

*Background*

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features:

(a) Essential to the conservation of the species and

(b) That may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies insure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner seeks or requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time it was listed must contain physical and biological features which are essential to the conservation of the species and which may require special management considerations or protection. Critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical and biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat), focusing on the principal biological or physical constituent elements (primary constituent elements) within an area that are essential to the conservation of the species (such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type). Primary constituent elements are the elements of physical and biological features that are essential to the conservation of the species.

Under the Act, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. We designate critical habitat in areas outside the geographical area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species. When the best available scientific data do not demonstrate that the conservation needs of the species require such additional areas, we will not designate critical habitat in areas outside the geographical area occupied by the species at the time of listing. An area currently occupied by

the species, but that was not occupied at the time of listing may, however, be essential to the conservation of the species and may be included in the critical habitat designation.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, the species' most recent 5-year Review, or other unpublished materials and expert opinion or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. Climate change will be a particular challenge for biodiversity because the interaction of additional stressors associated with climate change and current stressors may push species beyond their ability to survive (Lovejoy 2005, pp. 325–326). The information currently available on the effects of global climate change and increasing temperatures does not make sufficiently precise estimates of the location and magnitude of the effects to enable us to accurately predict its impacts on the narrow habitat range of *Monardella viminea,* which is limited to the western portion of central San Diego County. We are also not currently aware of any climate change information specific to the habitat of *M. viminea* that would indicate what areas may become important to the species in the future. Therefore, we are unable to determine what additional areas, if any, may be appropriate to include in the critical habitat for this species to address the effects of climate change.

We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be required for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to insure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) the prohibitions of section 9 of the Act if actions occurring in these areas may affect the species. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

## Proposed Critical Habitat Designation for *Monardella viminea*

### *Physical and Biological Features*

In accordance with sections 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied at the time of listing to designate as critical habitat, we consider the physical and biological features essential to the conservation of the species which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derive the specific physical and biological features required for *Monardella viminea* from studies of this species' habitat, ecology, and life history as described below. We also reviewed monitoring reports from private firms, the City of San Diego, Friends of Los Peñasquitos Canyon, the Service, and MCAS Miramar; technical reports; the CNDDB (CNDDB 2010a, EOs 1–31.); Geographic Information System (GIS) data (such as species occurrence data, soil data, land use, topography, aerial imagery, and ownership maps); correspondence to the Service from recognized experts; and other information as available. Additional information can be found in the final listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54938).

The primary constituent elements required for *Monardella viminea* are derived from the physical and biological needs of this species as described in the Background section for *M. viminea* in the beginning of this proposal, the previous critical habitat rule (71 FR 65662; November 8, 2006), the final listing rule (63 FR 54938; October 13, 1998), and below. The areas in this proposed critical habitat contain or support the soil types, potential insect pollinators, and vegetation associated with *M. viminea* occupancy, and include areas adjacent to plants (or plant clumps) necessary to maintain associated physical processes, such as suitable hydrological regime, and biotic associations, such as pollination. These areas provide suitable space, water, minerals, and other physiological needs for reproduction and growth of *M. viminea.* We have determined that *M. viminea* requires the physical and biological features described below:

Space for Individual and Population Growth and for Normal Behavior

Habitats that provide space for growth and persistence of *Monardella viminea* include: (1) Washes in coastal sage scrub or riparian scrub vegetation; (2) terraced secondary benches, channel banks, and stabilized sand bars; (3) soils with a high content of coarse-grained sand and low content of silt and clay; and (4) open ground cover, less than half of which is herbaceous vegetation cover (Scheid 1985, pp. 30–35; Service 1998, p. 54938; Elvin and Sanders 2003,

pp. 426, 430; Kelly and Burrascano 2006, p. 51).

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

*Monardella viminea* is most often found on the first above-water sandbar in intermittent streambeds, where water runs for 24 to 48 hours after heavy rain events (Elvin and Sanders 2003, p. 430; Kelly and Burrascano 2006, p. 51). It can also be found within the streambed if flow is infrequent enough and the soil is stable (Scheid 1985, pp. 3, 38–39). The most robust *M. viminea* individuals tend to occur in wide, open canyons with broad channels and secondary benches, as opposed to narrow, graded canyons (Kassebaum 2010, pers. comm.).

*Monardella viminea* plants are found on soil where subsurface layers stay relatively moist throughout the year and where water accumulates after rainstorms, such as north-facing slopes or canyon bottoms (Elvin and Sanders 2003, pp. 426, 430). Plants with inadequate soil moisture dry out during summer months and do not survive (Kelly and Burrascano 2006, p. 5). The species does not occur on soils that are permanently wet (Elvin and Sanders 2003, p. 425). *Monardella viminea* occurrences have been lost from areas where wetter soils result in an increase in density of surrounding vegetation (Kelly and Burrascano 2001, p. 4).

*Monardella viminea* most generally occurs on soil types with high sand content, often characterized by sediment and cobble deposited by flood events (Scheid 1985, p. 35; Rebman and Dossey 2006a, pp. 5–6). Natural Resources Conservation Service soil series where *M. viminea* is known to occur includes (but may not be limited to): Stony Land, Redding Gravelly Loam, Visalia Sandy Loam, and Riverwash (Rebman and Dossey 2006a, p. 6).

Cover or Shelter

*Monardella viminea* requires open to semi-open canopies of coastal sage and riparian scrub with limited herbaceous understory. *Monardella viminea* plants usually occur in areas with an average of 75 percent ground cover, of which approximately 65 percent is woody cover, and less than 10 percent is herbaceous cover (Scheid 1985, pp. 32, 37–38). Herbaceous cover, such as annual grasses, can grow in greater density than native riparian and chaparral species, and through resource competition and shading, herbaceous cover would likely prevent natural growth and reproduction of *M. viminea* (Rebman and Dossey 2006a, p. 12); therefore, suitable habitat for the species is not dominated by herbaceous cover.

Sites for Breeding, Reproduction, and Rearing (or Development) of Offspring

*Monardella viminea* is visited by numerous bees and butterflies, and is likely pollinated by a diverse array of insects, each of which have their own habitat requirements (see *Life History* section for *M. viminea* above); however, we are currently unaware of which insect species pollinate *M. viminea.* Pollinators facilitate mixing of genes within and among plant populations, without which inbreeding and reduced fitness may occur (Widen and Widen 1990, p. 191). Native sand wasps within the range of *M. viminea,* such as those from the Bembicine family, require sandy areas, such as dunes or sandy washes, to nest, while solitary bees from the Andrenidae family nest in upland areas (Kelly and Burrascano 2001, p. 8). Native bees typically are more efficient pollinators than introduced European honeybees (Javorek *et al.* 2002, p. 345). Therefore, populations serviced by a higher proportion of native pollinator species are likely to maintain higher reproductive output and persist for more generations than populations served by fewer native pollinators or with pollination limitations of any kind (Javorek *et al.* 2002, p. 350). Pollinators also require space for individual and population growth; therefore, adequate habitat should be preserved for pollinators in addition to the habitat necessary for *M. viminea* plants. In this proposed critical habitat, we acknowledge the importance of pollinators to *M. viminea.* However, we do not include pollinators and their habitats as a primary constituent element (PCE), because: (1) Meaningful data on specific pollinators and their habitat needs are lacking; and (2) we were not able to quantify the amount of habitat needed for pollinators, given the lack of information on the specific pollinators of *M. viminea.*

Habitats Protected From Disturbance or Representative of the Historical, Geographical, and Ecological Distributions of the Species

The long-term conservation of *Monardella viminea* is dependent on several factors including, but not limited to, maintenance of areas necessary to sustain natural ecosystem components, functions, and processes (such as full sun exposure and natural hydrologic regimes); and sufficient adjacent suitable habitat for vegetative reproduction, population expansion, and pollination.

Open or semi-open rocky, sandy alluvium on terraced floodplains, benches, stabilized sandbars, channel banks, and sandy washes along ephemeral streams, washes, and floodplains are needed for individual and population growth of *Monardella viminea* (Scheid 1985, pp. 30–31, 34–35). Within those areas, *M. viminea* requires adequate sunlight to grow. Woody overgrowth is common and can help to maintain adequate soil moisture, but areas crowded with herbaceous understory may not provide adequate light for *M. viminea.*

The 2008 5-year review (Service 2008, p. 7) concluded that *Monardella viminea* requires a natural hydrological regime to maintain or create suitable habitat conditions. This hydrological regime maintains the floodplains, benches, and sandbars where *M. viminea* grows. Characteristics of riparian channels and seasonal stream flow determine timing, pattern, and depth of deposition of alluvial materials and formation of sandbars and channel banks, which in turn determine location of plants within the streambed, and suitable habitat to support individuals and clumps of *M. viminea* (Scheid 1985, pp. 30–31 and 36–37). Decreases in flows, which would otherwise scour annual grasses and seeds from the area, result in increased cover of nonnative grasses, and decreased light and moisture availability for *M. viminea.* Rapidly growing nonnative grasses can smother seedling and mature *M. viminea* and prevent natural growth (Rebman and Dossey 2006a, p. 12). Additionally, increased flows can result in erosion that may alter floodplains and erode banks, channel bars, and sandy washes where *M. viminea* occurs (Kelly and Burrascano 2006, pp. 65–69).

*Primary Constituent Elements*

Under the Act and its implementing regulations, we are required to identify the physical and biological features essential to the conservation of *Monardella viminea* in areas occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements to be the elements of physical and biological features that are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the primary constituent element specific to *Monardella viminea* is riparian channels with ephemeral drainages and adjacent floodplains:

(1) With a natural hydrological regime, in which:

(a) Water flows only after peak seasonal rainstorms;

(b) High runoff events periodically scour riparian vegetation and redistribute alluvial material to create new stream channels, benches, and sandbars; and

(c) Water flows for usually less than 48 hours after a rain event, without long-term standing water;

(2) Surrounding vegetation that provides semi-open, foliar cover with:

(a) Little or no herbaceous understory;

(b) Little to no canopy cover;

(c) Open ground cover, less than half of which is herbaceous vegetation cover;

(d) Some shrub cover; and

(e) An association of other plants, including *Eriogonum fasciculatum* (California buckwheat) and *Baccharis sarothroides* (broom baccharis);

(3) That contain ephemeral drainages that:

(a) Are made up of coarse, rocky, or sandy alluvium; and

(b) Contain terraced floodplains, terraced secondary benches, stabilized sandbars, channel banks, or sandy washes; and

(4) That have soil with high sand content, typically characterized by sediment and cobble deposits, and further characterized by a high content of coarse, sandy grains and low content of silt and clay.

The need for space for individual and population growth and normal behavior is provided by all sections of the PCE. The need for food, water, air, light, minerals, or other physiological requirements is provided by all sections of the PCE. Cover and shelter requirements are provided by section (2) of the PCE. Areas for reproduction are provided by all sections of the PCE. Finally, habitats representative of the historical, geographical, and ecological distributions of a species are provided by all sections of the PCE.

*Special Management Considerations or Protection*

When designating critical habitat, we assess whether the physical and biological features within the geographical area occupied by the species at the time of listing that are essential to the conservation of the species may require special management considerations or protection.

The area proposed for designation as critical habitat will require some level of management or protection to address the current and future threats to the physical and biological features. In all units, special management considerations or protection may be required to provide for the sustained function of the ephemeral washes on which *Monardella viminea* depends.

The primary constituent element for *M. viminea* may require special management considerations or protection to reduce the following threats, among others: cover by nonnative plant species that crowds, shades, or competes for resources; habitat alteration due to altered hydrology from urbanization and associated infrastructure; and any actions that alter the natural channel structure or course, particularly increased water flow that could erode soils inhabited by *M. viminea* or cover them with sediment deposits (all sections of PCE). Conservation actions that could be implemented to address these threats include (but are not limited to): Removal of nonnative vegetation by weeding; planting of native species along stream courses in canyons to help control erosion; use of silt fences to control erosion; restriction of development that alters natural hydrological characteristics of stream courses in canyons; and implementation of prescribed burns (all sections of PCE). Additionally, specialized dams and smaller barriers could be installed in canyons to help address floodwater runoff that results from upstream development (which can cause erosion and loss of clumps of *M. viminea*), though these dams must be of adequate size and strength to withstand increased storm flow caused by urbanization (PCE section 3).

*Criteria Used To Identify Critical Habitat*

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available to designate critical habitat. We review available information pertaining to the habitat requirements of the species. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—is necessary to ensure the conservation of the species. We are not currently proposing to designate any areas outside the geographical area occupied by the species at the time of listing because currently occupied areas (which are within the area occupied by the species at the time of listing) are sufficient for the conservation of the species.

This proposed rule updates the information used in our 2006 final designation of critical habitat for *Monardella linoides* ssp. *viminea* (71 FR 65662; November 8, 2006) with the best available data, including new information not available when the 2006 rule was completed.

This section provides details of the process we used to delineate the proposed critical habitat. This proposed critical habitat designation is based on the best scientific data available, including our analysis of the distribution and ecology of *Monardella viminea* as identified in the 1998 final listing rule, the 2008 5-year review, new information on the species' distribution and ecology made available since listing, reclassification of *M. viminea* as a species, and State and local measures in place for the conservation of *M. viminea.* Specific differences from the 2006 designation of critical habitat are described in the Summary of Changes from Previously Designated Critical Habitat section below.

The areas in this proposed designation of critical habitat for *Monardella viminea* were occupied by the species at the time of listing and remain occupied today, and they possess those specific physical and biological features essential to the conservation of the species that may require special management considerations or protection. For this proposed rule, we completed the following steps to delineate critical habitat: (1) Compiled all available data from observations of *M. viminea* into a GIS database; (2) identified occurrences that were extant at the time of listing and those occurrences that are currently extant or contain transplanted *M. viminea;* (3) identified areas containing all the components that make up the PCE that may require special management considerations or protection; (4) circumscribed boundaries of potential critical habitat units based on the above information; and (5) removed all areas that did not have the PCE and therefore are not considered essential to the conservation of *M. viminea,* or that are exempt from critical habitat under 4(a)(3)(B)(i) of the Act. These steps are described in detail below.

(1) We compiled observational data from the following sources to include in our GIS database for *Monardella viminea:* (a) CNDDB data and supporting observation documentation information on *M. viminea;* (b) monitoring reports from MCAS Miramar; and (c) monitoring reports from private organizations and local government organizations, such as the Carroll Canyon Business Park and the City of San Diego Subarea Plan under the MSCP. No monitoring reports from the County of San Diego were available.

(2) We considered extant all occurrences where presence of living plants has been confirmed within the past 10 years. Using this information, we determined that seven occurrences are currently extant. Based on data from the CNDDB, we confirmed that all of these seven occurrences were known and extant at the time of listing. We also documented the presence of transplanted individual plants in Carroll, San Clemente, and Lopez Canyons and included them in our analysis.

(3) To identify areas containing all the components that make up the PCE for *Monardella viminea* that may require special management considerations or protection, we conducted the following steps:

(a) We determined occurrence locations likely to belong to the same population. Regardless of observation date, all occurrence locations downstream from an extant occurrence and which would be connected to the upstream occurrence during runoff events (that could transport seeds downstream) were considered part of the same extant occurrence; this was completed by examining survey reports from MCAS Miramar, the City of San Diego, and the Friends of Los Peñasquitos Canyon.

(b) In order to create a scientifically based approach to drawing critical habitat units, we first examined the utility of GIS vegetation data polygons containing *Monardella viminea* occurrences (SANDAG 1995) because the species is frequently associated with coastal sage scrub and riparian scrub habitats (Scheid 1985, p. 3; Elvin and Sanders 2003, p. 430; Kelly and Burrascano 2006, p. 51). In an attempt to better distinguish the width of the specific areas within drainages that contain the PCE, we searched for a correlation between habitat type and clumps of *M. viminea.* We found *M. viminea* occurred in areas mapped as 11 different vegetation types, with the greatest number (45 percent) falling within "Diegan Coastal Sage Scrub." We noted that mapped polygons of this vegetation type and some other vegetation types were relatively large and did not correspond well with the drainage areas where *M. viminea* and the PCE was likely to occur, indicating that they were poor predictors for areas that contain the physical and biological features essential to the conservation of *M. viminea.*

(c) We examined polygons that were labeled as "riparian" vegetation for possible useful information to assist in delineation of potential critical habitat areas because *Monardella viminea* is generally described as a riparian-associated species. We found that although southern sycamore-alder riparian woodland is rare in canyons where *M. viminea* exists, where it is present, it closely corresponds to areas that contain *M. viminea* and the physical and biological features essential to its conservation. Because of this close correlation, we used the southern sycamore-alder riparian woodland habitat type to identify the widest distance of a riparian vegetation type polygon from an occupied streambed line; we found this distance to be 490 ft (150 m).

(d) We then tested the 490 ft (150 m) value as an estimate of the distance from the streambed most likely to capture the PCE throughout the species' range. We used the widest distance from the streambed to help identify areas that meet the definition of critical habitat rather than the median (or another value). We wanted to ensure that we captured all potential areas that have the physical and biological features essential to the conservation of *M. viminea* versus those areas that only contain occurrences of the species. We found that this 490 ft (150 m) distance, when applied to all streambeds where *M. viminea* occurred, captured all clumps of *M. viminea* except two in the southern end of West Sycamore Canyon. The two southern clumps occur in an area that appears to be a remnant habitat wash area at the end of West Sycamore Canyon, which likely received additional stream flow during storm events greater than 48 hours after a rain event (or more frequently than just after a peak seasonal rainstorm), and thus does not likely support occupancy long term nor significantly contribute to population persistence.

The conservation of *Monardella viminea* depends on preservation of habitat containing the physical and biological features essential to the conservation of the species. Like most plants, *M. viminea* is occasionally found in areas considered atypical for the species. For example, a plant was once found growing in mesa-top habitat along a tributary of Rose Canyon (Rebman and Dossey 2006a, p. 24, no EO number). We consider that the habitat areas outlined using the method described above will capture only the habitat that contains the physical and biological features essential to the conservation of *M. viminea.* We determined the distance of 492 ft (150 m) was appropriate to capture areas surrounding occupied streambeds that contain the physical and biological features essential to the conservation of the species and that meet the definition of critical habitat, and we applied it across the species' range.

(4) We removed all areas not containing the physical and biological features essential to the conservation of *Monardella viminea. Monardella viminea* requires all four sections of the PCE for growth and reproduction; thus, only areas that contained all four sections of the PCE were considered as critical habitat. We removed areas in Rose Canyon (no EO number), Elanus Canyon (EO 24), and Lopez Canyon (EO 1), and all four transplanted occurrences. All of these areas are characterized by dense urban development on at least one border. As discussed under Factor A for *M. viminea,* urbanization results in increased frequency and intensity of storm flow events, to the point that they wash away sandbars rather than scouring them of vegetation. Further discussion of why we did not include these occurrences as critical habitat is included in the Summary of Changes from Previously Designated Critical Habitat section below. We also removed areas within the boundaries of MCAS Miramar for this proposed rule because these areas are exempt under section 4(a)(3)(B)(i) of the Act from critical habitat designation (see Exemptions section below).

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical and biological features for *Monardella viminea.* The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed critical habitat have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical and biological features in the adjacent critical habitat.

We are proposing for designation of critical habitat lands that we have determined were occupied at the time of listing and contain sufficient elements of physical and biological features to support life-history processes essential for the conservation of the species.

**Summary of Changes From Previously Designated Critical Habitat**

The areas identified in this proposed rule constitute a revision of the areas we described and mapped as meeting the definition of critical habitat for *Monardella linoides* ssp. *viminea* in the final critical habitat designation published in the **Federal Register** on November 8, 2006 (71 FR 65662) (see Table 2). This proposed rule identifies 348 ac (141 ha) that meet the definition of critical habitat for *Monardella viminea.* This proposed rule includes all 73 ac (30 ha) designated as critical habitat in the final rule in 2006, and portions of areas excluded from the 2006 designation. This proposed rule also differs in area from the 2006 designation due to the removal of areas now identified as habitat for *M. stoneana* (255 ac (103 ha); 71 FR 65662, November 8, 2006), as described above in the Background section of this proposed rule. The rest of the change in area is primarily due to our improved GIS mapping techniques, improved description of the areas containing the PCE for *M. viminea,* and our removal of lands in Lopez Canyon, Elanus Canyon, and Rose Canyon that we no longer consider to meet the definition of critical habitat (see *Criteria Used to Identify Critical Habitat* section above and Proposed Critical Habitat Designation—*Monardella viminea* section below).

The differences between this proposed rule and the 2006 critical habitat designation include the following:

(1) Recognition of *Monardella linoides* subsp. *viminea* as two distinct taxa at the species rank as *Monardella viminea* (willowy monardella) and *M. stoneana* (Jennifer's monardella). Given our determination that *M. viminea* warrants listing as endangered, we are proposing critical habitat for *M. viminea.*

(2) We revised the Background section to include our updated knowledge of life history, taxonomy, and nomenclature, including information on potential pollinators of *Monardella viminea.*

(3) We revised the description of the PCEs for *Monardella viminea* to include a single PCE with more detailed information on the physical and biological features essential to *Monardella viminea* including soil characteristics, disturbance regimes, stream flow, and ground cover that support this species.

(4) We revised the criteria used to identify critical habitat based on our reevaluation of all available *Monardella viminea* information, including that available since the publication of the 2006 rule, to ensure this proposed rule reflects the best available scientific data. Our conclusion based on this reevaluation differs from the 2006 critical habitat designation in how we identified and delineated critical habitat.

(5) Our reevaluation does not identify some areas as critical habitat that were designated as critical habitat in the 2006 final critical habitat rule. In the 2006 final critical habitat rule, all habitat containing occurrences of *Monardella viminea* was classified as critical habitat. However, we have revised the PCE for *M. viminea* based on our improved understanding of the habitat features essential for the species' conservation and, in this proposed rule, we have proposed critical habitat only in locations that contain the revised PCE. While Elanus, Lopez, and Rose Canyons contain species occurrences, they do not contain the PCE. We now recognize that urbanization around all three canyons has substantially altered drainage patterns, such that peak flood events have increased in intensity and frequency to the point where they occur more than just after peak rainfall events, and such that they regularly wash away entire channels and benches where *M. viminea* grows (PCE section (3)(b)). Thus the three areas do not contain all the components that make up the PCE identified for *M. viminea.*

We note that the habitat available in these canyons only supports a limited number of plants: Elanus Canyon has approximately 16 plants, Lopez Canyon has 8 plants, and Rose Canyon has the smallest occurrence of *Monardella viminea* with only 3 plants. Rose Canyon contains limited habitat for *M. viminea,* with little space downstream for expansion of the occurrence (Kassebaum 2010, pers. comm.), and the area around Rose Canyon is developed, which has disrupted the natural hydrological regime on which long-term persistence of *M. viminea* depends (Rebman and Dossey 2006, p. 37), resulting in high runoff events that occur more frequently than just at peak seasonal rainfalls. The area around Lopez Canyon is also heavily urbanized, and floods from storm runoff have already eroded channels and benches where *M. viminea* grows. A portion of land surrounding the southern half of Elanus Canyon has been developed. This development, located along the eastern side of the canyon, has also resulted in altered hydrology. Thus, we do not consider Elanus, Lopez, or Rose Canyons to meet the definition of critical habitat.

We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For this reason, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be required for recovery of the species. We solicit information during the public comment period on any areas that we have not included in this proposed rule (including Elanus, Lopez, and Rose Canyons), including any evidence that they meet the definition of critical habitat (see Public Comments section).

(6) We changed unit numbers and names in this proposed rule to reflect estimated population distributions instead of political boundaries (such as former Unit 2 that consisted of all partial polygons within MCAS Miramar, regardless of population distribution).

(7) Our revised criteria resulted in both inclusion of areas that meet the definition of critical habitat and removal of areas from the 2005 proposed rule or the 2006 final rule that do not meet the definition of critical habitat. Changes from areas identified in the 2005 proposed rule as meeting the definition of critical habitat include the exclusion of areas in Elanus, Lopez, and Rose Canyons that we no longer consider to meet the definition of critical habitat (see *Criteria Used to Identify Critical Habitat* section above).

(8) We did not include any areas associated with former Units 7, 8, and 9, described in the 2006 final critical habitat designation for *Monardella linoides* ssp. *viminea,* because these areas/occurrences are now recognized as supporting *M. stoneana* (see *Taxonomic and Nomenclatural Changes Affecting* Monardella linoides *ssp.* viminea section above).

The differences between the 2006 final critical habitat designation and the proposed revised critical habitat designation in this rule are summarized below in Table 2. Please note that Table 2's units for the 2006 final rule do not correspond to the unit numbers presented in that rule; they correspond to the proposed units in this document.

TABLE 2—COMPARISON OF THE 2006 FINAL CRITICAL HABITAT DESIGNATION FOR MONARDELLA LINOIDES SSP. VIMINEA AND THE PROPOSED CRITICAL HABITAT FOR M. VIMINEA.

[Note: This table does not include the 255 ac (103 ha) of habitat now identified as occupied by *M. stoneana*.]

| Location | 2006 final critical habitat | | 2011 proposed critical habitat | |
|---|---|---|---|---|
| | Unit name | Area containing essential features ac (ha) | Unit name | Area containing essential features ac (ha) |
| Sycamore Canyon | Unit 1 Partial 4(a)(3)(B)(i) exemption. | 373 (151) | Unit 1 Partial 4(a)(3)(B)(i) exemption. | 350 (142) |
| West Sycamore Canyon | | 529 (214) | Unit 2 Partial 4(a)(3)(B)(i) exemption. | 577 (233) |
| Spring Canyon | | 245 (99) | Unit 3 Partial 4(a)(3)(B)(i) exemption. | 273 (111) |
| East San Clemente Canyon. | | 638 (258) | Unit 4 Partial 4(a)(3)(B)(i) exemption. | 467 (189) |
| West San Clemente Canyon. | | 114 (46) | Unit 5 Partial 4(a)(3)(B)(i) exemption. | 227 (92) |
| Lopez Canyon | | 77 (31) | | 0 (0) |
| Elanus Canyon | | 82 (33) | | 0 (0) |
| Rose Canyon | | 185 (75) | | 0 (0) |
| TOTAL ESSENTIAL HABITAT**. | | 2,242 (907) | | 1,894 (767) |
| TOTAL EXEMPT | | 1,863 (754) | | 1,546 (626) |
| TOTAL EXCLUDED OR BEING CONSIDERED FOR EXCLUSION. | | 306 (124) (excluded in 2006). | | 208 (84) (considered for exclusion) |
| TOTAL CRITICAL HABITAT*. | | 73 (30) Designated | | 348 (141) Proposed |

*Values in this table may not sum due to rounding.
** See Table 4 for acreages considered for exclusion in each unit.

**Proposed Critical Habitat Designation—*Monardella viminea***

We are proposing five units as critical habitat for *Monardella viminea.* The proposed critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for *M. viminea.* This proposed rule, if finalized, will replace the current critical habitat designation for *M. linoides* ssp. *viminea* at 50 CFR 17.96(a). The five units we propose as critical habitat are: (1) Sycamore Canyon, (2) West Sycamore Canyon, (3) Spring Canyon, (4) East San Clemente Canyon, and (5) West San Clemente Canyon. The approximate area of each proposed critical habitat unit is shown in Table 3. All proposed units were occupied by *M. viminea* at the time the species was listed (as *M. linoides* ssp. *viminea*), are currently occupied by *M. viminea,* and contain the primary constituent element essential for the conservation of the species. A summary of the five units showing areas, ownership, and exemptions is given below in Table 3.

TABLE 3—PROPOSED CRITICAL HABITAT UNITS FOR *Monardella Viminea,* SHOWING ESTIMATED AREA IN ACRES (HECTARES), LAND OWNERSHIP, AND AREAS EXEMPT UNDER SECTION 4(A)(3)(B)(I) OF THE ACT

| Location of proposed non-exempt acres* | Federal ac (ha) | State and local ac (ha) | Private ac (ha) | Total ac (ha) |
|---|---|---|---|---|
| Unit 1. Sycamore Canyon | 0 (0) | 36 (15) | 158 (64) | 194 (79) |
| Unit 2. West Sycamore Canyon | 0 (0) | 27 (11) | 0 (0) | 27 (11) |
| Unit 3. Spring Canyon | 0 (0) | 5 (2) | 92 (37) | 97 (39) |
| Unit 4. East San Clemente Canyon | 0 (0) | 13(5) | 0 (0) | 13 (5) |
| Unit 5. West San Clemente Canyon | 0 (0) | 16 (7) | <1 (<1) | 16 (7) |
| Location of Exempt areas at MCAS Miramar—EXEMPT under section 4(a)(3)(B) of the Act | | | | |
| Sycamore Canyon | 156 (63) | 0 (0) | 0 (0) | 156 (63) |
| West Sycamore Canyon | 550 (222) | 0 (0) | 0 (0) | 550 (222) |
| Spring Canyon | 176 (71) | 0 (0) | 0 (0) | 176 (71) |
| East San Clemente Canyon | 454 (184) | 0 (0) | 0 (0) | 454 (184) |
| West San Clemente Canyon | 210 (85) | 0 (0) | 0 (0) | 210 (85) |
| Total Essential Habitat | 1,546 (625) | 86 (35) | 263 (106) | 1,894 (767) |
| Total Area Proposed Revised Critical Habitat | 0 (0) | 86 (35) | 263 (106) | 348 (141)** |

* Values in this table may not sum due to rounding.
** See Table 4 for acreages proposed for exclusion in each unit.

We present brief descriptions of the five proposed critical habitat units, and reasons why they meet the definition of critical habitat for *Monardella viminea.*

*Unit 1: Sycamore Canyon*

Unit 1 consists of 194 ac (79 ha) and is located in Sycamore Canyon at the northeastern boundary of MCAS Miramar, north of Santee Lakes in San Diego County, California. Three separate branches of the canyon within the unit pass outside the boundaries of MCAS Miramar and consist of 36 ac (15 ha) of land owned by San Diego County, 1 ac (less than 1 ha) of land owned by water districts, and 158 ac (64 ha) of private land, 110 ac (45 ha) of which are within the boundaries of the City of Santee, which has no approved MSCP; and 47 ac (19 ha) of which are within the boundaries of the City of San Diego. This canyon is the only place where *Monardella viminea* is found in oak woodland habitat, and is one of the few areas in the range of *M. viminea* with mature riparian habitat (Rebman and Dossey 2006a, p. 23). Sycamore Canyon, in which this unit is found, is essential to the recovery of the species because it supports over 400 individuals (City of San Diego 2010, p. 257; Tierra Data 2011, p. 12). The habitat in this unit provides redundancy and resiliency for *M. viminea,* and since not all areas of this unit are occupied by *M. viminea* (*i.e.,* the unit is occupied, although there are areas such as within the canyon where plants are not currently growing), the unit provides space for the growth and expansion of the species. This unit contains the physical and biological features essential to the conservation of *M. viminea,* including riparian channels with a natural hydrological regime (PCE section (1)), ephemeral drainages made up of rocky or sandy alluvium (PCE section (3)), and surrounding vegetation that provides semi-open foliar cover (PCE section (2)). The PCE in this subunit may require special management considerations or protection to address threats from nonnative plant species and erosion of the canyon (City of San Diego 2005, p. 68; 2006, p. 10; 2009, p. 2). Please see the *Special Management Considerations or Protection*—Monardella viminea section of this proposed rule for a discussion of the threats to *M. viminea* habitat and potential management considerations. We are considering exclusion of portions of Unit 1 (83 ac (34 ha)) for *M. viminea* from critical habitat under section 4(b)(2) of the Act that are covered by the City of San Diego and County of San Diego Subarea Plans under the MSCP; see Considered Exclusions—*Monardella viminea* section of this proposed rule for more information.

*Unit 2: West Sycamore Canyon*

Unit 2 consists of 27 ac (11 ha), comprised of 21 ac (9 ha) of land owned by the City of San Diego and 6 ac (2 ha) of land owned by water districts, and is located in West Sycamore Canyon adjacent to the eastern section of MCAS Miramar, in San Diego County, California. The northernmost point of the unit is just outside the boundary of MCAS Miramar. West Sycamore Canyon, in which Unit 2 is found, is essential to the recovery of *Monardella viminea* as it contains the largest number of *M. viminea* individuals of any canyon in the species' range (Tierra Data 2011, p. 12). The habitat in this unit provides redundancy and resiliency for *M. viminea,* and since not all areas of this unit are occupied by *M. viminea* (*i.e.,* the unit is occupied, although there are areas such as within the canyon where plants are not currently growing), the unit provides space for the growth and expansion of the species. Unit 2, which contains proposed critical habitat for *M. viminea* in that portion of West Sycamore Canyon located outside of MCAS Miramar, contains the physical and biological features essential to the conservation of *M. viminea,* including riparian channels with a natural hydrological regime (PCE section (1)), ephemeral drainages made up of rocky or sandy alluvium (PCE section (3)), and surrounding vegetation that provides semi-open foliar cover (PCE section (2)). The PCE in this unit may require special management considerations or protection to address threats associated with erosion from heavy rainfall events. Please see the *Special Management Considerations or Protection*—Monardella viminea section of this proposed rule for a discussion of the threats to *M. viminea* habitat and potential management considerations. We are considering exclusion of a portion of Unit 2 (21 ac (9 ha)) for *M. viminea* from critical habitat under section 4(b)(2) of the Act that is covered by the City of San Diego Subarea Plan under the MSCP; see Considered Exclusions—*Monardella viminea* section of this proposed rule for more information.

*Unit 3: Spring Canyon*

Unit 3 consists of 97 ac (39 ha) and is located in Spring Canyon south of the border of MCAS Miramar and north of State Route 52 and Kumeyaay Lake in San Diego County, California. This unit is composed of 5 ac (2 ha) of land owned by the City of San Diego and 92 ac (37 ha) of private land within the boundaries of the City of San Diego. The occurrences in this canyon exist in dense clumps along the canyon on the inside edge of meandering portions of the streambed, and on low benches adjacent to drainages, and comprise a large population of *Monardella viminea* with over 500 plants in 2002 (Rebman and Dossey 2006a, pp. 21, 23). Spring Canyon, in which Unit 3 is found, is essential to the recovery of *M. viminea* because, as one of the least disturbed canyons on MCAS Miramar and due to its isolation from developed areas (Rebman and Dossey 2006a, p. 23), it supports the natural hydrological regime necessary for growth and reproduction of the species. Unit 3 contains proposed critical habitat for *M. viminea* in that portion of Spring Canyon located outside of MCAS Miramar. Spring Canyon, in which Unit 3 is found, is also essential to the recovery of the species because it currently contains over 350 individuals (Tierra Data 2011, p. 12). The habitat in this unit provides redundancy and resiliency for *M. viminea,* and since not all areas of this unit are occupied by *M. viminea* (*i.e.,* the unit is occupied although there are areas such as within the canyon where plants are not currently growing), the unit provides space for the growth and expansion of the species. This unit contains the physical and biological features essential to the conservation of *M. viminea,* including riparian channels with a natural hydrological regime (PCE section (1)), ephemeral drainages made up of rocky or sandy alluvium (PCE section (3)), and surrounding vegetation that provides semi-open foliar cover (PCE section (2)). The PCE in this unit may require special management considerations or protection to address threats from nonnative species. Please see the *Special Management Considerations or Protection*—Monardella viminea section of this proposed rule for a discussion of the threats to *M. viminea* habitat and potential management considerations. We are considering exclusion of Unit 3 (97 ac (39 ha)) from critical habitat under section 4(b)(2) of the Act because all of the land within the unit is covered by the City of San Diego Subarea Plan under the MSCP; see Considered Exclusions—*Monardella viminea* section of this proposed rule for more information.

*Unit 4: East San Clemente Canyon*

Unit 4 consists of 13 ac (5 ha) of land located in the eastern portion of San Clemente Canyon north of the northeastern border of MCAS Miramar

in San Diego County, California. This unit is composed of 7 ac (3 ha) of land owned by the City of San Diego, and 6 ac (3 ha) of land owned by the California Department of Transportation. We are considering it a separate unit from the other portion of San Clemente Canyon because the Sim J. Harris aggregate mine acts as a barrier to the physical and biotic continuity between the two portions of the canyon. Unit 4 is drier than the western portion of the canyon (Unit 5) and consists of mature chaparral habitat (Rebman and Dossey 2006a, p. 22). This unit is essential to the recovery of the species because San Clemente Canyon, which includes Unit 4, contains over 500 individuals (Rebman and Dossey 2006a, p. 22). The habitat in this unit provides redundancy and resiliency for *M. viminea,* and since not all areas of this unit are occupied by *M. viminea* (*i.e.,* the unit is occupied, although there are areas such as within the canyon where plants are not currently growing), the unit provides space for the growth and expansion of the species. This unit contains the physical and biological features essential to the conservation of *M. viminea,* including riparian channels with a natural hydrological regime (PCE section (1)), ephemeral drainages made up of rocky or sandy alluvium (PCE section (3)), and surrounding vegetation that provides semi-open foliar cover (PCE section (2)). The PCE in this unit may require special management considerations or protection to address threats from nonnative species. Please see the *Special Management Considerations or Protection*—Monardella viminea section of this proposed rule for a discussion of the threats to *M. viminea* habitat and potential management considerations. We are considering exclusion of a portion of Unit 4 (7 ac (3 ha)) for *M. viminea* from critical habitat under section 4(b)(2) of the Act that is covered by the City of San Diego Subarea Plan under the MSCP; see Considered Exclusions—*Monardella viminea* section of this proposed rule for more information.

*Unit 5: West San Clemente Canyon*

Unit 5 consists of 16 ac (7 ha) of land made up of 16 ac (7 ha) of land owned by the California Department of Transportation and less than 1 ac (<1 ha) of private land within the boundaries of the City of San Diego. This unit is located in the western portion of San Clemente Canyon, and begins near Clairemont Mesa Boulevard and continues east to the boundary of MCAS Miramar, in San Diego County, California. We consider this unit as a separate unit from the other part of San Clemente Canyon because the Sim J. Harris aggregate mine acts as a barrier to the physical and biotic continuity between the two portions of the canyon. This portion of the canyon is wetter and contains more riparian habitat than the eastern portion of San Clemente Canyon in Unit 4 and is one of few areas of *Monardella viminea* habitat where riparian vegetation persists (Rebman and Dossey 2006a, p. 22). The western portion of San Clemente Canyon (where Unit 5 is located) is essential to the recovery of the species because it contains the PCE and consists of over 500 individuals of *M. viminea* (Tierra Data 2011, p. 12). The habitat in this unit provides redundancy and resiliency for *M. viminea,* and since not all areas of this unit are occupied by *M. viminea* (*i.e.,* the unit is occupied, although there are areas such as within the canyon where plants are not currently growing), this unit provides space for the growth and expansion of the species. Additionally, Unit 5 is essential to recovery because it is made up of several separate sites along the drainage where groups of naturally occurring *M. viminea* plants have been reported in a configuration that will likely contribute to gene exchange via pollinators. This unit contains the physical and biological features essential to the conservation of *M. viminea,* including riparian channels with a natural hydrological regime (PCE section (1)), ephemeral drainages made up of rocky or sandy alluvium (PCE section (3)), and surrounding vegetation that provides semi-open foliar cover (PCE section (2)). The PCE in this unit may require special management considerations or protection. The historical flow regime and flooding from the upper portion of the canyon to this unit is prevented by the Sim J. Harris aggregate mine. Therefore, in the future, this unit may require management to prevent overgrowth of annual species that would otherwise be scoured by periodic flooding. Please see the *Special Management Considerations or Protection*—Monardella viminea section of this proposed rule for a discussion of the threats to *M. viminea* habitat and potential management considerations. We are considering exclusion of a portion of Unit 5 (<1 ac (<1 ha)) from critical habitat under section 4(b)(2) of the Act that is covered by the City of San Diego Subarea Plan under the MSCP; see Considered Exclusions—*Monardella viminea* section of this proposed rule for more information.

**Effects of Critical Habitat Designation**

*Section 7 Consultation*

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of "destruction or adverse modification" (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or 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. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent

alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define "reasonable and prudent alternatives" (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions may affect subsequently listed species or designated critical habitat.

Federal activities that may affect *Monardella viminea* or its designated critical habitat require section 7 consultation under the Act. Activities on State, Tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from us under section 10 of the Act) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not Federally funded, authorized, or permitted, do not require section 7 consultations.

*Application of the "Adverse Modification" Standard*

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical and biological features to an extent that appreciably reduces the conservation value of critical habitat for *Monardella viminea.* As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat designated for *Monardella viminea,* when carried out, funded, or authorized by a Federal agency, should result in consultation with the Service. These activities include, but are not limited to:

(1) Actions that would alter channel morphology or geometry and resultant hydrology to a degree that appreciably reduces the value of critical habitat for either the long-term survival or recovery of the species. Such activities could include, but are not limited to: Water impoundment, channelization, or diversion; road and bridge construction (including instream structures); licensing, relicensing, or operation of dams or other water impoundments; and mining and other removal or deposition of materials. Examples of effects these activities may have on *Monardella viminea* habitat include (but are not limited to) a permanent removal or reduction of suitable space for individual and population growth or an increase in woody or herbaceous ground cover (due to increased moisture levels in soil occupied by the species) that affects the availability of suitable habitat for reproduction and survival of *M. viminea.*

(2) Actions that would significantly directly or indirectly affect pollinator abundance or efficacy to a degree that appreciably reduces the value of the critical habitat for the long-term survival or recovery of the species. Such activities include, but are not limited to: Destruction of critical habitat that contains pollinators; introduction of nonnative insects into designated critical habitat that could compete with native pollinators; clearing or trimming of other native vegetation in designated critical habitat in a manner that diminishes appreciably its utility to support *Monardella viminea* pollinators (such as clearing vegetation for fuels control); and application of pesticides.

(3) Actions that would significantly alter sediment deposition patterns and rates within a stream channel to a degree that appreciably reduces the value of the critical habitat for the long-term survival or recovery of the species. Such activities include, but are not limited to: Excessive sedimentation from road construction; excessive recreational trail use; residential, commercial, and industrial development; aggregate mining; and other watershed and floodplain disturbances. These activities may reduce the amount and distribution of suitable habitat for individual and population growth, and reduce or change habitat quality for reproduction, germination, and development.

(4) Actions that would significantly alter biotic features to a degree that appreciably reduces the value of the critical habitat for both the long-term survival or the recovery of the species. Such activities include, but are not limited to, modifying the habitats that support *Monardella viminea* to include coastal sage scrub, riparian scrub, and (in some areas) riparian oak woodland. Proposals for application of herbicides or fire retardant chemicals could also necessitate consultation. These activities may reduce the amount or quality of suitable habitat for individuals and populations; reduce or change sites for reproduction and development; or reduce the quality of water, light, minerals, or other nutritional or physiological requirements.

(5) Actions that could contribute to the introduction or support of nonnative species into critical habitat to a degree that appreciably reduces the value of the critical habitat for both the long-term survival or recovery of *Monardella viminea.* Such activities include, but are not limited to: Landscape disturbance or plant introductions that result in increased numbers of individuals and taxa of nonnative species for landscape or erosion control purposes, or addition of nutrients that would fertilize nonnative plant taxa. These activities may reduce the suitable space for individual and population growth, reduce or change sites for reproduction and development of offspring, and introduce or support nonnative plant taxa that compete with *M. viminea.*

**Exemptions**

*Application of Section 4(a)(3) of the Act*

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation."

We consult with the military on the development and implementation of INRMPs for installations with Federally listed species. We analyzed the INRMP developed by MCAS Miramar, the only military installation located within the range of the proposed critical habitat designation for *Monardella viminea,* to determine if the military lands are exempt under section 4(a)(3) of the Act.

Marine Corps Air Station Miramar (MCAS Miramar)

Marine Corps Air Station Miramar has an approved INRMP (Gene Stout and Associates 2006) that addresses *Monardella viminea,* and the Marine Corps has committed to work closely with us and CDFG to continually refine the existing INRMP as part of the Sikes Act's INRMP review process. In accordance with section 4(a)(3)(B) of the Act, the Secretary has determined that conservation efforts identified in the INRMP provide a benefit to *M. viminea* occurring on MCAS Miramar (see the following section that details this determination). Therefore, the 1,546 ac (625 ha) of habitat occupied by *M. viminea* at the time of listing on which are found the physical or biological features essential to its conservation and thus qualified for consideration as critical habitat on MCAS Miramar are exempt from this critical habitat designation for *M. viminea* under section 4(a)(3)(B)(i) of the Act. The rationale for this exemption is the same as it was for the 2006 designation (71 FR 65662; November 8, 2006).

In the previous final critical habitat designation for *Monardella viminea,* we exempted MCAS Miramar from the designation of critical habitat (71 FR 65662; November 8, 2006). We based this decision on the conservation benefits to *M. viminea* identified in the INRMP developed by MCAS Miramar in May 2000, and the updated INRMP prepared by MCAS Miramar in October 2006 (Gene Stout and Associates *et al.* 2006). We determined that conservation efforts identified in the INRMP provide a benefit to *M. viminea* on MCAS Miramar (Gene Stout and Associates *et al.* 2006, Section 7, p. 17). We reaffirm that continued conservation efforts on MCAS Miramar provide a benefit to *M. viminea.* Therefore, lands containing features essential to the conservation of *M. viminea* on this installation are exempt from this proposed critical habitat designation for *M. viminea* under section 4(a)(3)(B)(i) of the Act.

Provisions in the INRMP for MCAS Miramar benefit *Monardella viminea* by requiring efforts to avoid and minimize impacts to this species and riparian watersheds. All *M. viminea* suitable habitat is managed as specified for Level 1 or Level 2 Habitat Management Areas defined by the INRMP (Kassebaum 2010, pers. comm.). Under the INRMP, Level I Management Areas receive the highest conservation priority of the various Management Areas on MCAS Miramar. The conservation of watersheds in the Level I Management Areas is achieved through:

(1) Education of base personnel;

(2) Implementation of proactive measures that help avoid accidental impacts (such as signs and fencing);

(3) Development of procedures to respond to and restore accidental impacts; and

(4) Monitoring of *M. viminea* occurrences on MCAS Miramar (Gene Stout and Associates *et al.* 2006, Section 7, pp. 17–23).

Additionally, MCAS Miramar's environmental security staff reviews projects and enforces existing regulations and base orders that avoid and minimize impacts to natural resources, including *M. viminea* and its habitat. The INRMP for MCAS Miramar provides a benefit to *M. viminea* and includes measures designed to prevent degradation or destruction of the species' riparian habitat.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that *Monardella viminea* habitat on MCAS Miramar is subject to the MCAS Miramar INRMP and that conservation efforts identified in the INRMP provide and will continue to provide a benefit to *M. viminea* occurring in habitats within and adjacent to MCAS Miramar. Therefore, lands within this installation are exempt from critical habitat designation under section 4(a)(3) of the Act. We are not including approximately 1,546 ac (625 ha) of habitat in this proposed critical habitat designation because of this exemption.

**Exclusions**

*Application of Section 4(b)(2) of the Act*

Section 4(b)(2) of the Act states that the Secretary must designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, the Secretary may exercise his discretion to

exclude a specific area from critical habitat designation if the determination is made that the benefits of excluding the area outweigh the benefits of inclusion. The Secretary may exercise discretion to exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exercise discretion to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion would not result in the extinction of the species.

When identifying the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus; the educational benefits of mapping essential habitat for recovery of the listed species; and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

When identifying the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan that provides equal to or more conservation than a critical habitat designation would provide.

In the case of *Monardella viminea,* the benefits of critical habitat include public awareness of *M. viminea* presence and the species' critical habitat and the importance of protecting that habitat, and in cases where a Federal nexus exists, increased habitat protection for *M. viminea* due to the prohibition against adverse modification or destruction of critical habitat.

When we evaluate the existence of a conservation plan when considering the benefits of exclusion, we consider a variety of factors, including but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical and biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

The Secretary is considering whether to exercise discretion to exclude certain lands from critical habitat. Based on the information provided by entities seeking exclusion, as well as any additional public comments we receive, we will evaluate whether certain lands are appropriate for exclusion from the final critical habitat designation under section 4(b)(2) of the Act. If the analysis indicates that the benefits of excluding lands from the final designation outweigh the benefits of designating those lands as critical habitat, then the Secretary may exercise his discretion to exclude the lands from the final designation.

We are considering whether to exercise the delegated discretion of the Secretary to exclude the areas listed below either because:

(1) Their value for conservation will be preserved for the foreseeable future by existing protective actions, or

(2) They are appropriate for exclusion under the "other relevant factor" provisions of section 4(b)(2) of the Act.

We specifically request comments on the inclusion or exclusion of these areas, as listed in Table 4. In the paragraphs below, we provide a preliminary analysis of these lands under section 4(b)(2) of the Act.

TABLE 4—AREAS BEING CONSIDERED FOR EXCLUSION UNDER SECTION 4(B)(2) OF THE ACT FROM THIS PROPOSED CRITICAL HABITAT DESIGNATION FOR *Monardella viminea.***

| Unit* | Area Covered by City of San Diego Subarea Plan (acres (hectares)) | Area Covered by County of San Diego Subarea Plan (acres (hectares)) |
|---|---|---|
| 1. Sycamore Canyon | 47 (19) | 36 (15) |
| 2. West Sycamore Canyon | 21 (9) | 0 (0) |
| 3. Spring Canyon | 97 (39) | 0 (0) |
| 4. East San Clemente Canyon | 7 (3) | 0 (0) |
| 5. West San Clemente Canyon | < 1 (< 1) | 0 (0) |
| Total *** | 172 (70) | 36 (15) |

* Values in this table may not sum due to rounding.

** The areas being considered for exclusion in this table are included in Tables 1 and 2 above.

*** All areas that are covered by the HCPs (City of San Diego Subarea Plan under the MSCP and County of San Diego Subarea Plan under the MSCP) are considered for exclusion.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we are preparing an analysis of the economic impacts of the proposed critical habitat designation and related factors.

We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://www.regulations.gov,* or by contacting the Carlsbad Fish and Wildlife Office directly (see **FOR FURTHER INFORMATION CONTACT** section). During the development of a final designation, we will consider economic impacts, public comments, and other

new information, and areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense where a national security impact might exist. In preparing this proposal, we have exempted from the designation of critical habitat those lands on MCAS Miramar because the base has an approved INRMP which the Marine Corps is implementing and which we have concluded provides a benefit to *Monardella viminea.*

There are no other lands within the proposed designation of critical habitat that are owned or managed by the Department of Defense, and, therefore, we anticipate no impact on national security. Consequently, the Secretary is not considering exercising his discretion to exclude any areas from the final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any Tribal issues, and consider the government-to-government relationship of the United States with Tribal entities. We also consider any social impacts that might occur because of the designation.

Land and Resource Management Plans, Conservation Plans, or Agreements Based on Conservation Partnerships

We consider whether a current land management or conservation plan (HCPs as well as other types) provides adequate management or protection for critical habitat of *Monardella viminea.* In particular, we consider whether:

(1) The plan is complete and provides the same or better level of protection from adverse modification or destruction than is likely to result from a consultation under section 7 of the Act;

(2) There is a reasonable expectation that the conservation management strategies and actions will be implemented for the foreseeable future, based on past practices, written guidance, or regulations; and

(3) The plan provides conservation strategies and measures consistent with currently accepted principles of conservation biology.

We are considering exercising our delegated discretion to exclude proposed critical habitat covered by the City of San Diego Subarea Plan and the County of San Diego Subarea Plan under the San Diego Multiple Species Conservation Program. Our review of the plans under section 4(b)(2) of the Act is consistent with our commitments to the City and County in the Implementing Agreements (IA) to consider the plans in future designations of critical habitat for covered species (Service *et al.* 1997 p. 23 (City of San Diego IA and Service *et al.* 1998 p. 23 (County of San Diego IA). We will consider the above criteria and other relevant factors in making a decision under section 4(b)(2) of the Act.

*San Diego Multiple Species Conservation Program (MSCP)—County of San Diego Subarea Plan and City of San Diego Subarea Plan*

The Multiple Species Conservation Program (MSCP) is a comprehensive habitat conservation planning program that encompasses 582,243 (235,626 ha) acres within 12 jurisdictions of southwestern San Diego County. The MSCP is a subregional plan that identifies the conservation needs of 85 Federally listed and sensitive species, including *Monardella viminea,* and serves as the basis for development of subarea plans by each jurisdiction in support of section 10(a)(1)(B) permits. The subregional MSCP identifies where mitigation activities should be focused, such that upon full implementation of the subarea plans approximately 171,920 ac (69,574 ha) of the 582,243 ac (235,626 ha) MSCP plan area will be preserved and managed for covered species. Conservation of *Monardella viminea* is addressed in the sub-regional plan, and in the City of San Diego and County of San Diego Subarea Plans that we are considering for exclusion in this rule.

The subregional MSCP identifies where mitigation activities should be focused, such that upon completion approximately 171,920 ac (69,574 ha) of the 582,243 ac (235,626 ha) MSCP plan area will be preserved for conservation (MSCP 1998, pp. 2–1, and 4–2 to 4–4).

The City and County Subarea Plans identify areas where mitigation activities should be focused to assemble its preserve areas (*i.e.,* MHPA or PAMA). Those areas of the MSCP preserve that are already conserved, as well as those areas that are designated for inclusion in the preserve under the plan, are referred to as the "preserve area" in this proposed revised critical habitat designation. When the preserve is completed, the public sector (*i.e.,* Federal, State, and local government, and general public) will have contributed 108,750 ac (44,010 ha) (63.3 percent) to the preserve, of which 81,750 ac (33,083 ha) (48 percent) was existing public land when the MSCP was established, and 27,000 ac (10,927 ha) (16 percent) will have been acquired. At completion, the private sector will have contributed 63,170 ac (25,564 ha) (37 percent) to the preserve as part of the development process, either through avoidance of impacts or as compensatory mitigation for impacts to biological resources outside the preserve. Currently, and in the future, Federal and State governments, local jurisdictions and special districts, and managers of privately owned land will manage and monitor their land in the preserve for species and habitat protection (MSCP 1998, pp. 2–1, and 4–2 to 4–4).

The City and County Subarea Plans include multiple conservation measures that provide benefits to *Monardella viminea.* The MSCP requires the City and the County to develop framework and site specific management plans, subject to the review and approval of the Service and CDFG, to guide the management of all preserve land under City and County control. Currently, the framework plans are in place, and the County of San Diego has developed a site-specific management plan for the one area under its ownership that contains *M. viminea* (Sycamore Canyon), which incorporates requirements to monitor and adaptively manage *M. viminea* habitat over time. In contrast, though the City of San Diego has conserved 100 percent of *M. viminea* occurrences on City-owned lands within preserve areas (City of San Diego 1997, p. 127), it has not developed any site-specific management plan for any lands containing *M. viminea,* including the lands we are proposing as critical habitat. Any *M. viminea* occurrences that occur on private lands that have not been conserved by the City of San Diego Subarea Plan receive no management or protection other than that provided by the ESL (almost all occurrences that occur within the City of San Diego's MSCP Subarea Plan area have been protected in MSCP reserves; see Factor D discussion above). The ESL provides

protection for sensitive biological resources (including *Monardella viminea* and its habitat), by ensuring that development occurs "in a manner that protects the overall quality of the resources and the natural and topographic character of the area, encourages a sensitive form of development, retains biodiversity and interconnected habitats, maximizes physical and visual public access to and along the shoreline, and reduces hazards due to flooding in specific areas while minimizing the need for construction of flood control facilities." The ESL was designed to act as an implementing tool for the City of San Diego Subarea Plan (City of San Diego 1997, p. 98).

The MSCP also provides for a biological monitoring program, and *Monardella viminea* is identified as a first priority species for field monitoring under both the City and County Subarea Plans. Under the County's subarea plan, Group A plant species, including *M. viminea,* are conserved following guidelines outlined by the County's Biological Mitigation Ordinance, which uses a process that:

(1) Requires avoidance to the maximum extent feasible;

(2) Allows for a maximum 20 percent encroachment into a population if total avoidance is not feasible; and

(3) Requires mitigation at the 1:1 to 3:1 (in kind) for impacts if avoidance and minimization of impacts would result in no reasonable use of the property.

We are considering exercising our delegated discretion to exclude from critical habitat a portion of Unit 1 covered by the County of San Diego Subarea Plan under section 4(b)(2) of the Act. This area encompasses approximately 36 ac (15 ha) of land. We are also considering exercising our delegated discretion to exclude from critical habitat portions of Units 1–5 covered by the City of San Diego Subarea Plan under section 4(b)(2) of the act. This area encompasses 172 ac (70 ha) of land. All areas that are covered by the HCPs (City of San Diego Subarea Plan under the MSCP and County of San Diego Subarea Plan under the MSCP) are considered for exclusion.

**Peer Review**

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We have invited these peer reviewers to comment during this public comment period on our specific assumptions and conclusions in this proposed designation of critical habitat.

We will consider all comments and information we receive during this comment period on this proposed rule during our preparation of the final determination. Accordingly, the final decision may differ from this proposal.

**Public Hearings**

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. We must receive your request within 45 days after the date of this **Federal Register** publication. Send your request to the address shown in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

**Required Determinations**

*Regulatory Planning and Review—Executive Order 12866*

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this proposed rule under Executive Order 12866 (Regulatory Planning and Review). OMB bases its determination upon the following four criteria:

(1) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(2) Whether the rule will create inconsistencies with other Federal agencies' actions.

(3) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(4) Whether the rule raises novel legal or policy issues.

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, we lack the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, we defer the RFA finding until completion of the draft economic analysis prepared under section 4(b)(2) of the Act and Executive Order 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, we will announce availability of the draft economic analysis of the proposed designation in the **Federal Register** and reopen the public comment period for the proposed designation. We will include with this announcement, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. We have concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that we make a sufficiently informed determination based on adequate economic information and provide the necessary opportunity for public comment.

*Energy Supply, Distribution, or Use—Executive Order 13211*

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. We do not expect the designation of this proposed critical habitat to significantly affect energy supplies, distribution, or use, because there are no energy or distribution facilities within the area proposed as critical habitat. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and

review and revise this assessment as warranted.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

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

(1) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or Tribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or Tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments. Small governments would be affected only to the extent that any programs having Federal funds, permits, or other authorized activities must ensure that their actions would not adversely affect the critical habitat. Therefore, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment if appropriate.

*Takings—Executive Order 12630*

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for *Monardella viminea* in a takings implications assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. The takings implications assessment concludes that this designation of critical habitat for *M. viminea* would not pose significant takings implications for lands within or affected by the designation.

*Federalism—Executive Order 13132*

In accordance with Executive Order 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in California. The designation of critical habitat in areas currently occupied by *Monardella viminea* would impose no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the physical and biological features essential to the conservation of the species are more clearly defined, and the elements of the features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what Federally sponsored activities may occur. However, it may assist these local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

*Civil Justice Reform—Executive Order 12988*

In accordance with Executive Order 12988 (Civil Justice Reform), it has been determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the elements of physical and biological features essential to the conservation of *Monardella viminea* within the designated areas to assist the public in understanding the habitat needs of the species.

*Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act (42 U.S.C. 4321 et. seq.)*

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

*Clarity of the Rule*

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, *etc.*

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes.

We have determined that there are no Tribal lands occupied by *Monardella viminea* that contain the features essential for conservation of the species, and no Tribal lands unoccupied by *M. viminea* that are essential for the conservation of the species. Therefore, we have not proposed designation of critical habitat for *M. viminea* on Tribal lands.

**References Cited**

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

**Authors**

The primary authors of this package are the staff members of the Carlsbad Fish and Wildlife Office.

**List of Subjects in 50 CFR Part 17**

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

**Proposed Regulation Promulgation**

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

## PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

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

2. In § 17.12(h), revise the entry for "*Monardella linoides* ssp. *viminea*" under "FLOWERING PLANTS" in the List of Endangered and Threatened Plants to read as follows:

**§ 17.12 Endangered and threatened plants.**

* * * * *

(h) * * *

| Species | | Historic range | Family | Status | When listed | Critical habitat | Special rules |
|---|---|---|---|---|---|---|---|
| Scientific name | Common name | | | | | | |
| **Flowering Plants** | | | | | | | |
| * | * | * | * | * | * | * | |
| *Monardella viminea* | Willowy monardella | U.S.A. (CA), Mexico | Lamiaceae ..... | E | 649 | 17.96(a) | NA |
| * | * | * | * | * | * | * | |

3. In § 17.96, amend paragraph (a) by revising critical habitat for *Monardella linoides* ssp. *viminea* (willowy monardella) under Family Lamiaceae to read as follows:

**§ 17.96 Critical habitat—plants.**

(a) *Flowering plants.*

* * * * *

Family Lamiaceae: *Monardella viminea* (willowy monardella)

(1) Critical habitat units are depicted for San Diego County, California, on the maps below.

(2) Within these areas, the primary constituent element of the physical and biological features essential to the conservation of *Monardella viminea* is riparian channels with ephemeral drainages and adjacent floodplains:

(i) With a natural hydrological regime, in which:

(A) Water flows only after peak seasonal rainstorms;

(B) High runoff events periodically scour riparian vegetation and redistribute alluvial material to create new stream channels, benches, and sandbars; and

(C) Water flows for usually less than 48 hours after a rain event, without long-term standing water;

(ii) With surrounding vegetation that provides semi-open, foliar cover with:

(A) Little or no herbaceous understory;

(B) Little to no canopy cover;

(C) Open ground cover, less than half of which is herbaceous vegetation cover;

(D) Some shrub cover; and

(E) An association of other plants, including *Eriogonum fasciculatum* (California buckwheat) and *Baccharis sarothroides* (broom baccharis);

(iii) That contain ephemeral drainages that:

(A) Are made up of coarse, rocky, or sandy alluvium; and

(B) Contain terraced floodplains, terraced secondary benches, stabilized sandbars, channel banks, or sandy washes; and

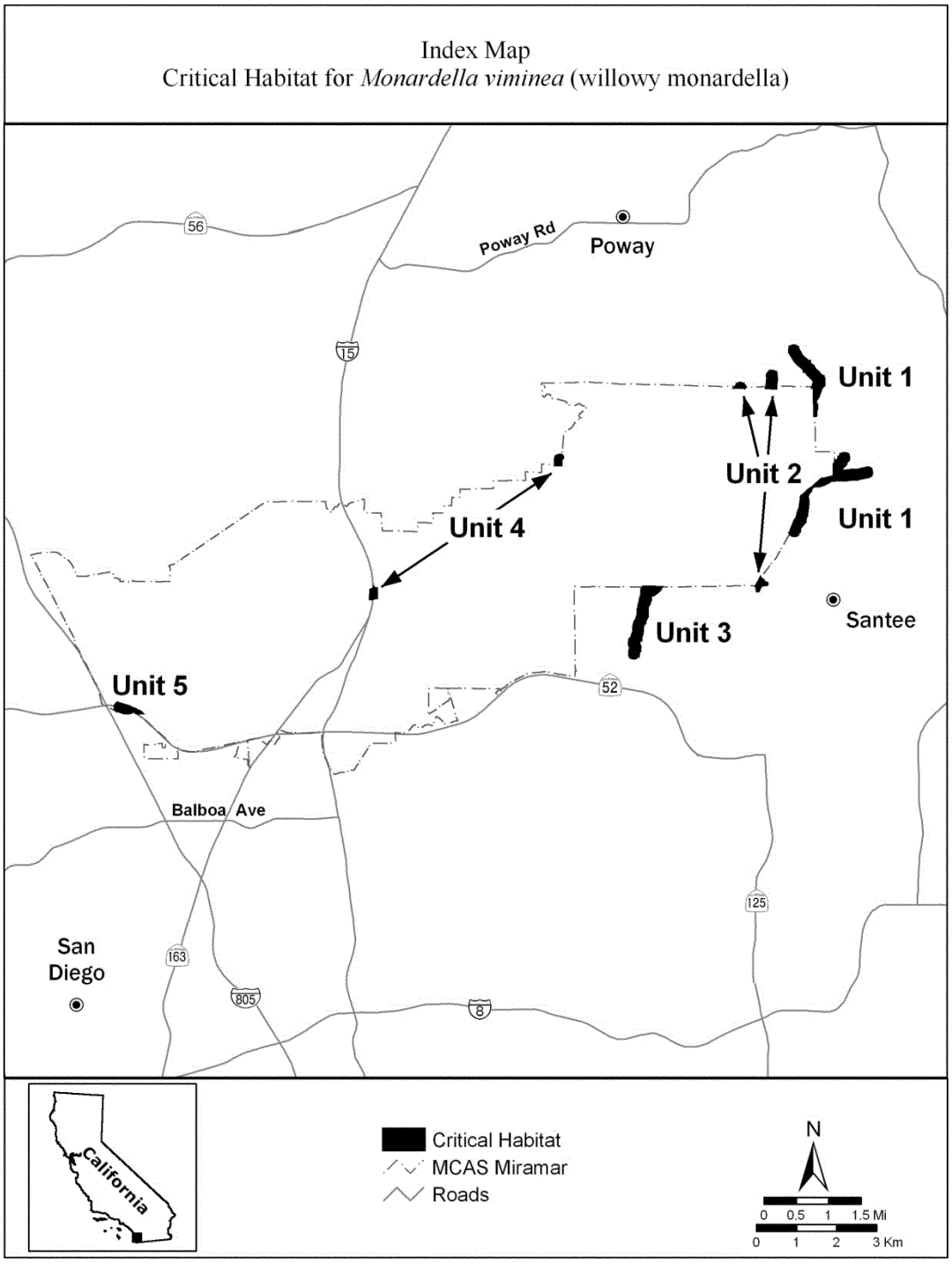
(iv) That have soil with high sand content, typically characterized by sediment and cobble deposits, and further characterized by a high content of coarse, sandy grains and low content of silt and clay.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) *Critical habitat map units.* Data layers defining map units were created using a base of U.S. Geological Survey 7.5' quadrangle maps. Critical habitat units were then mapped using Universal Transverse Mercator (UTM) zone 11, North American Datum (NAD) 1983 coordinates.

(5) *Note:* Index map of critical habitat units for *Monardella viminea* follows:

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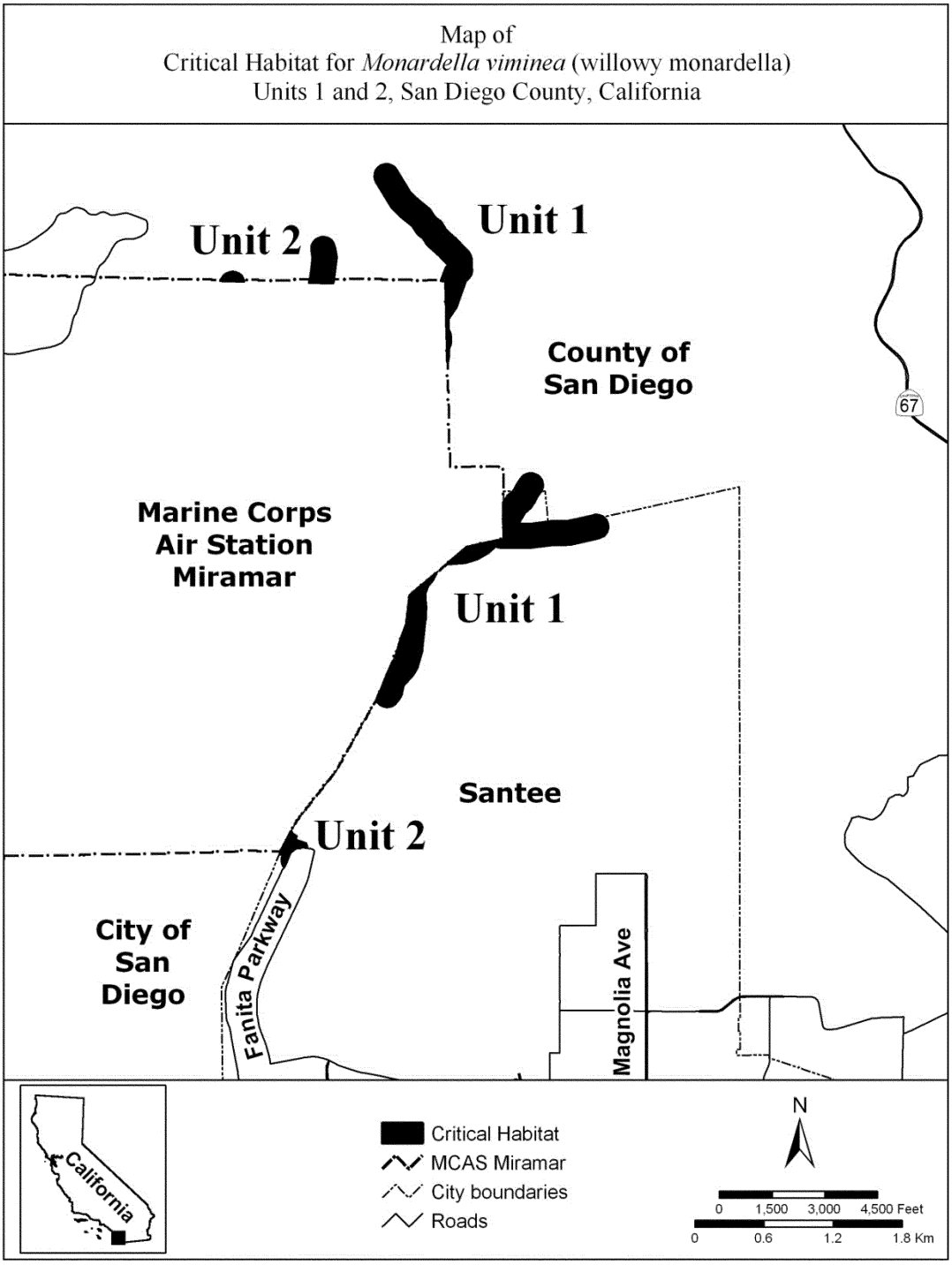

Index Map
Critical Habitat for *Monardella viminea* (willowy monardella)
56
Poway Rd
Poway
15
Unit 1
Unit 2
Unit 1
Unit 4
Unit 3
Santee
Unit 5
52
Balboa Ave
125
San Diego
163
805
8
California
Critical Habitat
MCAS Miramar
Roads
N
0 0.5 1 1.5 Mi
0 1 2 3 Km

(6) Unit 1: Sycamore Canyon and West Sycamore Canyon, San Diego County, California.

(i) [Reserved for textual description of Unit 1.]

(ii) [Reserved for textual description of Unit 2.]

(iii) *Note:* Map of Unit 1 and Unit 2, Sycamore Canyon and West Sycamore Canyon, follows:

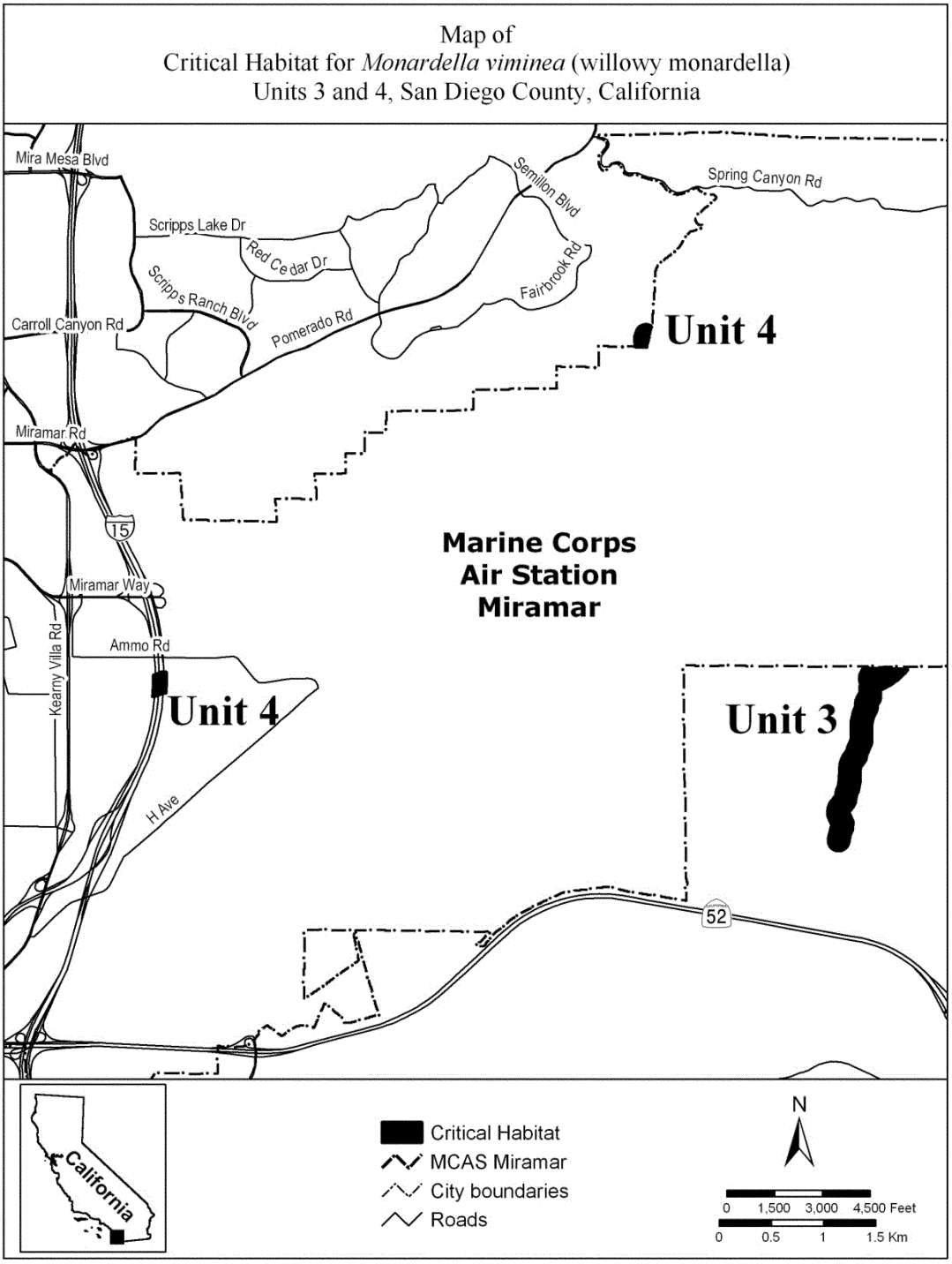


(7) Units 3 and 4: Spring Canyon and East San Clemente Canyon, San Diego County, California.

(i) [Reserved for textual description of Unit 3.]

(ii) [Reserved for textual description of Unit 4.]

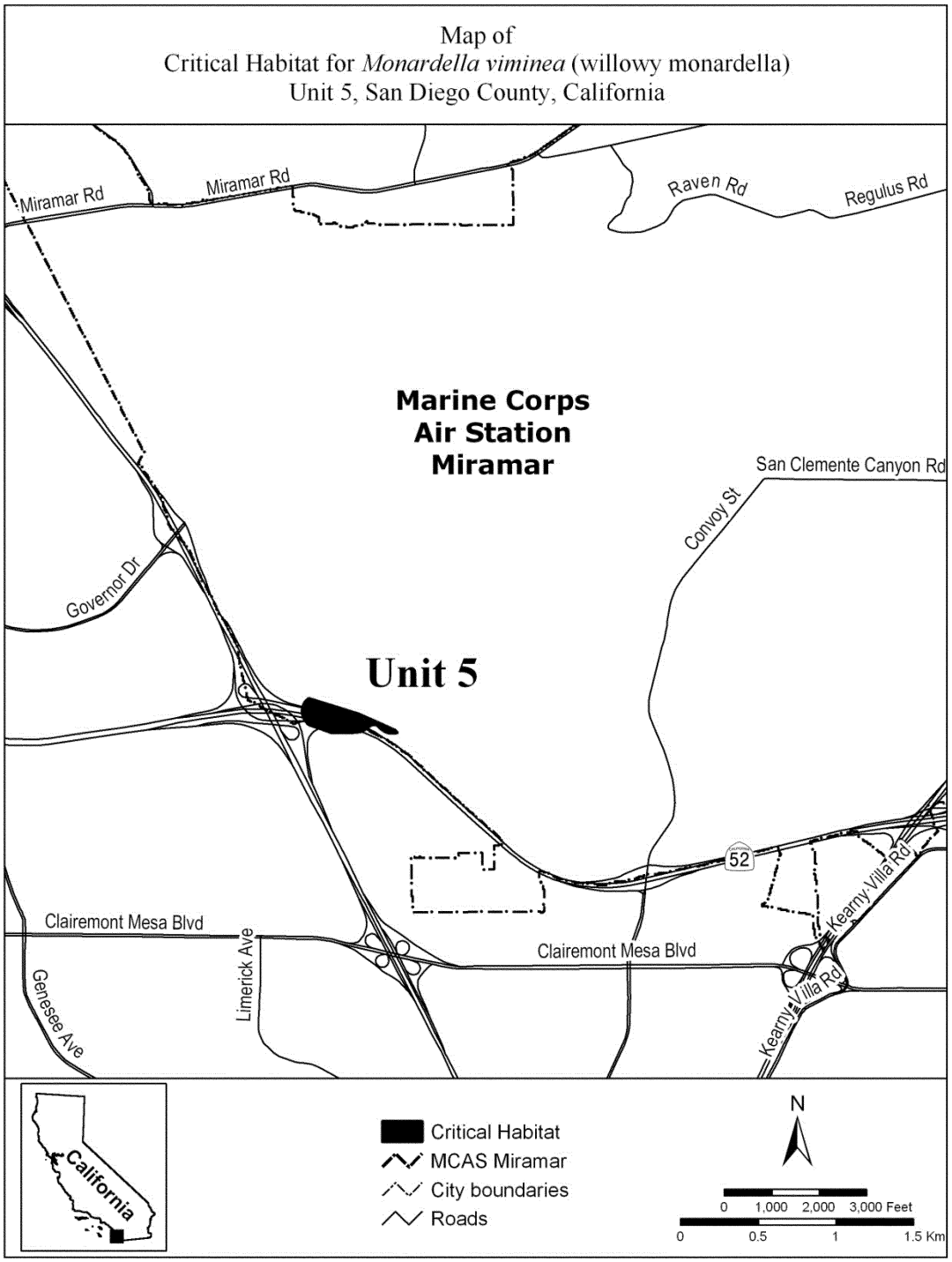
(iii) *Note:* Map of Unit 3 and Unit 4, Spring Canyon and East San Clemente Canyon, follows:



(8) Unit 5: West San Clemente Canyon, San Diego County, California.

(i) [Reserved for textual description of Unit 5.]

(ii) *Note:* Map of Unit 5, West San Clemente Canyon, follows:




* * * * *

Dated: May 25, 2011.

**Eileen Sobeck,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 2011–13912 Filed 6–8–11; 8:45 am]

**BILLING CODE 4310–55–C**




# FEDERAL REGISTER

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Part IV

## Department of the Interior

Fish and Wildlife Service

50 CFR Part 17
Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List Abronia ammophila, Agrostis rossiae, Astragalus proimanthus, Boechera (Arabis) pusilla, and Penstemon gibbensii as Threatened or Endangered; Proposed Rule

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[FWS–R6–ES–2011–0023; MO 92210–0–0008–B2]**

## Endangered and Threatened Wildlife and Plants; 12–Month Finding on a Petition To List *Abronia ammophila, Agrostis rossiae, Astragalus proimanthus, Boechera (Arabis) pusilla,* and *Penstemon gibbensii* as Threatened or Endangered

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 12-month petition finding.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding on a petition to list *Abronia ammophila* (Yellowstone sand verbena), *Agrostis rossiae* (Ross' bentgrass), *Astragalus proimanthus* (precocious milkvetch), *Boechera* (*Arabis*) *pusilla* (Fremont County rockcress or small rockcress), and *Penstemon gibbensii* (Gibbens' beardtongue) as threatened or endangered, and to designate critical habitat under the Endangered Species Act of 1973, as amended (Act). After review of all available scientific and commercial information, we find that listing *A. ammophila, A. rossiae, A. proimanthus,* and *P. gibbensii* is not warranted at this time. However, we ask the public to submit to us any new information that becomes available concerning the threats to *A. ammophila, A. rossiae, A. proimanthus,* and *P. gibbensii* or their habitats at any time. After a review of all the available scientific and commercial information, we find that listing *B. pusilla* as threatened or endangered is warranted. However, currently listing *B. pusilla* is precluded by higher priority actions to amend the Federal Lists of Endangered and Threatened Wildlife and Plants. Upon publication of this 12-month petition finding, we will add *B. pusilla* to our candidate species list. We will develop a proposed rule to list *B. pusilla* as our priorities allow. We will make any determinations on critical habitat during development of the proposed listing rule. In any interim period, we will address the status of the candidate taxon through our annual Candidate Notice of Review.

**DATES:** The finding announced in this document was made on June 9, 2011.

**ADDRESSES:** This finding is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–R6–ES–2011–0023. Supporting documentation used in preparing this finding is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Wyoming Ecological Services Field Office, 5353 Yellowstone Road, Suite 308A, Cheyenne, WY 82009. Please submit any new information, materials, comments, or questions concerning this finding to the above address.

**FOR FURTHER INFORMATION CONTACT:** R. Mark Sattelberg, Field Supervisor, Wyoming Ecological Services Field Office (see **ADDRESSES**); by telephone at 307–772–2374; or by facsimile at 307–772–2358. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### Background

Section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et seq.*), requires that, for any petition to revise the Federal Lists of Endangered and Threatened Wildlife and Plants that contains substantial scientific or commercial information that listing the species may be warranted, we make a finding within 12 months of the date of receipt of the petition. In this finding, we will determine that the petitioned action is: (1) Not warranted, (2) warranted, or (3) warranted, but the immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are threatened or endangered, and expeditious progress is being made to add or remove qualified species from the Federal Lists of Endangered and Threatened Wildlife and Plants. Section 4(b)(3)(C) of the Act requires that we treat a petition for which the requested action is found to be warranted but precluded as though resubmitted on the date of such finding, that is, requiring a subsequent finding to be made within 12 months. We must publish these 12-month findings in the **Federal Register**.

*Previous Federal Actions*

Federal action for *Agrostis rossiae* and *Astragalus proimanthus* began as a result of section 12 of the original Act, which directed the Secretary of the Smithsonian Institution to prepare a report on plants considered to be endangered, threatened, or extinct in the United States. This report, designated as House Document No. 94–51, was presented to Congress on January 9, 1975. That document lists *A. rossiae* as a threatened species and *A. proimanthus* as an endangered species (House Document 94–51, pp. 57, 90, 163). On July 1, 1975, we published a notice in the **Federal Register** (40 FR 27823) accepting the Smithsonian Institution report as a petition within the context of section 4(c)(2) (petition provisions are now found in section 4(b)(3) of the Act), and giving notice of the Service's intention to review the status of the plant taxa listed therein.

As a result of that review, we published a proposed rule on June 16, 1976, in the **Federal Register** (41 FR 24523) to determine endangered status pursuant to section 4 of the Act for approximately 1,700 vascular plant taxa, including *Astragalus proimanthus.* This list of plant taxa was assembled based on comments and data received by the Smithsonian Institution and the Service in response to House Document No. 94–51 and the July 1, 1975, **Federal Register** publication. General comments received in response to the 1976 proposal are summarized in an April 26, 1978, **Federal Register** publication (43 FR 17909). In 1978, amendments to section 4(f)(5) of the Act required that all proposals over 2 years old be withdrawn. However, proposals already over 2 years old were given a 1-year grace period. On December 10, 1979, we published a notice in the **Federal Register** (44 FR 70796) withdrawing the portion of the June 16, 1976, proposal that had not been made final. This removed both *A. proimanthus* and *Agrostis rossiae* from proposed status, but retained both species as candidate plant taxa that "may qualify for listing under the Act."

On December 15, 1980, we published a current list of those plant taxa native to the United States being considered for listing under the Act; this identified both *Agrostis rossiae* and *Astragalus proimanthus* as category 1 taxa (45 FR 82480). The Service defined category 1 taxa as a taxonomic group for which we presently had sufficient information on hand to support the biological appropriateness of these taxa being listed as threatened or endangered species (45 FR 82480). On November 28, 1983, *A. rossiae* was lowered to a category 2 taxon "currently under review," whereas *A. proimanthus* was moved to the "taxa no longer under review" list, and given a 3C rank, indicating the species was more abundant or widespread than previously believed or not subjected to any identifiable threat (48 FR 53640). We defined category 2 taxa as those for which we had information at that time that indicated proposing to list was possibly appropriate, but for which substantial data on biological

vulnerability and threat(s) was not currently known or on file to support proposed rules. *Boechera* (formerly *Arabis*) *pusilla* and *Penstemon gibbensii* were added as category 2 taxa during the same review (48 FR 53640). These four species retained the same ranking for the subsequent review on September 27, 1985 (50 FR 39526). The February 21, 1990, list kept *A. rossiae, B. pusilla,* and *P. gibbensii* as category 2 taxa, and reverted *A. proimanthus* back to a category 2 taxon (55 FR 6184).

The September 30, 1993, review changed the status of *Boechera pusilla* to a category 1 species (58 FR 51144). This review added a "status trend" column. Each species was identified as increasing (I), stable (S), declining (D), or unknown (U). The 1993 review added *Abronia ammophila* and assigned it a 2U rank, moved *Boechera pusilla* up to a 1D rank, and listed *Agrostis rossiae* as 2U, *Astragalus proimanthus* as 2S, and *Penstemon gibbensii* as 2U (58 FR 51144).

On February 28, 1996, we proposed discontinuing the designation of category 2 species as candidates due to the lack of sufficient information to justify issuance of a proposed rule (61 FR 7596). This proposal included eliminating candidate status for four of the five species addressed in this finding; only *Boechera pusilla* was proposed to remain a candidate (61 FR 7596). This policy change was finalized on December 5, 1996, stating that the listing of category 2 species was not needed because of other lists already maintained by other entities such as Federal and State agencies (61 FR 64481).

On September 19, 1997, we published a notice of review that retained *Boechera pusilla* as a candidate species (62 FR 49398). However, on October 25, 1999, we published a notice of review that indicated our intent to remove several species, including *B. pusilla,* from the list of candidate species because evidence suggested that these taxa were either more abundant than previously believed or that the taxa were not subject to the degree of threats sufficient to warrant continuance of candidate status, issuance of a proposed listing, or a final listing (64 FR 57534). The change of status for *B. pusilla* was finalized on October 20, 2000, on the basis that regulatory mechanisms and changes to management of the associated land reduced or eliminated the threats facing *B. pusilla* and ensured the survival and conservation of this species (65 FR 63044).

On July 30, 2007, we received a formal petition dated July 24, 2007, from Forest Guardians (now WildEarth Guardians), requesting that we: (1) Consider all full species in our Mountain-Prairie Region ranked as G1 or G1G2 by the organization NatureServe, except those that are currently listed, proposed for listing, or candidates for listing; and (2) list each species as either threatened or endangered. The petition identified 206 species as petitioned entities, including the 5 species we address in this status review. A species ranking of G1 is defined as a species that is critically imperiled across its entire range (or global range) (NatureServe 2010b, p. 3). A ranking of G1G2 means the species is either ranked as a G1 or a G2 species, with G2 defined as imperiled across its entire range (NatureServe 2010b, pp. 3–4). The petition incorporated all analysis, references, and documentation provided by NatureServe in its online database at *http://www.natureserve.org/* into the petition. The petition clearly identified itself as a petition and included the identification information, as required in 50 CFR 424.14(a). We sent a letter to the petitioners, dated August 24, 2007, acknowledging receipt of the petition and stating that, based on preliminary review, we found no compelling evidence to support an emergency listing for any of the species covered by the petition.

On March 19, 2008, WildEarth Guardians filed a complaint (1:08–CV–472–CKK) indicating that the Service failed to comply with its mandatory duty to make a preliminary 90-day finding on their two multiple-species petitions—one for mountain-prairie species and one for southwest species. We subsequently published two initial 90-day findings on January 6, 2009 (74 FR 419), and February 5, 2009 (74 FR 6122). The February 5, 2009, finding determined that there was not substantial scientific or commercial information indicating that listing 165 of the 206 petitioned species in the mountain-prairie region may be warranted (74 FR 6122). Two additional species were evaluated in a January 6, 2009, 90-day finding (74 FR 419), and no determination was made on whether substantial information had been presented on the remaining 39 species included in the petition (74 FR 6122). The 5 species covered in this 12-month finding were among the remaining 39 species. An additional species was determined to qualify for candidate status (73 FR 75175; December 10, 2008). On March 13, 2009, the Service and WildEarth Guardians filed a stipulated settlement in the District of Columbia Court, agreeing that the Service would submit to the **Federal Register** a finding as to whether WildEarth Guardians' petitions present substantial information indicating that the petitioned actions may be warranted for the remaining 38 mountain-prairie species by August 9, 2009.

On June 18, 2008, we received a petition from WildEarth Guardians dated June 12, 2008, to emergency list 32 species under the Administrative Procedure Act and the Endangered Species Act. Of those 32 species, 11 were included in the July 24, 2007, petition to be listed on a non-emergency basis. Although the Act does not provide for a petition process for an interested person to seek to have a species emergency listed, section 4(b)(7) of the Act authorizes the Service to issue emergency regulations to temporarily list a species. In a letter dated July 25, 2008, we stated that the information provided in both the 2007 and 2008 petitions and in our files did not indicate that an emergency situation existed for any of the 11 species. The Service's decisions whether to exercise its authority to issue emergency regulations to temporarily list a species are not judicially reviewable. *See Fund for Animals* v. *Hogan,* 428 F.3d 1059 (DC Cir. 2005).

On August 18, 2009, we published a notice of 90-day finding (74 FR 41649) on the remaining 38 species from the petition to list 206 species in the mountain-prairie region of the United States as threatened or endangered under the Act. We found that the petition presented substantial scientific and commercial information for 29 of the 38 species, indicating that listing may be warranted for those species. The 5 species we address in this 12-month finding were included within these 29 species. We also opened a 60-day public comment period to allow all interested parties an opportunity to provide information on the status of the 29 species (74 FR 41649). The public comment period closed on October 19, 2009. We received 224 public comments. Of these, 38 specifically addressed *Abronia ammophila, Agrostis rossiae, Astragalus proimanthus, Boechera pusilla,* and *Penstemon gibbensii.* All information received has been carefully considered in this finding. This notice constitutes the 12-month finding on 5 of the 206 species identified in WildEarth Guardians' petition dated July 24, 2007, to list *Abronia ammophila, Agrostis rossiae, Astragalus proimanthus, Boechera pusilla,* and *Penstemon gibbensii* as threatened or endangered.

*Summary of Procedures for Determining the Listing Status of Species*

Review of Status Based on Five Factors

Section 4 of the Act (16 U.S.C. 1533) and implementing regulations (50 CFR part 424) set forth procedures for adding species to, removing species from, or reclassifying species on the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, a species may be determined to be endangered or threatened based on any of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In making these findings, information pertaining to each species in relation to the five factors provided in section 4(a)(1) of the Act is discussed below. In considering what factors might constitute threats to a species, we must look beyond the exposure of the species to a particular factor to evaluate whether the species may respond to the factor in a way that causes actual impacts to the species. If there is exposure to a factor and the species responds negatively, the factor may be a threat, and during the status review, we attempt to determine how significant a threat it is. The threat is significant if it drives or contributes to the risk of extinction of the species such that the species warrants listing as endangered or threatened as those terms are defined by the Act. However, the identification of factors that could impact a species negatively may not be sufficient to compel a finding that the species warrants listing. The information must include evidence sufficient to suggest that the potential threat has the capacity (*i.e.,* it should be of sufficient magnitude and extent) to affect the species' status such that it meets the definition of endangered or threatened under the Act.

Findings

Distinct Population Segments

After considering the five factors, we assess whether each species is threatened or endangered throughout all of its range. Generally, we next consider in our findings whether a distinct vertebrate population segment (DPS) or any significant portion of the species' range meets the definition of endangered or is likely to become endangered in the foreseeable future (threatened). Section 3(16) of the Act defines a species to include only a vertebrate species as a DPS. Therefore, the Service's Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (DPS Policy) (61 FR 4722; February 7, 1996) is not applicable to plants and no population segments under the review could qualify as DPSs under the Act. Although the Service's DPS Policy is not applicable to plants, we do determine in our findings whether a plant species is threatened or endangered in a significant portion of its range.

Significant Portion of the Range

In determining whether a species is threatened or endangered in a significant portion of its range, we first identify any portions of the range of the species that warrant further consideration. The range of a species can theoretically be divided into portions an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be both (1) significant and (2) threatened or endangered. To identify only those portions that warrant further consideration, we determine whether there is substantial information indicating that: (1) The portions may be significant, and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. In practice, a key part of this analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the species' range that are not significant, such portions will not warrant further consideration.

If we identify portions that warrant further consideration, we then determine whether the species is threatened or endangered in these portions of its range. Depending on the biology of the species, its range, and the threats it faces, the Service may address either the significance question or the status question first. Thus, if the Service considers significance first and determines that a portion of the range is not significant, the Service need not determine whether the species is threatened or endangered there. Likewise, if the Service considers status first and determines that the species is not threatened or endangered in a portion of its range, the Service need not determine if that portion is significant. However, if the Service determines that both a portion of the range of a species is significant and the species is threatened or endangered there, the Service will specify that portion of the range as threatened or endangered under section 4(c)(1) of the ESA.

*Evaluation of the Status of Each of the Five Plant Species*

For each of the five species, we provide a description of the species and its life-history and habitat, an evaluation of listing factors for that species, and our finding that the petitioned action is warranted or not for that species. We follow these descriptions, evaluations, and findings with a discussion of the priority and progress of our listing actions.

**Species Information for *Abronia ammophila***

*Species Description*

*Abronia ammophila* is a low-growing, mat-forming perennial herb (Clark *et al.* 1989, p. 7; Fertig 1994, unpaginated; (National Park Service (NPS) 1999b, p. 3; Fertig 2000b, unpaginated; Saunders and Sipes 2006, p. 76). *A. ammophila* is a highly restricted endemic (occurring only in one location or region) to the Yellowstone Plateau (NPS 1999a, p. 1). In addition to the common name of Yellowstone sand verbena, *A. ammophila* has been called Tweedy's sand verbena (Clark *et al.* 1989, p. 7; Marriott 1993, p. 1) and Wyoming sand verbena (Integrated Taxonomic Information System 2010a, unpaginated).

*Abronia ammophila* has a large taproot (primary root that grows vertically downward, not highly branched) that can be over 0.5 meter (m) (1.6 feet (ft)) in length, which helps the plant root into the loose sand (Whipple 1999, p. 3; Whipple 2002, p. 257; Saunders and Sipes 2004, p. 9). Its stems can grow up to 2 to 4 decimeters (dm) (0.66 to 1.31 ft) in length; however, this plant is only 2.5 to 10.2 centimeters (cm) (1 to 4 inches (in.)) tall (Rydberg 1900, p. 137; Galloway 1975, p. 344; Fertig 1994, unpaginated; NPS 1999b, p. 3; Fertig 2000b, unpaginated; NPS 2000, unpaginated). *A. ammophila* is covered by sticky glands, which result in the plants being covered with sand (Coulter and Nelson 1909, p. 175; NPS 1999b, p. 3; NPS 2000, unpaginated; Whipple 2002, pp. 257–258; Saunders and Sipes 2006, p. 76). The leaf blades are succulent (fleshy) and oval or diamond-shaped with smooth edges (Fertig 1994, unpaginated; NPS 1999b, p. 3).

The flowers of *Abronia ammophila* are whitish to light pink or light green and grow in a capitulum (head-like group of flowers) typically containing 4 to 21 flowers (Saunders and Sipes 2006, p. 79). The flowers are hermaphroditic (possessing both male and female reproductive organs) (Saunders and Sipes 2004, p. 9; 2006, p. 76). As with other members of the Nyctaginaceae (the Four O'Clock) family, *A. ammophila* lacks true petals (Saunders and Sipes 2004, p. 9; 2006, p. 76).

*Discovery and Taxonomy*

Frank Tweedy made the first collection of *Abronia ammophila* in 1885; however, he labeled it as *Abronia villosa* (desert sand verbena). The collection was from the sandy beaches on the north side of Yellowstone Lake at the mouth of Pelican Creek (Tweedy 1886, p. 59). *A. villosa* is a common purple-flowered species of the American southwest (Whipple 2002, p. 256). In 1900, Per Axel Rydberg determined that Tweedy's sample was sufficiently different from other *Abronia* to warrant recognition as a unique species; he named it *Abronia arenaria* (coastal sand verbena) (NPS 1999b, p. 2; Whipple 1999, p. 3; 2002, p. 256). However, the name *A. arenaria* had previously been used (NPS 1999b, p. 2; Whipple 1999, p. 2; 2002, p. 256). E.L. Greene proposed the name *A. ammophila* for the Yellowstone sand verbena species (Greene 1900 as cited in Whipple 2002, p. 256).

The name *Abronia ammophila* was formally recognized (Coulter and Nelson 1909, p. 175); however, midway through the 20th century it was combined with *Abronia fragrans* (snowball sand verbena), a widespread western species (Hitchcock *et al.* 1964 and Despain 1975 as cited in Whipple 2002, p. 257). In 1975, a study of the *Abronia* genus determined that the Yellowstone species was unique (Galloway 1975, p. 344; NPS 1999b, p. 3; Whipple 2002, p. 257). Plant material collected from scrub communities of sandy hills near Big Piney, Sublette County, Wyoming, also was included under *A. ammophila* (Galloway 1975, p. 344, NPS 1999b, p. 3; Whipple 2002, p. 257). Further examination revealed that the specimens from Sublette County are actually *Abronia mellifera* (white sand verbena) (Marriott 1993, pp. 6, 9; Fertig 1994, unpaginated).

*Abronia ammophila* is a member of the New World plant family Nyctaginaceae that typically lives in warmer climates, such as deserts and tropical areas (NPS 2000, unpaginated). The genus *Abronia* contains approximately 20 to 30 species (NPS 1999b, p. 2, Flora of North America 2010a, unpaginated). Most *Abronia* occur in the western United States and Mexico, but some extend into southern Canada and east into the Great Plains and Texas (NPS 1999b, p. 2). *A. ammophila* is similar to *Abronia mellifera* (Fertig 1994, unpaginated) and *Abronia fragrans* (Flora of North America 2010, unpaginated). We recognize *A. ammophila* as a valid species and a listable entity.

*Biology and Life History*

*Abronia ammophila* starts to flower by the middle of June and continues producing flowers until a frost occurs that kills its aboveground parts, usually in late August or early September (NPS 1999b, p. 6; Whipple 1999, p. 3; NPS 2000, unpaginated; Whipple 2002, p. 258). This extended blooming period is unusual in comparison to other plants in Yellowstone National Park (YNP) (Whipple 1999, p. 3). Additionally, unlike many of its associated species, *A. ammophila* continues to flower vigorously even after setting fruit (NPS 1999b, p. 6; Whipple 2002, p. 258).

*Abronia ammophila* is visited by several orders of insects (Saunders and Sipes 2004, p. 10; 2006, p. 80). The most frequent visitors to *A. ammophila* are lepidopterans (butterflies and moths) (Saunders and Sipes 2004, p. 10; 2006, p. 80). Even though *Abronia ammophila* is visited by a diverse range of pollinators, the total number of pollinator visitations is extremely low (Saunders and Sipes 2006, p. 81). The low level of pollinator visits may be offset by *A. ammophila* exhibiting a mixed-mating system (Saunders and Sipes 2004, pp. 6, 10, 12; 2006, p. 82). In addition to cross-pollination facilitated by pollinators, *A. ammophila* is able to self-pollinate with or without a pollen vector (Saunders and Sipes 2004, pp. 6, 10, 12; 2006, pp. 80–82; Whipple 2010b, pers. comm.). Self-pollination is highly likely due to the floral morphology (the structure of the flower) and the functional phenology (life cycle) of *A. ammophila* (Saunders and Sipes 2006, p. 81).

*Abronia ammophila* is capable of producing large numbers of flowers (Saunders and Sipes 2004, p. 13). Seed dispersal mechanisms of *Abronia ammophila* have not been extensively studied. Primary seed dispersal appears to occur beneath the parent plant (Saunders and Sipes 2006, p. 79). Seeds also accumulate in depressions of the sand, where the wind has blown them (NPS 1999b, p. 6; Whipple 2002, p. 258). The sticky surface of the seeds may facilitate dispersal, for example on the feet of waterfowl (NPS 1999b, pp. 6–7; Whipple 2002, p. 258). Water also may facilitate dispersal (Saunders and Sipes 2006, p. 79). As *A. ammophila* occurs in locations that are not located adjacent to each other, there appears to be an effective method of seed dispersal (NPS 1999b, pp. 6–7; Whipple 2002, p. 258). However, the longevity of *A. ammophila* seeds in the seed bank in unknown (NPS 1999b, p. 7; Whipple 2002, p. 258).

*Habitat*

*Abronia ammophila* is endemic to YNP, within Park and Teton Counties of Wyoming (Whipple 2002, p. 256; Fertig 2000b, unpaginated; Saunders and Sipes 2006, p. 76). Specifically, *A. ammophila* occurs around Yellowstone Lake typically within 40 m (131.2 ft) of the shoreline (NPS 1999b, p. 5; Whipple 1999, p. 3; Fertig 2000b, unpaginated; Whipple 2002, p. 262). The plant has been found up to 60 m (196.9 ft) inland and up to approximately 10 m (32.8 ft) above the high-water line (NPS 1999b, p. 5; Whipple 1999, p. 3; Fertig 2000b, unpaginated; Whipple 2002, p. 262). *A. ammophila* generally occurs above the high-water mark; no plants grow in areas that are regularly inundated (NPS 1999b, p. 5; Whipple 1999, p. 3; 2002, p. 262). Yellowstone Lake is a high-elevation (2,360 m (7,742 ft)), freshwater lake that was formed by volcanic activity (Pierce *et al.* 2007, pp. 131–132; NPS 2006a, unpaginated). The lake level was originally 61 m (200 ft) higher than its present level, and the level is not entirely stable (Pierce *et al.* 2007, pp. 131–132; NPS 2006a, unpaginated). *A. ammophila* appears to be able to adapt to the continually changing boundaries of its habitat as defined by Yellowstone Lake's fluctuations.

Occurring between the area of beach affected by wave action and the more densely vegetated areas inland, *Abronia ammophila* prefers open, sunny, sparsely vegetated sites (NPS 1999b, p. 5; Whipple 2002, p. 262; Saunders and Sipes 2006, p. 77). Associated vegetative species include *Phacelia hastata* (silver-leaf scorpion-weed), *Rumex venosus* (veiny dock), *Polemonium pulcherrimum* (Jacob's-ladder), and *Lupinus argenteus* (silvery lupine) (NPS 1999b, p. 5; Whipple 2002, p. 262; Saunders and Sipes 2006, p. 77). *A. ammophila* loses its competitive advantage on more stable soils or in areas where *Artemisia tridentata* (big sagebrush) or *Eriogonum umbellatum* (sulfur flower buckwheat) occur (Whipple 2002, p. 262; Saunders and Sipes 2006, p. 77).

*Abronia ammophila* occurs at four locations around Yellowstone Lake; these locations are identified as North

Shore, Rock Point, Pumice Point, and South Arm (NPS 1999a, pp. 3–6; NPS 1999b, pp. 4–5; Whipple 2002, p. 262). These populations cover an area of 0.6 hectares (ha) (1.48 acres (ac)) (Whipple 2011, pers. comm.). The populations all occur in loose, unconsolidated (loosely arranged) sand with a minimal amount of fines (powdered material), gravel, or organic matter (NPS 1999b, p. 5; Whipple 2002, p. 262; Saunders and Sipes 2006, p. 77). All sites are located on beach sand except the Pumice Point site, which occurs on black sand (NPS 1999b, p. 5; Whipple 2002, p. 262). Some of the populations occur in horseshoe-shaped, sandy depressions (blowouts) (NPS 1999a, p. 3; 1999b, p. 5; Whipple 2002, p. 262; Saunders and Sipes 2006, p. 77). Additionally, the largest subpopulation in the North Shore area—the "Thermal" site—is located adjacent to a small thermal barren (area where no vegetation grows) (NPS 1999a, p. 6; NPS 1999b, p. 6). This area hosts an extremely dense population of *Abronia ammophila* with some of the largest individuals (NPS 1999b, p. 6). *A. ammophila* is able to coexist with thermal influences; however, most of the populations grow on ground that is not thermally influenced (NPS 1999a, p. 6).

*Distribution and Abundance*

Herbarium records show that *Abronia ammophila* was previously more widely distributed along the northern shore of Yellowstone Lake (NPS 1999b, p. 9; Whipple 2002, p. 258). Locations such as 0.40 kilometer (km) (0.25 mile (mi)) west of the mouth of Pelican Creek and several locations near the current Fishing Bridge development have been recorded as collection locations of *A. ammophila* (NPS 1999b, p. 9; Whipple 2002, pp. 258–259). Many additional areas of the northern shoreline provide suitable habitat for *A. ammophila,* such as west of Pelican Creek to the outlet of the Yellowstone River and Mary Bay (NPS 1999b, p. 9; Whipple 2002, p. 259; Whipple 2010a, pers. comm.). Construction of the East Entrance Road and the Fishing Bridge campground, an area that was near the current parking area for the Fishing Bridge Museum, as well as higher human use may have extirpated populations of *A. ammophila* in these areas (NPS 1999b, pp. 8–9; Whipple 2002, pp. 258–259; Whipple 2010a, pers. comm.).

Table 1 below presents available information regarding the four populations of *Abronia ammophila.* The 1998–1999 survey was a rigorous population count (NPS 1999a, entire). The other years were generally estimates, except for some of the smaller populations where an exact count was easily obtained (Correy 2009, entire; Whipple 2010d, pers. comm.).

TABLE 1—POPULATION ESTIMATES OF ABRONIA AMMOPHILA

| Population (year of discovery) | Estimated numbers (year) |
|---|---|
| North Shore (prior to 1998). | Approx. 1,000 (early 1990s).<br>7,978 (1998–1999) rigorous count.<br>Approx. 3,600 (2010). |
| Rock Point (1998) ..... | 325 (1998).<br>120 (2009). |
| Pumice Point (1998) .. | 22 (1998).<br>1 (2001).<br>5 (2009).<br>24 (2010). |
| South Arm (1998) ..... | 1 (1998).<br>3 (2005).<br>2 (2010). |
| Totals ..... | 1,000 (early 1990s) (only North Shore known).<br>8,326 (1998–1999) rigorous count.<br>2,728 (2009) estimate.<br>3,626 (2010) estimate. |

References: NPS 1999a, Appendix A; Corry 2009, Table 1; Whipple 2002, p. 259; 2010d pers. comm.

The majority of *Abronia ammophila* is found in the North Shore population scattered along a 2.41-km (1.5-mi) stretch of beach on the northern shoreline of Yellowstone Lake between the mouth of Pelican Creek and Storm Point (NPS 1999a, p. 3; 1999b, p. 4; Correy 2009, p. 2). This population contains 95 percent or more of all *A. ammophila* (NPS 1999a, pp. 2, Appendix A; Whipple 2002, p. 264; Correy 2009, p. 4). Prior to surveys conducted between 1995 and 1999, the North Shore population of *A. ammophila* was the only known population (NPS 1999a, p. 3; Correy 2009, p. 2). Of the additionally discovered sites, two are located on the west shore of Yellowstone Lake: One at Rock Point, and one at a picnic area 1.6 km (1 mi) west of Pumice Point (NPS 1999a, p. 5; NPS 1999b, p. 4). Additionally, a single plant was found during surveys on the east shore of the South Arm (NPS 1999a, p. 5). Not all suitable habitat within YNP has been surveyed (NPS 1999a, pp. 6–7).

Casual surveys of the North Shore area in the early 1990s estimated the population to be around 1,000 plants (Correy 2009, pp. 1–2), with the majority of the plants of a large-size class representing mature, older plants (NPS 1999a, p. 1; 1999b, p. 7). No seedlings were observed (NPS 1999b, p. 7). Extensive surveys during the 1998–1999 field seasons conservatively estimated the North Shore population to consist of 7,978 *Abronia ammophila* plants, with 45 percent of the population represented by young recruitment within the prior 2 years (recruit and medium class plants) (NPS 1999a, p. 1). The record high lake levels of 1996 and 1997 appeared to improve the habitat conditions for *A. ammophila* by eroding the southern edge of the stabilized sand along the northern shoreline (NPS 1999b, p. 7; Whipple 2002, p. 265). Although this erosion washed away part of the existing habitat, it also improved conditions for recruitment of seedlings (NPS 1999b, p. 7; Whipple 2002, p. 265).

During the 2009–2010 field season, surveys of the North Shore population yielded an approximate count of 3,600 *A. ammophila* plants (Correy 2009, p. 3; Whipple 2010d, pers. comm.; Whipple 2011, pers. comm.). The North Shore population can be split into four subpopulations (Correy 2009, p. 2). Two of these subpopulations had comparable population counts during both the 1998–1999 survey and the 2009–2010 estimate (Correy 2009, pp. 3–4). The remaining two subpopulations, the Thermal and Long Skinny groups, had decreased in both total area populated and total number of plants (Correy 2009, p. 5). The central portion of the Thermal group is now bare or mostly bare sand due to increased ground temperatures (due to changes within the Yellowstone geothermal basin), ground subsidence, increased scouring during storms, or a combination of such factors (Correy 2009, p. 5). The Long Skinny group also may have been affected by increased ground temperatures, particularly on the western end; furthermore, some of the habitat may have eroded (Correy 2009, p. 5). Additional factors potentially affecting the low population count include many years of drought (Whipple 2002, p. 265; Correy 2009, pp. 5–6) and lack of rigorous survey methods (Correy 2009, pp. 5–6).

The Rock Point and Pumice Point *Abronia ammophila* populations were accurately counted in 1998 and 2009 (Correy 2009, Table 1). In 1998, the Rock Point population consisted of 324 individual plants; the 2009 survey counted 120 individual plants (NPS 1999a, p. 6; Correy 2009, Table 1). An area of Rock Point surveyed in 1998 had no *A. ammophila* in June, but contained many medium-sized plants later in the summer (NPS 1999a, p. 6). The Pumice Point population consisted of 22 plants in 1998, whereas only 5 were counted in 2009 (NPS 1999a, p. 6; Correy 2009,

Table 1). In 1998, the Pumice Point population contained a higher percentage of large (diameter greater than or equal to 5 up to 30 cm (2 up to 11.8 in.)) and very large (diameter greater than or equal to 30 cm (11.8 in.)) plants when compared to the North Shore population distribution (NPS 1999a, p. 6). Additionally, the Pumice Point population contained 24 plants in the 2010 field survey (Whipple 2010e, pers. comm.), which is comparable to the 1998 population count.

The South Arm population contained only one large *Abronia ammophila* plant when it was discovered in 1998 (NPS 1999a, p. 6). When this site was revisited in 2005, the large individual found in 1998 was no longer present, but three small *A. ammophila* plants were present (Correy 2009, p. 2). Additionally, during the 2010 field survey, this population consisted of two plants (Whipple 2010e, pers. comm.).

Dead and dying plants were counted during the 1998–1999 field surveys. Dead and dying *Abronia ammophila* plants accounted for 1.3 percent of the total population (NPS 1999a, Appendix A). Of the dead *A. ammophila* plants, many were large individuals; however, some were failed seedlings (NPS 1999b, p. 7). The majority of dead and dying plants did not display obvious causes of mortality; they were interspersed throughout the communities (NPS 1999b, p. 7). Additionally, stressed *A. ammophila* plants are able to recover and put out new growth later in the season (NPS 1999b, p. 7).

The Wyoming Natural Diversity Database (WNDD) has designated *Abronia ammophila* as a plant species of concern with ranks of G1 and S1 (Heidel 2007, p. 1). This designation indicates that *A. ammophila* is considered to be critically imperiled because of extreme rarity (*i.e.,* often less than five occurrences (a location where a plant or plants has been recorded)) or because some factor makes it highly vulnerable to extinction both at the global and State level; however, this ranking does not grant *A. ammophila* any special status under State legislation (WNDD 2009, unpaginated; WNDD 2010, unpaginated). Since *A. ammophila* is endemic to Wyoming, the Wyoming occurrences encompass the entire global range. Additionally, YNP considers *A. ammophila* to be a sensitive species of concern; therefore, it evaluates effects to this species in conjunction with any project or action that has the potential to affect the plant (Whipple 2011, pers. comm.).

*Trends*

Natural fluctuations in the *Abronia ammophila* population from year to year or even within a season are not understood (Correy 2009, p. 6). From the first population estimates of the North Shore population in the early 1990s to the more rigorous survey conducted in 1998–1999, there was extensive recruitment and the *A. ammophila* population increased approximately 87 percent (NPS 1999a, p. 1; Correy 2009, pp. 6, Table 1). Notably, 1996 and 1997 had high precipitation, with resultant high lake levels (NPS 1999a, p. 2). The 1998–1999 surveys recorded approximately 20 percent of the population to be seedlings or recruit size class (NPS 1999a, Appendix A). The 2009 population estimate of the North Shore populations shows a decrease from the 1998–1999 survey (Correy 2009, Table 1). However, the 1998–1999 survey was an exact count, whereas the 2009 was an estimate. Additionally, the subsequent 2010 population estimate shows a slight increase in the population size compared to the 2009 population estimate (Whipple 2010e, pers. comm.). Hypotheses for population fluctuations are changing thermal activity of the underlying area, ground subsidence, changing precipitation levels, and human and animal activity (Correy 2009, pp. 5–6). The *A. ammophila* population seems to be stable within the parameters of a population that lives in an unstable habitat that fluctuates with wave action and weather (Whipple 2010a, pers. comm.).

**Five Factor Evaluation for *Abronia ammophila***

Information pertaining to *Abronia ammophila* in relation to the five factors provided in section 4(a)(1) of the Act is discussed below.

*Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range*

Potential factors that may affect the habitat or range of *Abronia ammophila* are discussed in this section, including: (1) Development, (2) trampling, (3) nonnative invasive plants, (4) climate change, and (5) drought.

Development

*Abronia ammophila* occurs entirely inside YNP, which limits potential threats to its habitat. By statute, regulation, and policy, YNP conserves wildlife and habitat; preserves and maintains biological processes, ecosystem components, and ecological integrity; controls invasive plants; and protects and monitors populations of sensitive plants and animals (See *Yellowstone National Park* under *Factor D. The Inadequacy of Existing Regulatory Mechanisms* in this Five Factor Evaluation for *Abronia ammophila* section). YNP was established prior to the States in which it is located (Mazzu 2010, pers. comm.; Whipple 2010e, pers. comm.). This means that YNP owns not only the land, but also the mineral rights; therefore, energy development is not a threat (Mazzu 2010, pers. comm.; Whipple 2010e, pers. comm.). Construction of new roads, trails, or structures within YNP is rare, with reconstruction of existing features occurring occasionally. When new construction or reconstruction occurs in areas where there are sensitive species, YNP analyzes and carries out construction in a manner that minimizes adverse effects. *A. ammophila* populations are located a sufficient distance from roads; therefore, road reconstruction does not impact any of the *A. ammophila* populations (Whipple 2010e, pers. comm.).

As noted above (see Distribution and Abundance), *Abronia ammophila* has been extirpated in some areas in which there is no longer habitat due to the construction of roads or structures. However, the construction in these areas occurred prior to YNP identifying *A. ammophila* as a species of conservation concern. Now, when new construction or reconstruction occurs, YNP analyzes and carries out construction in a manner that avoids adverse effects to sensitive species. Additionally, projects must be accompanied by a Resource Compliance Checklist that requires the evaluation of any potential impacts to resources including rare plants; if there are impacts, mitigation measures are developed (Schneider 2010, pers. comm.). The majority of YNP remains undeveloped, and we have no information that this will change; therefore, we do not consider development to be a threat to the species now or in the foreseeable future.

Trampling

Trampling of *Abronia ammophila,* by both humans and wildlife, is a potential concern at most sites (Whipple 2010a, pers. comm.). The *Abronia* genus is vulnerable to disturbance by trampling (NPS 1999b, p. 8; Whipple 2010e, pers. comm.). Trampling is frequently indicated as a threat to *A. ammophila* (*e.g.,* NPS 1999a; 1999b); however, studies that seek to document trampling indicate that there is very little foot traffic actually impacting the populations of *A. ammophila* (NPS 1999a, pp. 2, 5).

The North Shore population is located in one of the least visited portions of the north side of Yellowstone Lake's shoreline (NPS 1999b, p. 8). A large wetland restricts access to this site from the west (NPS 1999b, p. 8). The Storm Point Trail approaches the east end of the North Shore population, and visitors occasionally walk down the beach toward this population (NPS 1999b, p. 8). The YNP plans to install a sign just past the Storm Point Trail requesting that visitors remain near the water and avoid sensitive vegetation areas (Schneider 2010, pers. comm.).

The Pelican Creek Nature Trail is also near the North Shore population (Schneider 2010, pers. comm.). No plants currently occur in this area; however, it is historical habitat (Whipple 2010a, pers. comm.; Schneider 2010, pers. comm.). YNP is currently considering conservation measures, including closing all or part of this trail to protect the potential habitat (Whipple 2010a, pers. comm.; Schneider 2010, pers. comm.). A final decision, on this trail, has not been made at this time (Whipple 2011, pers. comm.).

The Pumice Point population of *Abronia ammophila* is located near an unmarked picnic area; the plants are located within 10 m (32.8 ft) of the picnic tables (NPS 1999b, p. 8). This area is currently unsigned (not marked as a picnic area from the main road), and the entrance is inconspicuous (Whipple 2010c, pers. comm.). Additionally, the *A. ammophila* in this area may be benefiting from the disturbance; if foot traffic did not occur, the area might be more densely vegetated and not available as habitat for *A. ammophila* (NPS 1999b, p. 8; Whipple 2010c, pers. comm.).

The two remaining populations are in areas with little visitation (NPS 1999b, p. 8). The Rock Point population is approximately a half-hour walk from the closest access point (Whipple 2010c, pers. comm.). The South Arm population is accessible by boat, with a backcountry campsite located about 200 m (656.2 ft) from the population (Whipple 2010c, pers. comm.). This backcountry campsite has no trail access (Whipple 2010c, pers. comm.).

YNP has received approximately 3 million visitors a year for the past 20 years; visitation was over 3 million for 11 of those years (NPS 2010a, unpaginated). From January to September of 2010, YNP received 3.4 million visitors, an increase of 8.7 percent over the previous year (NPS 2010b, unpaginated). Even with increases to visitation, we have no information indicating that the number of visitors correlates with increased trampling of *Abronia ammophila* populations to a level that poses a threat to the species.

Wildlife trampling, particularly by ungulates, is occasionally indicated as a concern (Whipple 2010a, pers. comm.) We believe that these anecdotal observations do not add up to routine impacts on a scale that would cause the species to be threatened or endangered. Additionally, we believe that trampling by wildlife represents a natural ecological interaction in YNP that the species would have evolved with and poses no threat to long-term persistence.

In summary, the populations of *Abronia ammophila* are located in areas of YNP that do not receive the bulk of visitor traffic. When surveys have attempted to document trampling by humans, observers had determined that the impact is minor. We have only anecdotal evidence of wildlife trampling. Therefore, we have no information indicating that trampling by either humans or wildlife is a threat to the species now or in the foreseeable future.

Nonnative Invasive Plants

After habitat loss, the spread of nonnative invasive species is considered the second largest threat to imperiled plants in the United States (Wilcove *et al.* 1998, p. 608). Nonnative invasive plants alter ecosystem attributes including geomorphology, fire regime, hydrology, microclimate, nutrient cycling, and productivity (Dukes and Mooney 2004, pp. 411–437). Nonnative invasive plants can detrimentally affect native plants through competitive exclusion, altered pollinator behaviors, niche displacement, hybridization, and changes in insect predation (D'Antonio and Vitousek 1992, pp. 74–75; DiTomaso 2000, p. 257; Mooney and Cleland 2001, p. 5449; Levine *et al.* 2003, p. 776; Traveset and Richardson 2006, pp. 211–213).

As of 2010, YNP has documented 218 nonnative plant species occurring within its boundaries (NPS 2010e, p. 1). Encroachment of invasive plants may potentially affect *A. ammophila,* as this species prefers open, sparsely vegetated sites and does not compete well in areas that are more densely vegetated.

Currently, nonnative invasive plants have affected only a few sites occupied by *Abronia ammophila* (NPS 1999b, p. 8; Whipple 2010a, pers. comm.). The invasive grass *Bromus tectorum* (cheatgrass) has been noted in the vicinity of the North Shore population, and *Cirsium arvense* (Canada thistle) occurs near the Rock Point population (Whipple 2010a, pers. comm.). Additionally, some *B. tectorum* was documented around the Storm Point population (NPS 1999b, p. 8). To combat these occurrences, YNP has an exotic vegetation management plan in place that emphasizes prevention, education, early detection and eradication, control, and monitoring (Olliff *et al.* 2001, entire).

In summary, nonnative invasive plants occur within YNP; however, the majority of these species do not impact the habitat of *Abronia ammophila.* A few nonnative invasive species have been documented near the habitat of *A. ammophila.* These species are being monitored and the National Park System (NPS) has mechanisms in place to help control these encroachments. We have no information indicating that nonnative invasive species are modifying the species habitat to the extent that it represents a threat to the species now or in the foreseeable future.

Climate Change

The Intergovernmental Panel on Climate Change (IPCC) was established in 1988 by the World Meteorological Organization and the United Nations Environment Program in response to growing concerns about climate change and, in particular, the effects of global warming. The IPCC Fourth Assessment Report (IPCC 2007, entire) synthesized the projections of the Coupled Model Intercomparison Project (CMIP) Phase 3, a coordinated large set of climate model runs performed at modeling centers worldwide using 22 global climate models (Ray *et al.* 2010, p. 11). Based on these projections, the IPCC has concluded that the warming of the climate system is unequivocal, as evidenced from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level (IPCC 2007, pp. 6, 30; Karl *et al.* 2009, p. 17). Changes in the global climate system during the 21st century are likely to be larger than those observed during the 20th century (IPCC 2007, p. 19). Several scenarios are virtually certain or very likely to occur in the 21st century including: (1) Over most land, weather will be warmer, with fewer cold days and nights, and more frequent hot days and nights; (2) areas affected by drought will increase; and (3) the frequency of warm spells and heat waves over most land areas will likely increase (IPCC 2007, pp. 13, 53).

In some cases, climate change effects can be demonstrated and evaluated (*e.g.,* McLaughlin *et al.* 2002, p. 6073). Where regional effects from global climate change have been demonstrated, we can

rely on that empirical evidence to predict future impacts, such as increased stream temperatures (see status review for Rio Grande cutthroat trout, 73 FR 27900; May 14, 2008) or loss of sea ice (see determination of threatened status for the polar bear, 73 FR 28212; May 15, 2008), and treat these effects as a threat that can be analyzed. In instances for which a direct cause and effect relationship between global climate change and regional effects to a specific species has not been documented, we rely primarily on synthesis documents (*e.g.,* IPCC 2007, entire; Independent Scientific Advisory Board 2007, entire; Karl *et al.* 2009, entire) to inform our evaluation of the extent that regional impacts due to climate change may affect our species. These synthesis documents present the consensus view of climate change experts from around the world. Additionally, we have examined models downscaled to specific regions (*e.g.,* Ray *et al.* 2010, entire; WRCC 2011, p. 1; CIG 2011, p. 1)—including some in-progress finer-scaled models that include Wyoming and the surrounding area—in order to inform our evaluation of the extent that regional impacts may threaten species. Typically, the projections of downscaled models agree with the projections of the global climate models (Ray *et al.* 2010, p. 25). Climate change projections are based on models with assumptions and are not absolute.

Portions of the global climate change models can be used to predict changes at the regional-landscape scale; however, this approach contains higher levels of uncertainty than using global models to examine changes on a larger scale. The uncertainty arises due to various factors related to difficulty in applying data to a smaller scale, and to the paucity of information in these models such as regional weather patterns, local physiographic conditions, life stages of individual species, generation time of species, and species reactions to changing carbon dioxide levels. Additionally, global climate models do not incorporate a variety of plant-related factors that could be informative in determining how climate change could affect plant species (*e.g.,* effect of elevated carbon dioxide on plant water-use efficiency, the physiological effect to the species of exceeding the assumed (modeled) bioclimatic limit, the life stage at which the limit affects the species (seedling versus adult), the life span of the species, and the movement of other organisms into the species' range) (Shafer *et al.* 2001, p. 207). Moreover, empirical studies are needed on what determines the distributions of species and species assemblages.

Regional landscapes also can be examined by downscaling global climate models. Two common methods of downscaling are statistical downscaling and dynamic downscaling (Fowler *et al.* 2007, p. 1548). These downscaled models typically inherit the broad-scale results of global climate change models, imbed additional information, and run the models at a finer scale (Ray *et al.* 2010, p. 25, Hostetler 2011, pers. comm.). These methods provide additional information at a finer spatial scale (*i.e.,* all of Wyoming downscaled to a 15-km (9.3-mi) resolution (Hostetler 2010, pers. comm.). However, they are not able to account for the myriad of processes that may affect a species that only inhabits a narrow range, as local effects may reduce or amplify the large-scale patterns that are projected over the larger spatial resolution of the global climate models (Ray *et al.* 2010, p. 24). In summary, global climate models can play an important role in characterizing the types of changes that may occur, so that the potential impacts on natural systems can be assessed (Shafer *et al.* 2001, p. 213). However, they are of limited use to assess local impacts to species with a limited range, such as the five plants discussed in this finding.

Climate change is likely to affect the habitat of *Abronia ammophila,* but we lack scientific information on what those changes may ultimately mean for the status of the species. Yellowstone Lake water levels affect habitat conditions for *A. ammophila.* As noted previously, the record high lake levels of 1996 and 1997 (due to increased snowpack and subsequent spring snowmelt) had both positive and negative effects on *A. ammophila* (NPS 1999b, p. 7; Whipple 2002, p. 265). In general, the outflow and maximum water surface elevation of Yellowstone Lake are functions of winter snow accumulation and spring precipitation inputs; these vary significantly from year to year (Farnes 2002, p. 73). Analysis of snow depth and last date of snow cover in YNP from 1948 to 2003 has shown that winters are getting shorter, as measured by the number of days with snow on the ground (Wilmers and Getz 2005, entire). This change is due to decreased snowfall and an increase in the number of days with temperatures above freezing (Wilmers and Getz 2005, entire).

Climate change effects are not limited to the timing and amount of precipitation; other factors potentially influenced by climate change may in turn affect the habitat conditions for *Abronia ammophila.* For example, fire frequency, insect populations (*e.g.,* mountain pine beetle, *Dendroctonus ponderosae*), and forest pathogens may be influenced by climate change (Logan and Powell 2001, p. 170; Westerling *et al.* 2006, pp. 942–943) and may in turn affect forest canopy cover and the timing of snowmelt within the Yellowstone Lake watershed. The increased rate of snowmelt caused by fire-generated openings in the forest canopy from the 1988 fires in YNP may have slightly reduced the annual maximum Yellowstone Lake level because it spread the snowpack melt rate over a longer period of time (Farnes 2002, p. 73). Impacts of specific events on *A. ammophila* and its habitat have not been analyzed.

Climate change is likely to affect multiple variables that may influence the availability of habitat for *A. ammophila.* As lake levels have fluctuated in the past and *A. ammophila* has adapted to these fluctuations, this species should be able to persist so long as climate change does not result in extreme changes to important characteristics of the species habitat, such as the complete loss of water from Yellowstone Lake. At this time, the best available scientific information does not indicate that impacts from climate change are likely to threaten the species now or in the foreseeable future.

Drought

Precipitation studies show that YNP weather cycles typically follow the larger weather patterns across the larger Northern Rockies ecosystem (Gray *et al.* 2007, p. 24). The reconstruction of precipitation levels in YNP from AD 1173–1998 shows strong interannual variability (Gray *et al.* 2007, entire). Moreover, extreme wet and dry years, which have occurred recently, fall within the range of past variability (Gray *et al.* 2007, entire).

We believe that *Abronia ammophila* has evolved to adapt to recurring drought conditions because it persists in this type of environment. Short-term population fluctuations appear to be typical for the species. The population at Rock Point was thought to have been extirpated due to drought; however, a survey in 2004 located seedlings at this site (Saunders and Sipes 2004, p. 4). The Pumice Point population completely vanishes some years. It is located on sand that does not connect to the aquifer, and during drought years the population can be 9.1 m (30 ft) above water (Whipple 2010e, pers. comm.). Although drought may temporarily influence the abundance of

plants at some specific locations, we have no information indicating that drought threatens the species now or in the foreseeable future.

Summary of Factor A

YNP offers protection of *Abronia ammophila* populations from all kinds of development including roads, campgrounds, buildings, mining, and energy development. There are currently no plans for any further development in YNP near the existing populations or potential habitat of *A. ammophila.* We have no information to suggest that trampling, nonnative invasive plants, climate change, or drought represents a threat to the species.

We conclude that the best scientific and commercial information available indicates that *Abronia ammophila* is not in danger of extinction or likely to become so within the foreseeable future because of the present or threatened destruction, modification, or curtailment of its habitat or range.

*Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

There has been limited use and collection of *Abronia ammophila* and its parts for scientific study (Saunders and Sipes 2006, p. 77). Additionally, the Denver Botanical Gardens (DBG) collected approximately 3,300 *A. ammophila* seeds in 2005 (DBG 2008, p. 3). The DBG is a participating institution in the Center for Plant Conservation, an organization dedicated to preventing the extinction of plants native to the United States (Center for Plant Conservation 2010, unpaginated). Because these collections were limited, we do not believe this collection constituted a threat to the species. The collections also contribute to the long-term conservation of the species.

Specimens, seeds, and parts of *Abronia ammophila* are occasionally collected for scientific purposes in order to increase the knowledge of this species (*e.g.,* Saunders and Sipes 2006; DBG 2008); however, these collections are rare. We do not have any evidence of risks to *A. ammophila* from overutilization for commercial, recreational, scientific, or educational purposes, and we have no reason to believe this factor will become a threat to the species in the future. We conclude that the best scientific and commercial information available indicates that *A. ammophila* is not in danger of extinction or likely to become so within the foreseeable future because of overutilization for commercial, recreational, scientific, or educational purposes.

*Factor C. Disease or Predation*

Disease

*Abronia ammophila* is not known to be affected or threatened by any disease. Therefore, we do not consider disease to be a threat to *A. ammophila* now or in the foreseeable future.

Predation—Grazing and Herbivory

No studies have been conducted investigating the effects of grazing or herbivory on *Abronia ammophila.* Minimal insect herbivory has been noted. Sphingid moth larvae and others tentatively identified in the family *Noctuidae* have been seen feeding on the aboveground plant parts (Saunders and Sipes 2004, p. 11). Also, what appeared to be an army cutworm caterpillar was observed eating the belowground parts of an uprooted plant (NPS 1999b, p. 7).

Additionally, some uprooted, partially eaten taproots were found in areas with abundant rodent tunnels (NPS 1999b, p. 7). Ungulate grazing has been noted on species that grow near *Abronia ammophila;* however, none has been noted on *A. ammophila* (NPS 1999b, p. 7). Any predation, as noted above, would represent a natural ecological interaction in YNP. We have no evidence that the extent of such predation represents a population level threat to *A. ammophila.* Therefore, we do not consider predation to be a threat to the species now or in the foreseeable future.

Summary of Factor C

We have no evidence of adverse impacts to *Abronia ammophila* from disease or predation. We conclude that the best scientific and commercial information available indicates that *A. ammophila* is not in danger of extinction or likely to become so within the foreseeable future because of disease or predation from herbivory or grazing.

*Factor D. The Inadequacy of Existing Regulatory Mechanisms*

The Act requires us to examine the adequacy of existing regulatory mechanisms with respect to threats that may place *Abronia ammophila* in danger of extinction or likely to become so in the future. Existing regulatory mechanisms that could have an effect on potential threats to *A. ammophila* include (1) local land use laws, processes, and ordinances; (2) State laws and regulations; and (3) Federal laws and regulations. *A. ammophila* occurs entirely on Federal land under the jurisdiction of the YNP; therefore, the discussion below focuses on Federal laws. Actions adopted by local groups, States, or Federal entities that are discretionary, including conservation strategies and guidance, are not regulatory mechanisms; however, we may discuss them in relation to their effects on potential threats to the species.

Federal Laws and Regulations

Yellowstone National Park

All known populations of *Abronia ammophila* occur within YNP. The YNP was established as the first national park on March 1, 1872, under control of the Secretary of the Department of the Interior (NPS 2010c, unpaginated). The NPS was established by the NPS Organic Act of 1916, and reaffirmed by the General Authorities Act, as amended (NPS 2008a, unpaginated; Schneider 2010, pers. comm.). The NPS Organic Act states, "[The NPS] shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations* * * to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations" (16 USC 1) (NPS 2006b, p. 8; NPS 2008a, unpaginated; Schneider 2010, pers. comm.).

Additionally, the Management Policies of the NPS state that conservation is paramount in situations of conflict between conserving resources and values and providing for enjoyment of them (NPS 2006b, p. 9; Schneider 2010, pers. comm.). These policies also charge the NPS with preserving the fundamental physical and biological processes, and maintaining all the components and processes of a naturally evolving park ecosystem, including the natural abundance, diversity, and genetic and ecological integrity of the plant and animal species native to those ecosystems (NPS 2006b, pp. 35–36; Schneider 2010, pers. comm.). The NPS is responsible for the inventory of native species that are of special management concern to parks (such as rare, declining, sensitive, or unique species and their habitats) and will manage them to maintain their natural distribution and abundance (NPS 2006b, pp. 45–46; Schneider 2010, pers. comm.). The Management Policies also direct the NPS to control detrimental nonnative species and manage detrimental visitor access (NPS 2006, p. 45).

As stated above, YNP is required, to the maximum extent practicable, to

prevent exotic (nonnative invasive) plant introduction and to control established exotic plants by law, executive order, and management policy (*e.g.,* Executive Order 13112, National Park Service Management Policies (NPS 1988), and the Federal Noxious Weed Act of 1974) (Olliff *et al.* 2001, pp. 348–349). YNP's approach emphasizes prevention, education, early detection and eradication, control, and monitoring (Olliff *et al.* 2001, entire).

Visitors to national parks are prohibited from removing, defacing, or destroying any plant, animal, or mineral; this includes collecting natural or archeological objects (NPS 2006c, p. 2). Visitors are prohibited from driving off roadways or camping outside of designated campgrounds (NPS 2010d, unpaginated). Additionally, YNP has developed a Conservation Plan for *Abronia ammophila* (NPS 1999b, entire). This plan recommends the protection of all known (and any newly discovered) populations, monitoring of the populations, reestablishment of historical occupancy areas, long-term seed storage, and research (NPS 1999b, pp. 10–11).

National Environmental Policy Act

All Federal agencies are required to adhere to the National Environmental Policy Act (NEPA) of 1970 (42 U.S.C. 4321 *et seq.*) for projects they fund, authorize, or carry out. The Council on Environmental Quality's regulations for implementing NEPA (40 CFR 1500–1518) state that agencies shall include a discussion on the environmental impacts of the various project alternatives, any adverse environmental effects which cannot be avoided, and any irreversible or irretrievable commitments of resources involved (40 CFR 1502). Additionally, activities on non-Federal lands are subject to NEPA if there is a Federal nexus. The NEPA is a disclosure law, and does not require subsequent minimization or mitigation measures by the Federal agency involved. Although Federal agencies may include conservation measures for sensitive species as a result of the NEPA process, any such measures are typically voluntary in nature and are not required by the statute.

Summary of Factor D

We considered the adequacy of existing regulatory mechanisms to protect *Abronia ammophila.* We believe the existing regulatory mechanisms, especially the NPS Organic Act, adequately protect the Yellowstone Lake shore habitat of *Abronia ammophila* from the potential threats of development, trampling, and nonnative invasive plants. We expect that *A. ammophila* and its habitat will be generally protected from direct human disturbance. Therefore, we conclude that the existing regulatory mechanisms are adequate to protect *A. ammophila* from the known potential threat factors.

We conclude that the best scientific and commercial information available indicates that *Abronia ammophila* is not in danger of extinction or likely to become so within the foreseeable future because of inadequate regulatory mechanisms.

*Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence*

Natural and manmade factors with the potential to affect *Abronia ammophila* include: (1) Small population size, (2) pollination, and (3) genetic diversity.

Small Population Size

Small populations can be especially vulnerable to environmental disturbances such as habitat loss, nonnative species, grazing, and climate change (Barrett and Kohn 1991, p. 7; Oostermeijer 2003, p. 21; O'Grady 2004, pp. 513–514). However, plants that are historically rare may have certain adaptations to rarity (*e.g.,* early blooming, extended flowering, or mixed-mating systems) that enable them to persist (Brigham 2003, p. 61).

Based on herbarium records, extirpation of *Abronia ammophila* sites has occurred (see Distribution and Abundance discussion above). However, additional sites also have been recently discovered, and not all suitable habitat within YNP has been surveyed (NPS 1999a, pp. 6–7). We have no information on whether these new sites represent recent expansion of the species or if surveys were not previously conducted in these areas.

We do not have any indication that *Abronia ammophila* was ever present on the landscape over a more extensive range. Existing sites are monitored, and surveys have located new occurrences. We have no information indicating that random demographic or environmental events are a threat to the species now or in the foreseeable future because of its small population size.

Pollination

Small populations may represent an unreliable food source, which may be visited by fewer pollinators than larger, less fragmented populations (Oostermeijer 2003, p. 23). However, low visitation rates may be more of a concern in currently rare species that were historically abundant (Brigham 2003, p. 84). We have no information suggesting that *Abronia ammophila* was previously more abundant across the landscape. Co-flowering species (species that flower during the same timeframe) also may be important to pollination of *A. ammophila;* the pollinators recorded as visiting *A. ammophila* also were observed visiting other dune plants in the vicinity (Saunders and Sipes 2004, p. 13).

Only very limited information is available regarding pollination of *Abronia ammophila.* However, *A. ammophila* is a historically rare species that exhibits a mixed-mating system. A mixed-mating system and co-flowering species may help alleviate negative effects that may occur due to low pollination visitation rates. Therefore, we have no information indicating that poor pollination is a threat to the species now or in the foreseeable future.

Genetic Diversity

Small population size can decrease genetic diversity due to genetic drift (the random change in genetic variation each generation), and inbreeding (mating of related individuals) (Antonovics 1976, p. 238; Ellstram and Elam 1993, pp. 218–219). Genetic drift can decrease genetic variation within a population by favoring certain characteristics and, thereby, increasing differences between populations (Ellstram and Elam 1993, pp. 218–219). Self-fertilization and low dispersal rates can cause low genetic diversity due to inbreeding (Antonovics 1976, p. 238; Barrett and Kohn 1991, p. 21). This decreased genetic diversity diminishes a species' ability to adapt to the selective pressures of a changing environment (Newman and Pilson 1997, p. 360; Ellstrand 1992, p. 77).

Limited information is available regarding the genetic diversity of the *Abronia* genus. No information is available regarding the genetic diversity exhibited by *Abronia ammophila.* Therefore, we have no information indicating that a lack of genetic diversity is a threat to the species now or in the foreseeable future.

Summary of Factor E

*Abronia ammophila* is a historically rare species that, as such, has adaptations such as a mixed-mating system and prolific flowering, which minimize the risks of small population size, low pollinator abundance, and genetic diversity. Therefore, we conclude that the best scientific and commercial information available indicates that *Abronia ammophila* is not in danger of extinction or likely to become so within the foreseeable future because of small population size,

pollination, or reduced genetic diversity.

**Finding for *Abronia ammophila***

As required by the Act, we considered the five factors in assessing whether *Abronia ammophila* is threatened or endangered throughout all of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by *A. ammophila.* We reviewed the petition, information available in our files, other available published and unpublished information, and we consulted with recognized *A. ammophila* experts and other Federal and State agencies.

The primary factor potentially impacting *Abronia ammophila* is human disturbance through trampling. However, studies that have sought to quantify foot traffic in the habitat of *A. ammophila* have found that there is little foot traffic occurring (NPS 1999a, pp. 2, 5). Additionally, *A. ammophila* prefers open sites and thrives under some disturbance. Other factors potentially affecting *A. ammophila*—including nonnative invasive plants, drought, small population size, limited pollinators, and genetic diversity—are either limited in scope, or lacking evidence apparent to us indicating that they adversely impact the species. We have no evidence that overutilization, disease, or predation are affecting this species. Although climate change will likely impact the status of some plant species in the future, we do not have enough information to determine that climate change will result in a species-level response from *A. ammophila.* Additionally, the existing regulatory mechanisms directing management of YNP appear to be adequate to protect the species from potential threats.

Based on our review of the best available scientific and commercial information pertaining to the five factors, we find that the threats are not of sufficient imminence, intensity, or magnitude to indicate that *Abronia ammophila* is in danger of extinction (endangered) or likely to become endangered within the foreseeable future (threatened), throughout all of its range. Therefore, we find that listing *A. ammophila* as a threatened or endangered species is not warranted throughout its range.

*Significant Portion of the Range*

Having determined that *Abronia ammophila* does not meet the definition of a threatened or endangered species, we must next consider whether there are any significant portions of the range where *A. ammophila* is in danger of extinction or is likely to become endangered in the foreseeable future.

In determining whether *Abronia ammophila* is threatened or endangered in a significant portion of its range, we first addressed whether any portions of the range of *A. ammophila* warrant further consideration. We evaluated the current range of *A. ammophila* to determine if there is any apparent geographic concentration of the primary stressors potentially affecting the species including trampling, nonnative invasive plants, drought, small population size, limited pollinators, and genetic diversity. This species' small range suggests that stressors are likely to affect it in a uniform manner throughout its range. However, we found the stressors are not of sufficient imminence, intensity, magnitude, or geographically concentrated such that it warrants evaluating whether a portion of the range is significant under the Act. We do not find that *A. ammophila* is in danger of extinction now, nor is likely to become endangered within the foreseeable future, throughout all or a significant portion of its range. Therefore, listing *A. ammophila* as threatened or endangered under the Act is not warranted at this time.

We request that you submit any new information concerning the status of, or threats to, *Abronia ammophila* to our Wyoming Ecological Services Field Office (see **ADDRESSES** section) whenever it becomes available. New information will help us monitor *A. ammophila* and encourage its conservation. If an emergency situation develops for *A. ammophila,* or any other species, we will act to provide immediate protection.

**Species Information for *Agrostis rossiae***

*Species Description*

*Agrostis rossiae* is a small annual grass in the family Poaceae (Clark *et al.* 1989, p. 8; Fertig 1994, unpaginated; 2000c, unpaginated). *A. rossiae* grows as a dense clump about 5 to 15 cm (2.0 to 5.9 in.) high (Fertig 2000c, unpaginated). The short leaves are 1.0 to 2.5 cm (0.39 to 0.98 in.) long, and 0.5 to 2.0 millimeters (mm) (0.02 to 0.08 in.) wide, with slightly inflated and smooth sheaths (the lower part of the leaf that surrounds the stem) (Clark *et al.* 1989, p. 8; Clark and Dorn 1981, p. 10; Fertig 1994, unpaginated; 2000c, unpaginated). The one-flowered spikelets (flowers) form at the top of the stems in a narrow, compact panicle (a structure in which the flowers mature from the bottom upwards) that is 2.0 to 6.0 cm (0.79 to 2.36 in.) long (Dorn 1980, p. 59; Fertig 2000c, unpaginated). The panicle remains compact at maturity (Fertig 1994, unpaginated). Branches of the panicle are scabrous (rough), purple, and lack spikelets at the base (Clark *et al.* 1989, p. 8; Dorn 1980, p. 59; Fertig 2000c, unpaginated).

*Discovery and Taxonomy*

Edith A. Ross collected the first recorded specimen of *Agrostis rossiae* in July of 1890 (Vasey 1982, p. 77; Hitchcock 1905, p. 41). The genus *Agrostis* consists of over 100 species occurring in both hemispheres, typically in cooler areas of temperate climates (Hitchcock 1905, p. 5). More recent sources list 150 to 200 species (Harvey 2007, unpaginated), or up to 220 species within the *Agrostis* genus (Watson and Dallwitz 1992, unpaginated).

Species of the *Agrostis* genus are able to form morphologically similar ecotypes (subspecies that survives as a distinct group due to environmental pressures and isolation) in response to variations in climate, heavy metals in the soil, and other unusual soil conditions (Bradshaw 1959, entire; Jowett 1964, p. 78; Aston and Bradshaw 1966, entire; Jain and Bradshaw 1966, pp. 415–417). Therefore, morphology of *Agrostis* species is not a reliable indicator of species (Tercek 2003, p. 9).

In the geothermally influenced areas of YNP, thermal *Agrostis scabra* (rough bentgrass) is sympatric (occurs in the same area) with *Agrostis rossiae* (Tercek 2003, pp. 9–10). *A. scabra* occurs as an annual in the thermal areas of YNP; however, this species is typically a perennial when it occurs in nonthermal habitats (Fertig 2000c, unpaginated; Tercek 2003, pp. 9–10). *A. scabra* can be distinguished from *A. rossiae,* when mature, by its spreading panicle (Fertig 1994, unpaginated; 2000c, unpaginated; Tercek 2003, pp. 9–10). Another similar species, although not sympatric, is *Agrostis variabilis* (mountain bentgrass), which is a perennial with panicle branches bearing spikelets nearly to the base (whereas *A. rossiae* lacks spikelets at the base) (Fertig 1994, unpaginated; Fertig 2000c, unpaginated). Genetic studies have shown that thermal *Agrostis* species occurring in YNP are more closely related to other thermal *Agrostis* species worldwide than to the nonthermal *Agrostis scabra* (Tercek 2003, pp. 17–21). Additionally, *A. rossiae* and thermal *A. scabra* are closely related to each other (Tercek *et al.* 2003, p. 1308–1309); however, additional genetic studies need to be completed to quantify their relationship. We recognize *A. rossiae* as a valid species and a listable entity.

*Biology and Life History*

*Agrostis rossiae* is a thermal species that takes advantage of the warmth from its environment and germinates from December to January, when nonthermal areas remain covered in snow (Tercek 2003, pp. 12, 45, 51). The growing season for *A. rossiae* is from December 1 to April 1; it blooms in May, matures in June, and dies by mid-June when the thermal ground temperature reaches between 40 and 45 °C (104 and 113 °F) (a temperature that kills *A. rossiae*) (Beetle 1977, p. 40; Tercek 2003, pp. 10, 34, 12, 45, 51–52).

*Agrostis rossiae* plants do not have a reduced seed set when isolated from external pollen sources; this suggests that *A. rossiae* reproduces through apomixis (reproduction that does not involve pollination) (Tercek 2003, p. 19). Seeds remain viable for about 100 years in artificial conditions, but persist for less time in natural conditions (Tercek 2010, pers. comm.). Seeds do not disperse very far from the parent plant (Whipple 2010a, pers. comm.).

*Habitat*

Typically, *Agrostis rossiae* grows on glacial deposits, which are at a slightly higher elevation than nearby hot springs (Tercek 2003, p. 11). These deposits border active geysers and hot springs at elevations of 2,210 to 2,256 m (7,250 to 7,400 ft) (Clark *et al.* 1989, p. 8; Fertig 1994, unpaginated; 2000c, unpaginated). These geothermally influenced soils remain moist throughout the year even though they are partially isolated from the water table of nearby hot springs by the higher elevation or a nonpermeable rock layer (White *et al.* 1971, p. 77; Fournier 1989, pp. 20–21; Tercek 2003, pp. 36, 45–46; Tercek and Whitbeck 2004, p. 1956).

The geysers in YNP are vapor-dominated, meaning that steam and other gases rise out of the ground (Fournier 1989, pp. 20–21; Tercek 2003, p. 36). The geysers are important to the soils because the elements and chemicals produced from the geysers affect the composition of the soil on which this species grows. The accompanying soils are rich in silica and calcium, and contain gases such as hydrogen sulfide and iron sulfide that are converted into sulfuric acid by bacteria (Tercek and Whitbeck 2004, p. 1956; White *et al.* 1971, p. 77; Fournier 1989, pp. 20–21; Tercek 2003, p. 36). The sulfuric acid lowers the pH (a measure of acidity and alkalinity) of the soil (White *et al.* 1971, p. 77; Fournier 1989, pp. 20–21; Tercek 2003, p. 36). YNP's thermal soils are more acidic (pH 3.9–5.6), in general, than the nonthermal soils (pH 4.3–6.4) (Tercek and Whitbeck 2004, p. 1964). *Agrostis rossiae* demonstrates peak growth in acidic soils (pH 3.0), whereas the optimal growth of both thermal and nonthermal *Agrostis scabra* occurs at a pH of 5.0 (Terceck and Whitbeck 2004, p. 1964). While *A. rossiae* is more tolerant of acidity than other sympatric *Agrostis* species, its growth declines at pH of less than 3.0 (Tercek and Whitbeck 2004, p. 1964). Many of the thermal features in YNP have a very high acidity (Whipple 2011, pers. comm.).

In addition to *Agrostis scabra,* a limited number of thermally adapted species occur in the same habitat as *Agrostis rossiae: Racomitrium canescens* (Racomitrium moss), several heat-loving soil fungi, a heat-tolerant grass—*Dichanthelium lanuginosum* (panicgrass), and a few annual forbs (Tercek and Whitbeck 2004, p. 1956). Annual forbs include *Conyza canadensis* (Canadian horseweed), *Gnaphalium stramineum* (cottonbatting plant), *Plantago elongata* (Prairie plantain), *Mimulus guttatus* (seep monkeyflower), and *Heterotheca depressa* (hairy false goldenaster) (Fertig 2000c, unpaginated).

*Distribution and Abundance*

*Agrostis rossiae* is endemic to YNP, occurring only in Teton County, Wyoming (Beetle 1977, p. 40; Clark and Dorn 1981, p. 10; Clark *et al.* 1989, p. 8; Fertig 2000c, unpaginated, Tercek 2003, p. 10). Even though there are many thermal areas in YNP, *Agrostis rossiae* only occurs in the west-central portion of YNP (Tercek 2003, p. 10). Specifically, *A. rossiae* only occurs in the Firehole River drainage and the Shoshone Geyser Basin (Greater Yellowstone 2010, unpaginated). The reason for this restriction is not known. One proposed hypothesis is that the high acidity of some of the other thermal areas restricts the species' distribution; another is that *A. rossiae* is a fairly recently evolved species that has not had time for successive generations to disperse and colonize a wider area (Whipple 2010e, pers. comm.).

Four known populations of the plant occur in an area of approximately 4.86 ha (12 ac); these populations are named Upper Geyser Basin, Shoshone, Midway, and Lower Geyser (Whipple 2010a, pers. comm.). Many of these occurrences are ephemeral (only persist for a short period) subpopulations (Fertig 2000c, unpaginated). Because of the changing thermal habitat, subpopulation numbers and locations may fluctuate greatly (Fertig 2000c, unpaginated). One small (generally less than 50 plants) subpopulation northeast of Infant Geyser in Geyser Hill disappeared due to changes in soil temperatures between 1992 and 2008 (Fertig 2000c, unpaginated; Whipple 2010e, pers. comm.).

The WNDD has designated *Agrostis rossiae* as a plant species of concern with ranks of G1 and S1 (Heidel 2007, p. 1). This designation indicates that *A. rossiae* is considered to be critically imperiled because of extreme rarity. For background information on G1 and S1 rankings, please refer to the last paragraph under *Distribution and Abundance* in the Species Information for *Abronia ammophila* section. Since *A. rossiae* is endemic to Wyoming, the Wyoming occurrences encompass the entire global range. Additionally, YNP considers *A. rossiae* to be a sensitive species of concern; therefore, it evaluates effects to this species in conjunction with any project or action that has the potential to affect the plant (Whipple 2011, pers. comm.).

*Trends*

Subpopulations can range in size from a solitary plant up to several thousand plants, in an area with a diameter of 100 m (328.1 ft) (Tercek 2003, p. 10; Tercek and Whitbeck 2004, p. 1956). Surveys conducted in 1995 suggest that the total population of all known *Agrostis rossiae* plants is approximately 5,000 to 7,500 individuals (Fertig 2000a, p. 36; 2000a, unpaginated). The 1998 survey determined the total population consisted of between 5,580 and 7,735 plants (Whipple *in litt.* 2009, entire). The entire population has not been surveyed in any additional years (Whipple *in litt.* 2009, entire). Surveys have been completed on a sporadic schedule, with not all populations surveyed in a given year (Whipple 2009 *in litt.,* unpaginated). All population counts are estimates as *A. rossiae* is an annual with a clumped growth form, and exact counts are unable to be obtained without destroying the plants (Whipple 2010d, pers. comm.). Overall, there is not enough information to conclusively determine rangewide trends; however, the total population numbers appear to be stable despite subpopulation fluctuations. Additionally, the known populations have expanded in the last 3 years (Whipple 2010a, pers. comm.).

**Five Factor Evaluation for *Agrostis rossiae***

Information pertaining to *Agrostis rossiae* in relation to the five factors provided in section 4(a)(1) of the Act is discussed below.

*Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range*

The following potential factors that may affect the habitat or range of *Agrostis rossiae* are discussed in this section, including: (1) Development, (2) trampling, (3) nonnative invasive species, (4) climate change, (5) thermal fluctuations, (6) drought, and (7) fire.

Development

*Agrostis rossiae* occurs entirely inside YNP, which limits potential threats to its habitat from development. As stated above (see Factor D under *Abronia ammophila*), YNP owns both its land and the mineral rights so energy development within the YNP's boundary is not a threat (Mazzu 2010, pers. comm.; Whipple 2010e, pers. comm.).

In the late 1970s and early 1980s, potential for geothermal energy development outside YNP was considered a threat to *Agrostis rossiae* because of the potential to affect the thermal basin that underlies YNP (Fertig 2000, unpaginated). Currently, no known applications for geothermal leases have this potential (Mazzu 2010, pers. comm.; Whipple 2010e, pers. comm.). However, applications are occasionally made for geothermal leases in the geothermal areas outside of YNP (NPS 2008b, unpaginated). The Geothermal Steam Act of 1970 (30 U.S.C. 1001–1027, December 24, 1970), as amended in 1977, 1988, and 1993, provides protections for the thermal features in YNP (see *Factor D. The Inadequacy of Existing Regulatory Mechanisms* below) (Legal Information Institute 2010, unpaginated). This law should protect the species, unless high energy costs, such as occurred in the late 1970s and early 1980s, encourage development interest that results in changes that weaken these protections. Therefore, *A. rossiae* is not threatened by geothermal energy development inside or outside of YNP's boundary.

As stated above, new construction of roads, trails, or structures occurring in YNP is rare, with reconstruction of existing features occurring occasionally (Whipple 2010e, pers. comm.). When new construction or reconstruction occurs in areas where there are sensitive species, YNP analyzes and carries out construction in a manner that minimizes adverse effects. For example, the reconstruction of the Biscuit Basin Boardwalk in the summer of 2010 included rerouting the boardwalk and restoration of *Agrostis rossiae* habitat that had been impacted during prior maintenance (Whipple 2010a, pers. comm.; 2010e, pers. comm.).

The majority of YNP remains undeveloped, and we have no information that this will change; therefore, we do not view development to be a threat to the species now or in the foreseeable future.

Trampling

Most habitat of *Agrostis rossiae* is easily accessible to visitors, as it is generally located near popular thermal features in YNP (Whipple 2010a, pers. comm.). However, visitors are required to stay on boardwalks and designated trails around thermal areas (NPS 2006c, unpaginated). Human impact to *A. rossiae* was noted in a survey of the Shoshone Geyser Basin area (Whipple 2009 *in litt.,* unpaginated). This trampling was partially mitigated by the reroute discussed above; surveys in 2000, after the trail was rerouted, documented a healthy *A. rossiae* population (Whipple 2009 *in litt.,* unpaginated). No studies have specifically examined disturbance due to trampling or its effects on *A. rossiae.* However, *A. rossiae* is typically located in the vicinity of thermal features that could be detrimental for humans to walk near, and any areas that have the potential for trampling are protected by YNP's policies.

For information on impacts of increased visitation to YNP, please refer to the "Trampling" discussion under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range* in the Five Factor Evaluation for *Abronia ammophila* section. As the plant is located in YNP, it is afforded protections (see *Factor D: The Inadequacy of Existing Regulatory Mechanisms* below).

Wildlife, also, have the potential to trample *Agrostis rossiae.* American bison (*Bison bison*) scat (fecal droppings) has been found in the vicinity of *A. rossiae* at several sites; however, no trampling of *A. rossiae* was noted in the survey notes (Whipple 2009 *in litt.,* unpaginated). In 1998, a small patch of *A. rossiae* was highly impacted by the actions of a rutting bull elk (*Cervus canadensis*); however, that *A. rossiae* population was reported to be healthy when resurveyed in 2000 (Whipple 2009 *in litt.,* unpaginated). We believe that these anecdotal observations do not add up to routine impacts on a scale that would cause the species to be threatened or endangered. Additionally, we believe that trampling by wildlife, as noted above, represents a natural ecological interaction in YNP with which the species would have evolved and poses no threat to long-term persistence.

We have no information indicating that trampling by either humans or wildlife is a threat to the species now or in the foreseeable future.

Nonnative Invasive Plants

For general background information on nonnative invasive plants, please refer to the first paragraph of "Nonnative Invasive Plants" under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range* in the Five Factor Evaluation for *Abronia ammophila* section.

As stated above, as of 2010, YNP has documented 218 nonnative plant species occurring within its boundaries (NPS 2010e, p. 1). The majority of these plants have not been documented in or around *Agrostis rossiae* habitat. Encroachment of nonnative species has the potential to affect *Agrostis rossiae.* However, at this time, none of the nonnative species are able to tolerate the hottest of the thermal habitats, where *A. rossiae* primarily grows (Whipple 2010e, pers. comm.). Several nonnative species that are considered either invasive or exotic occur near the thermal habitats of *A. rossiae* (Whipple 2009 *in litt.,* entire). In order to combat nonnative invasives that can tolerate the transition areas closer to the thermal habitat of *A. rossiae,* YNP is targeting *Rumex acetosella* (common sheep sorrel) around the Shoshone Geyser Basin (Schneider 2010 pers. comm.) and *Hypericum perforatum* (St. John's wort) near the Lower Geyser Basin (Whipple 2010f, pers. comm.). Additionally, NPS plans to establish trial plots in some of the geyser basins to determine the best control mechanisms (Schneider 2010 pers. comm.). Nonnative species currently occur only within the transition zones and not in the hot thermal habitat of *A. rossiae.* Additionally, the NPS has an exotic plant management plan (see *Factor D: The Inadequacy of Existing Regulatory Mechanisms* in the Five Factor Evaluation for *Abronia ammophila* section), which includes measures to identify and treat any new nonnatives; therefore, we believe that *A. rossiae* will be protected from nonnative plant invasions.

We have no information indicating that nonnative invasive species are modifying the habitat of *Agrostis rossiae* to the extent that they represent a threat to the species now or in the foreseeable future.

Climate Change

For general background information on climate change, please refer to the first paragraphs of "Climate Change" under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range* in the Five Factor Evaluation for *Abronia ammophila* section.

*Agrostis rossiae* is adapted to an ephemeral habitat subject to lethal summer soil temperatures and appears most clearly influenced by the condition of thermal features as opposed to other climatic factors. Although climate change has the potential to affect the species' habitat, it is not clear that climate change has relevance to the condition or availability of habitat for this species because we have no information that climate change will play a significant role in altering geothermal features. Climate change may affect the timing and amount of precipitation as well as other factors linked to habitat conditions for this species. We are uncertain how these changes will affect the geothermal habitat of *A. rossiae.* At this time the available scientific information does not clearly indicate that climate change is likely to threaten the species now or in the foreseeable future.

Thermal Fluctuations

The thermal features in YNP are part of the largest and most varied geyser basin in the world; this basin is essentially undisturbed (NPS 2008b, unpaginated). Few of YNP's thermal features have ever been diverted for human use (such as bathing pools or energy), despite the proximity of roads and trails (NPS 2008b, unpaginated). Thermal features can be affected by nearby ground-disturbing activities; water, sewer, and other utility systems adjacent to YNP have likely affected the park's features in the past (NPS 2008b, unpaginated). In other countries, geothermal drill holes and wells located 4.02 to 9.98 km (2.5 to 6.2 mi) from thermal features have reduced geyser activity and hot spring discharges (NPS 2008b, unpaginated). Connections between YNP's underlying geothermal basins are not fully understood. Therefore, if geothermal activities were to occur outside YNP, they could have the potential to affect this species.

*Agrostis rossiae* tends to follow very subtle geothermal features, growing along geothermal cracks and edges of sunken pools (Whipple 2010e, pers. comm.). For example, in Cathos Springs, *A. rossiae* currently grows along one crack and in a ring around the spring; however, when the water level is higher or the ground level hotter, the distribution shifts, or the plant may not be present at all in a given year (Whipple 2010e, pers. comm.). As discussed above, the Geothermal Steam Act of 1970 (30 U.S.C. 1001–1027, December 24, 1970), as amended in 1977, 1988, and 1993, prevents significant adverse effects to the thermal features in YNP (see *Factor D: The Inadequacy of Existing Regulatory Mechanisms* below) (Legal Information Institute 2010, unpaginated). Additionally, the NPS is included in discussions of activities that may affect the groundwater or geothermal areas of YNP (Mazzu 2010, unpaginated). Therefore, we have no information indicating that human-caused changes to the thermal features are likely to threaten the species now or in the foreseeable future.

Drought

For background information, please refer to the first paragraph of the "Drought" discussion under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range* in the Five Factor Evaluation for *Abronia ammophila* section. As noted above under the *Habitat* section for this species, the vapor-dominated geothermally influenced soils on which *Agrostis rossiae* typically grows remain moist throughout the year (Tercek 2003, pp. 36, 45–46). However, these soils are influenced by the amount and timing of the rain that falls in the area (Tercek and Whitbeck 2004, p. 1958). Typically around May or June, the snow in the surrounding area has melted and rains are no longer frequent enough for the soils in the areas surrounding the habitat of *A. rossiae* to remain moist (Tercek and Whitbeck 2004, p. 1958). This decrease in soil moisture of the surrounding habitat is accompanied by a sharp increase in the thermal soil temperatures (Tercek and Whitbeck 2004, p. 1958). The typical growing season in the hot thermal habitats is approximately 120 days (Tercek and Whitbeck 2004, p. 1963). *A. rossiae* requires only 30 to 70 days to complete its life cycle (Tercek and Whitbeck 2004, p. 1963). A decrease in the growing season of 40 percent could occur prior to drought having a detrimental effect on this species. Prediction models indicate that areas already affected by drought will suffer greater effects from temperature increases caused by climate change and that high precipitation effects will become more frequent (IPCC 2007, entire). Although we do not fully understand how these changes will affect the habitat of *A. rossiae,* we do know that this species is resilient to changes in the thermal basins of its environment. Therefore, we do not believe that drought will rise to the level of a threat to the species now or in the foreseeable future.

Fire

As *Agrostis rossiae* completes its annual life cycle by mid-June, it is typically dead by the time fire season occurs (Whipple 2010e, pers. comm.); YNP's fire season generally extends from late June to the first large rain events in September. The fires in 1988 burned the area where *A. rossiae* occurs; however, the fire did not carry on the ground through the *A. rossiae* populations and, therefore, did not have any effect on the population (Whipple 2010e, pers. comm.). We have no information indicating that fire is likely to threaten the species now or in the foreseeable future.

Summary of Factor A

YNP offers protection to the populations of *Agrostis rossiae* from all kinds of development, including roads, campgrounds, buildings, mining, and energy development. There are currently no plans for any further development in YNP near the existing populations or potential habitat of *A. rossiae.* We have no information to show that *Agrostis rossiae* is likely to be threatened by trampling, nonnative species, climate change, thermal fluctuations, drought, or fire.

We conclude that the best scientific and commercial information available indicates that *Agrostis rossiae* is not in danger of extinction or likely to become so within the foreseeable future because of the present or threatened destruction, modification, or curtailment of its habitat or range.

*Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

There has been limited use and collection of the leaves of *Agrostis rossiae* for scientific purposes to determine the genetic relationship between different *Agrostis* species (Tercek 2003, p. 12). We have no indications of *A. rossiae* being collected for any other purposes (Whipple 2010e, pers. comm.). Therefore, we conclude that the best scientific and commercial information available indicates that *A. rossiae* is not in danger of extinction or likely to become so within the foreseeable future because of overutilization for commercial, recreational, scientific, or educational purposes.

*Factor C. Disease or Predation*

*Agrostis rossiae* is not known to be affected or threatened by any disease. We have no records showing predation by grazing or herbivory on *A. rossiae.* Therefore, we conclude that the best scientific and commercial information available indicates that *A. rossiae* is not in danger of extinction or likely to become so within the foreseeable future because of disease or predation.

*Factor D. The Inadequacy of Existing Regulatory Mechanisms*

All known populations of *Agrostis rossiae* occur within YNP, which is under the jurisdiction of the NPS. Please refer to *Yellowstone National Park* under the *Factor D: The Inadequacy of Existing Regulatory Mechanisms* section in the Five Factor Evaluation for *Abronia ammophila* section for additional information.

The Geothermal Steam Act of 1970 (30 U.S.C. 1001–1027, December 24, 1970), as amended in 1977, 1988, and 1993, governs the lease of geothermal resources on public lands (Legal Information Institute 2010, unpaginated). In addition to preventing the issuance of geothermal leases on lands in YNP, it prevents the issuance of any lease that is reasonably likely to result in a significant adverse effect on thermal features within YNP (Legal Information Institute 2010, unpaginated).

Summary of Factor D

The existing regulatory mechanisms, especially the NPS Organic Act and the Geothermal Steam Act, appear to adequately protect *Agrostis rossiae* and its habitat in YNP. We expect that *A. rossiae* and its habitat will be generally protected from direct human disturbance. Therefore, we conclude that the existing regulatory mechanisms are adequate to protect *A. rossiae* from the known potential threat factors.

We conclude that the best scientific and commercial information available indicates that *Agrostis rossiae* is not in danger of extinction or likely to become so within the foreseeable future because of the inadequacy of existing regulatory mechanisms, provided the existing mechanisms are not weakened or removed.

*Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence*

Natural and manmade factors with the potential to affect *Agrostis rossiae* include: (1) Competition and hybridization, (2) small population size, and (3) genetic diversity.

Competition and Hybridization

Previously, *Agrostis scabra* has been listed as a threat to *Agrostis rossiae,* possibly because of competition or hybridization (*e.g.,* Fertig 2000a; 2000c; NatureServe 2010a, p. 1). However, *A. scabra* is a native species that does not compete with or restrict *A. rossiae* (Whipple 2010a, pers. comm.). The thermal areas in which *A. rossiae* grows have lethal summer soil temperatures (greater than 45 °C (113 °F)) that preclude the growth of perennial roots and reproduction of any plant that requires greater than 120 days to complete its life cycle (Tercek 2003, p. 51). Nonthermal *A. scabra* is able to germinate in garden experiments of thermal temperatures; however, nonthermal *A. scabra* seldom occurs in the interior of the thermal habitats where *A. rossiae* occurs (Tercek 2003, p. 53). Additionally, nonthermal *A. scabra* requires a growing season of approximately 160 days in order to flower; the typical growing season in the transition zone between thermal and nonthermal ground is approximately 105 days (Tercek 2003, p. 52). Therefore, even if the nonthermal *A. scabra* germinated in the transition zone, it would be unable to reproduce before desiccation occurred.

Conversely, thermal *Agrostis scabra* is able to flower at the same time as *Agrostis rossiae* (Tercek 2003, p. 10). However, each thermal area is typically populated by only one of these species because of differences in microhabitat requirements (*e.g.,* soil temperature, soil pH) (Tercek 2003, p. 10). A few thermal areas do support populations of both *A. rossiae* and thermal *A. scabra* (Whipple 2010e, pers. comm.); however, *A. rossiae* and thermal *A. scabra* maintain separate morphologies in these locations and when they are grown under uniform laboratory conditions (Tercek *et al.* 2003, p. 1311; Whipple 2010e, pers. comm.). Additionally, attempts to cross-pollinate *A. rossiae* and thermal *A. scabra* were unsuccessful; however, experiments that are more rigorous are needed to determine conclusively whether these two *Agrostis* species can hybridize (Tercek 2003, p. 19) and to confirm that there is not a crossbreeding effect that could be a threat to *A. rossiae.*

Small Population Size

For general background information on small population size, please refer to the first paragraph of "Small Population Size" under *Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence* in the Five Factor Evaluation for *Abronia ammophila* section.

We do not have any indication that *Agrostis rossiae* was ever present on the landscape over a more extensive range. Nor do we have any evidence that the populations of *A. rossiae* are sufficiently small to experience the problems that occur in some species because of small population size. Additionally, *A. rossiae* has the potential to expand its habitat, although potential habitat may be limited (see Distribution and Abundance) (Whipple 2010e, pers. comm.). We have no information indicating that random demographic or environmental events are a threat to the species because of a small population size. Therefore, we do not consider small population size to be a threat to *A. rossiae* now or in the foreseeable future.

Genetic Diversity

For general background information on genetic diversity, please refer to the first paragraph of "Genetic Diversity" under *Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence* in the Five Factor Evaluation for *Abronia ammophila* section.

Decreased genetic diversity diminishes a species' ability to adapt to the selective pressures of a changing environment (Newman and Pilson 1997, p. 360; Ellstrand 1992, p. 77). However, *Agrostis rossiae* continually adapts to the changing thermal conditions of its environment and is able to shift its distribution to follow these changes (Whipple 2010e, pers. comm.). Therefore, potential decreased genetic diversity does not appear to be affecting *A. rossiae.*

Gene flow can also have negative effects on a species (Ellstrand 1992, p. 77). Genes favoring adaptations to a different environment or hybridization between two species can result (Ellstrand 1992, p. 77). Gene flow between *Agrostis* populations is low (Tercek 2003, p. 19). Therefore, there may be some risk to the species, but we do not fully understand this risk based on currently available information.

Limited information is available about the genetic diversity of *Agrostis rossiae.* We do not have any indication that *A. rossiae* is at risk of suffering from reduced genetic diversity and consider it capable of adapting to changes based on our current understanding of the species' genetics. Therefore, we do not consider reduced genetic diversity to be a threat to *A. rossiae* now or in the foreseeable future.

Summary of Factor E

*Agrostis scabra* is a native species that does not outcompete or invade the habitat of *Agrostis rossiae.* Typically, these two species do not occur together. Additionally, we have no information to suggest that small population size or reduced genetic diversity limit *A. rossiae.* We conclude that the best scientific and commercial information available indicates that *Agrostis rossiae* is not in danger of extinction or likely to become so within the foreseeable future because of competition or hybridization, small population size, or reduced genetic diversity.

**Finding for *Agrostis rossiae***

As required by the Act, we considered the five factors in assessing whether *Agrostis rossiae* is threatened or endangered throughout all of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by *A. rossiae.* We reviewed the petition, information available in our files, and other available published and unpublished information, and we consulted with recognized *A. rossiae* experts and other Federal and State agencies.

The primary factors potentially impacting *Agrostis rossiae* are visitor impacts, the invasion of *Agrostis scabra,* and changing thermal activity. However, *A. scabra* is a native species that typically does not compete with *A. rossiae,* the existing boardwalks and trails offer sufficient pathways for visitors to navigate around the thermal areas, and sufficient regulatory mechanisms exist to prevent human-caused changes to the thermal basin by groundwater or geothermal development. Other factors affecting *A. rossiae*—including nonnative invasive plants, drought, small population size, and genetic diversity—are either limited in scope, or lacking evidence apparent to us indicating that they adversely impact the species as a whole. We have no evidence that overutilization, disease, or predation are affecting this species. Although climate change may impact the species in the future, we do not have enough information to determine that climate change will elicit a species-level response from *A. rossiae.* Based on our knowledge of the species, the regulatory mechanisms to protect the species appear appropriate.

Based on our review of the best available scientific and commercial information pertaining to the five factors, we find that the threats are not of sufficient imminence, intensity, or magnitude to indicate that *Agrostis rossiae* is in danger of extinction (endangered), or likely to become endangered within the foreseeable future (threatened), throughout all of its range. Therefore, we find that listing *A. rossiae* as a threatened or endangered species is not warranted throughout all of its range.

*Significant Portion of the Range*

Having determined that *Agrostis rossiae* does not meet the definition of a threatened or endangered species, we must next consider whether there are any significant portions of the range where *A. rossiae* is in danger of extinction or is likely to become endangered in the foreseeable future.

In determining whether *Agrostis rossiae* is threatened or endangered in a significant portion of its range, we first addressed whether any portions of the range of *A. rossiae* warrant further consideration. We evaluated the current range of *A. rossiae* to determine if there is any apparent geographic concentration of the primary stressors potentially affecting the species including visitor-related impacts (trampling), changing thermal activity, nonnative invasive plants, drought, small population size, and genetic diversity. This species' small range suggests that stressors are likely to affect it in a uniform manner throughout its range. Furthermore, we found the stressors are not of sufficient imminence, intensity, magnitude, or geographically concentrated such that it warrants evaluating whether a portion of the range is significant under the Act. We do not find that *A. rossiae* is in danger of extinction now, nor is it likely to become endangered within the foreseeable future throughout all or a significant portion of its range. Therefore, listing *A. rossiae* as threatened or endangered under the Act is not warranted at this time.

We request that you submit any new information concerning the status of, or threats to, *Agrostis rossiae* to our Wyoming Ecological Services Field Office (see **ADDRESSES** section) whenever it becomes available. New information will help us monitor *A. rossiae* and encourage its conservation. If an emergency situation develops for *A. rossiae,* or any other species, we will act to provide immediate protection.

**Species Information for *Astragalus proimanthus***

*Species Description*

*Astragalus proimanthus* is a mat-forming, stemless, perennial herb measuring 2 to 3 dm (7.9 to 11.8 in.) in diameter (Fertig 2001, unpaginated) and up to 4 cm (1.6 in.) in height (Dorn 1979 *in litt.,* unpaginated). The densely clustered, 1.0- to 3.5-cm-long (0.39- to 1.38-in.-long) leaves are divided into three narrow, 5- to 9-mm-long (0.2- to 0.4-in.-long) leaflets (small leaflike divisions of a larger compound leaf) (Fertig and Welp 2001, p. 7). The plants are covered with fine hairs and appear silvery, with leaflets that are equally hairy on both sides (Barneby 1964, p. 1153). The 17-mm-long (0.67-in.-long), asymmetrical, pea-like flowers have five petals: one large broad upper petal, two side petals, and two lower petals that form a canoe shape (Fertig and Welp 2001, p. 7). The broad upper petal, called the banner petal, is constricted along the midline, forming a fiddle shape (Roberts 1977, p. 63). The yellow to whitish flowers are often tinged with lavender or pink, especially near the center, and occur in pairs at the base of the leaves (Fertig and Welp 2001, p. 7). This plant has a taproot that is woody and branching (Barneby 1964, p. 1153).

*Discovery and Taxonomy*

The first specimens of *Astragalus proimanthus* were discovered and collected 9.7 km (6 mi) north of the town of McKinnon (Sweetwater County, Wyoming) on June 13, 1946, by H.C. Ripely and R.C. Barneby (Barneby 1964, p. 1154). A second population was located in 1961 (Barneby 1964, p. 1154). The population discovered in 1961 was collected from and revisited multiple times in the decades that followed; however, the population discovered in 1946 could not be relocated after multiple attempts (Fertig and Welp 2001, p. 8). In 2000, two populations were discovered, one of which may be the original site collected by Barneby in 1946 as this population was found 9.7 km (6 mi) north of the town of McKinnon (Fertig and Welp 2001, p. 9).

The flowering plant genus *Astragalus* is the largest genus of vascular plants (Montana Plant Life 2010, unpaginated). With the common names "milk-vetch" or "locoweed" (family Fabaceae or Leguminosae), the genus contains more than 2,000 species, which are distributed worldwide, although they are primarily found in the northern hemisphere (Barneby 1989, p. 1; Montana Plant Life 2010, unpaginated). Based on similar morphological features of the flower, calyx (collective term for the sepals, which are the green, leaflike structures that protect the delicate inner parts of the flower while it is developing), and fruits, *Astragalus proimanthus* is in a taxonomic grouping within *Oropahca* (subgenus) with *Astragalus gilviflorus* (Dubois milkvetch) and *Astragalus hyalinus*

(summer milkvetch), which both occur in Wyoming (Fertig and Welp 2001, p. 6). *A. proimanthus* has been considered a descendant of *A. hyalinus* (Roberts 1977, p. 63). *A. proimanthus* is similar to *A. hyalinus* in its dwarf habit of growth and short flower with fiddle-shaped banner petal, but it is dissimilar in having smooth, hairless petals and an earlier flowering period (by a month or so) (Barneby 1964, p. 1154). Additionally, *A. proimanthus* grows in a small, compact form and not in a large, highly curved cushion characteristic of *A. hyalinus. A. proimanthus* resembles *A. gilviflorus* in its growth form and has a similar range of numbers of seeds in the fruits; however, unlike *A. gilviflorus,* it has narrow, oval-shaped fruit and short, differently shaped banner petals (Barneby 1964, p. 1154). The only other *Astragalus* species in Wyoming with three leaflets have smaller flowers than *A. proimanthus* (Fertig 1994, unpaginated). All species within the subgenus *Oropahca* have 12 chromosomes (Roberts 1977, p. 1), but it is unknown if they are interfertile (capable of cross-pollinating or breeding with other *Astragalus* species) (Fertig and Welp 2001, p. 14). No evidence of hybridization between *A. proimanthus* and other *Astragalus* species has been documented (Fertig and Welp 2001, p. 14). Based on this information, we recognize *A. proimanthus* as a valid species and a listable entity.

*Biology and Life History*

*Astragalus proimanthus* (precocious milkvetch) is named for its early flowering period. It has been observed in flower as early as April 28, and it may continue to bloom until mid-June (Fertig and Welp 2001, p. 14). *Astragalus* species are typically insect-pollinated; however, we have no information specific to *A. proimanthus* (Heidel 2003, p. 19). Both insects and birds have been observed visiting the flowers of *A. proimanthus* and may be involved in pollination (Fertig and Welp 2001, p. 14). Fruits are continuously produced from mid-May through late July (Roberts 1977, pp. 43, 97). The narrow, oval fruit pods (7 to 10 mm (0.28 to 0.39 in.) long) are attached to the stems and are covered in dense, fine hair (Fertig and Welp 2001, p. 7). The fruit pods contain 11 to 14 seeds (Barneby 1964, p. 1154) that are brown and 2.0 to 3.1 mm (0.08 to 0.12 in.) long (Roberts 1977, p. 64). Fruit production may be limited during drought years as evidenced by low fruiting rates observed in 2000 (Fertig and Welp 2001, p. 14). Due to the absence of seed structures (*e.g.,* winged edges) to enhance dispersal, seed dispersal appears passive and limited to short distances (Fertig and Welp 2001, p. 14).

Although *Astragalus proimanthus* is perennial, its lifespan may be shorter than is commonly assumed for mat-forming perennials, as is evidenced by shifts in location of plant subpopulations and disappearances of previously documented plant occurrences (Fertig and Welp 2001, pp. 13–14, 17). Longevity is an important life-history trait for the persistence and survival of species occurring in harsh environments where recruitment (reproductive success) is variable and unpredictable (Garcia *et al.* 2008, p. 261).

*Habitat*

*Astragalus proimanthus* is a narrow endemic occurring only on the shale bluffs of the Henrys Fork River, near the town of McKinnon, which is in the southern Green River Basin of southwestern Sweetwater County, Wyoming (Fertig and Welp 2001, p. 8). Sparsely vegetated rims and gullied upper slopes of benches, bluffs, and mesa-like ridges at elevations of 1,950 to 2,195 m (6,400 to 7,200 ft) provide habitat for *A. proimanthus* (Fertig and Welp 2001, p. 11).

*Astragalus proimanthus* inhabits cushion plant and bunchgrass communities dominated by *Phlox hoodii* (spiny phlox or carpet phlox), *Haplopappus nuttallii* (rayless aster), *Cryptantha sericea* (silky cryptantha), and *Elymus spicatus* (bluebunch wheatgrass) in openings within *Artemisia tridentata* (big sagebrush) and grasslands intermixed with *Juniperus osteosperma* (Utah juniper) (Fertig and Welp 2001, p. 11). *A. proimanthus* also occurs on gentle slopes at the base of ridges within a matrix of *Artemisia nova* (black sagebrush), *Sarcobatus vermiculatus* (greasewood), *J. osteosperma,* and *Grayia spinosa* (spiny hopsage) (Fertig and Welp 2001, p. 11). This species grows in fine-textured limestone shale clays that are dry, shallow, and covered by a dense layer of coarse cobbles, whitish flakey shale, and dark volcanic rock (Fertig and Welp 2001, pp. 11–12).

Individual *Astragalus proimanthus* plants are often separated by apparently suitable, nonvegetated habitat, and typically occur in densities ranging from 0.18 to 3.4 plants per square meter ($m^2$) (0.15 to 2.8 plants per square yard ($yd^2$)) (Fertig and Welp 2001, p. 14). The habitat in which *A. proimanthus* grows typically has less than 5 to 10 percent vegetative cover (Fertig and Welp 2001, pp. 11–12). The absence of plants from seemingly suitable habitat may be the result of passive seed dispersal (addressed above) or episodic (occurring at irregular intervals) establishment events, such as gully washouts (Fertig and Welp 2001, p. 14).

Average annual precipitation where *Astragalus proimanthus* occurs is 25 cm (9.8 in.), with peak precipitation events occurring in May and June (Martner 1986 as cited in Fertig and Welp 2001, p. 12). Mean annual temperature is 4.4 °C (40 °F), with mean lows of −14.4 °C (6 °F) in January, and mean highs of 28.9 °C (84 °F) in July (Martner 1986 as cited in Fertig and Welp 2001, p. 12). The average number of days per year at or below freezing are 225 (Martner 1986 as cited in Fertig and Welp 2001, p. 12).

*Distribution and Abundance*

The distribution of *Astragalus proimanthus* consists of 3 populations which are made up of 26 subpopulations (Fertig and Welp 2001, pp. 12–13; Heidel 2010a, pers. comm.). The largest population contains 21 subpopulations and occurs within 3.2 km (2 mi) of the Henrys Fork River along an 8-km (5-mi) stretch (WNDD *in litt.* 2010, unpaginated). The second largest population consists of four subpopulations and occurs 12.9 km (8 mi) further upstream on the Henrys Fork River, near the mouth of Cottonwood Creek (WNDD *in litt.* 2010, unpaginated). The smallest population consists of one subpopulation and occurs 2.5 km (1.5 mi) north of the largest population, along Lane Meadow Creek—a tributary to the Henrys Fork River (WNDD *in litt.* 2010, unpaginated). The entire distribution of *A. proimanthus* is limited to an area of less than 129.5 ha (320 ac) within an area of 6.4 by 22.5 km (4 by 14 mi) (Fertig and Welp 2001, p. 8).

Population estimates of *A. proimanthus* have varied widely, probably reflecting variability in survey methods and discovery of new subpopulations (Fertig and Welp 2001, p. 13). In 1980, prior to the discovery of all 26 subpopulations, an estimated 200 plants were documented as occurring within 2 populations (Dorn 1980, p. 49). The first survey to inventory the entire known distribution was completed in May of 1981, with the total number of *A. proimanthus* plants estimated at 22,000 plants occurring on 97.1 ha (240 ac) (Whiskey Basin Consultants 1981, p. 5). Conclusions from field studies conducted in 1989 are that, although the distribution of *A. proimanthus* was limited, subpopulations within that distribution were large, containing thousands of individual plants; the total population size was estimated at 25,000 to 40,000 individuals (Fertig and Welp

2001, p. 13). However, the 1989 field studies focused on identifying new subpopulations and initiating a monitoring program, not on conducting a quantitative census (Fertig and Welp 2001, p. 13). In June 2000, a survey of 11 subpopulations representing the 3 known populations, conducted by the WNDD, resulted in a count of 2,644 individuals; this was extrapolated to a minimum total population estimate of 10,500 to 13,000 individuals (Fertig and Welp 2001, p. 13).

The distribution of *A. proimanthus* may be associated with the presence of a light-colored shale formation, where it is the uppermost soil layer (Whiskey Basin Consultants 1981, p. 9). The Henrys Fork River has eroded this shale formation away in some areas, causing it to be exposed over a distance of 9 km (5.5 mi) near the river (Whiskey Basin Consultants 1981, p. 9). Approximately 95 percent of the known occurrences of *A. proimanthus* have been found on BLM-administered lands, with 4 percent occurring on State lands, and 1 percent on private lands (Heidel 2010b, pers. comm.).

The WNDD has designated *Astragalus proimanthus* as a plant species of concern with ranks of G1 and S1 (Heidel 2007, p. 3). For background information on G1 and S1 rankings, please refer to the last paragraph under *Distribution and Abundance* in the Species Information for *Abronia ammophila* section. Since *A. proimanthus* is endemic to Wyoming, the Wyoming occurrences encompass this species' entire global range.

*Trends*

Population trends for *Astragalus proimanthus* are difficult to determine because survey methodologies have not remained consistent, baseline data are lacking, and precipitation has varied significantly during survey years (Fertig and Welp 2001, p. 13). Shifts in the distribution suggest that *A. proimanthus* may be shorter-lived than is often assumed for mat-forming perennials (Fertig and Welp 2001, p. 14). The importance of yearly fluctuations in precipitation and temperature to the establishment and survival of this species is unknown (Fertig and Welp 2001, p. 14).

Population counts and distribution of *Astragalus proimanthus* along established transects have varied during the past two decades (Fertig and Welp 2001, p. 14). Five transects were established in 1989 to evaluate changes in abundance and density of plants (Marriott 1989, Appendix D). Surveys from two transects monitored from 1989 to 1998 showed a long-term increase in numbers and densities of plants (Fertig and Welp 2001, pp. 37–47). However, numbers along a third transect decreased by 7 percent from 1989 to 1998, and then the transect could not be relocated in 2000 possibly due to a local extirpation of plants (Fertig and Welp 2001, pp. 14, 37–47). Surveys from the fourth transect showed a steady decline in overall plant numbers, reaching a 43 percent decrease in numbers by 2000 (Fertig and Welp 2001, pp. 14, 37–47). Surveys from the fifth transect revealed short-term oscillations in the population size, with numbers increasing between 1989 and 1998 and then decreasing 8 percent by 2000 (Fertig and Welp 2001, pp. 37–47). Changes in numbers and plant densities may be attributed to the short lifespans of individual plants or the lack of new plants becoming established (Fertig and Welp 2001, p. 14). Localized increases and decreases in population numbers and density may be expected for this species, as evidenced by the variable numbers and changes in spatial distributions along survey transects (Fertig and Welp 2001, p. 40). However, overall monitoring data suggest that the main population along the bluffs of the Henrys Fork River was relatively stable from 1998 to 2000 despite localized shifts in distribution (Fertig and Welp 2001, p. 14).

**Five Factor Evaluation for *Astragalus proimanthus***

Information pertaining to *Astragalus proimanthus* in relation to the five factors provided in section 4(a)(1) of the Act is discussed below.

*Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range*

The following potential factors that may affect the habitat or range of *Astragalus proimanthus* are discussed in this section, including: (1) energy development, (2) road construction, (3) off-road vehicle use, (4) range improvements, (5) disposal sites, (6) nonnative invasive plants, (7) fire, and (8) climate change and drought.

Energy Development

Energy development has been identified as a potential threat to *Astragalus proimanthus* (Marriot 1989, p. 8, Fertig and Welp 2001, p. 16). The distribution of *A. proimanthus* is limited to Sweetwater County, Wyoming (WNDD *in litt.* 2010, unpaginated). Sweetwater County sits atop the coal seams and oil and gas reserves of the Upper Green River Basin, which by some estimates contain 10 percent of the nation's total onshore natural gas reserves, as well as the largest known trona (a source of sodium carbonate) deposit in the world (Headwaters Economics 2009, p. 26). Uranium and coal (Headwaters Economics, p. 26) as well as oil shale resources (Congressional Research Service 2008, p. 3) occur throughout the county. There also is the potential for wind energy development in Sweetwater County (BLM 2010a, unpaginated).

Oil and gas exploration and extraction; coal, uranium, and trona mining; and oil shale and wind energy development may involve ground-disturbing actions that have the potential to remove or disturb *Astragalus proimanthus* and its habitat (Marriott 1989, p. 8; Fertig and Welp 2001, p. 16). Oil and gas exploration and coal mining may involve drilling, using explosives, driving heavy earth-moving equipment off road, clearing land for resource extraction or project infrastructures, and constructing roads and utility lines. Oil shale development may involve converting oil shale into crude oil through a process called destructive distillation, which may require land removal (Congressional Research Service 2008, p. 4). Wind energy development involves clearing land for constructing turbine sites and infrastructure including utility lines and roads. Additionally, all energy development may result in increased human use and vehicular traffic, which can result in trampling and increased erosion in the area.

In 2000, seismic explorations took place near the mouth of Cottonwood Creek, where a population of *Astragalus proimanthus* occurs (Fertig and Welp, 2001, p. 16). Associated road construction may have disturbed *A. proimanthus* habitat, but there is no indication that plants were removed by these activities and any population-level effects are unknown. Presently, there is no ongoing energy development near the known occurrences of *A. proimanthus* on BLM-administered lands (Glennon 2010a, pers. comm.).

*Astragalus proimanthus* is a special status species designated by the BLM State Director as sensitive (BLM 1997, p. 19). This status requires that potential habitat on Federal or split estate (*i.e.,* mixed surface and mineral ownership) lands be searched to determine if sensitive plants are located in the project area before the project occurs (BLM 1997, p. 19). Areas with special status plant populations are closed to activities that would adversely affect them, including surface disturbances, locating new mining claims, mineral material sales, all off-road vehicle (ORV)

use, and use of explosives and blasting (BLM 1997, p. 19).

In the Green River Resource Management Plan (RMP), the BLM has established a Special Status Plant Species Area of Critical Environmental Concern (ACEC) that covers four plant species including *Astragalus proimanthus* (BLM 1997, pp. 19, 34). This ACEC protects 100 percent of *A. proimanthus* that occurs on BLM land (BLM 2011, unpaginated). This ACEC is closed to energy development activities that have the potential to adversely affect *A. proimanthus* and its habitat. Prohibited activities include surface disturbing activities and surface occupancy (such as leasable mineral exploration and development or construction of long-term facilities or structures), mineral material sales, and use of explosives and blasting (BLM 1997, pp. 19, 34). The ACEC has provisions by which any newly located *A. proimanthus* individuals and habitat can be added to the ACEC by an amendment to the RMP (BLM 1997, pp. 19, 34).

Additionally, BLM-administered lands under a 48.6-ha (120-ac) fenced enclosure around one of the subpopulations of *Astragalus proimanthus,* north of the town of McKinnon, have been withdrawn from mineral exploration and mining (BLM 1999, p. 6; Glennon 2010a, pers. comm.). The BLM has committed to pursuing the withdrawal of mining claims in all areas of the Special Status Plants Species ACEC (BLM 1997, p. 34).

Although occurrences of *Astragalus proimanthus* on BLM-administered lands are protected from the impacts of energy development, future energy development remains a potential threat to occurrences of *A. proimanthus* that are not located on Federal land. However, this potential threat is unlikely to rise to the level of a threat to the species as the vast majority of known occurrences (95 percent) of *A. proimanthus* are located on BLM-administered lands (Heidel 2010b, pers. comm.; WNDD *in litt.* 2010, unpaginated). Therefore, we do not consider energy development to be a threat to *A. proimanthus* now or in the foreseeable future.

Road Construction

Roads can destroy or modify habitat and increase human access that may lead to trampling or the introduction of nonnative invasive plants (discussed below). Additionally, road construction can lead to increased erosion, and vehicle traffic on unimproved roads can result in increased atmospheric dust and dust deposition on vegetation.

Habitat for *Astragalus proimanthus* has been lost at several locations due to road construction (Fertig and Welp 2001, p 16). Wyoming State Highway 1 intersects two subpopulations (Fertig and Welp 2001, p. 13). Several two-track vehicle trails are located near populations of *A. proimanthus* (BLM 1997, p. 199). During the summer of 1993, BLM personnel documented surface disturbance due to traffic; this was partially associated with vehicles accessing the unauthorized McKinnon Dump, which is no longer in use and has since been reclaimed (BLM 1997, p. 199).

On BLM lands, special status plant populations are closed to activities that could adversely affect them or their habitat (BLM 1997, p. 19), and the ACEC is closed to all direct surface-disturbing road construction (BLM 1997, p. 34). Future road development is a potential threat to occurrences of *Astragalus proimanthus* that are not on BLM-managed lands. However, future road construction does not rise to the level of a threat to *A. proimanthus,* because the species primarily occurs on BLM-administered lands and, therefore, is protected by the provisions in the ACEC and its designation as a special status plant species (BLM 1997, pp. 19, 34). Therefore, we do not consider road construction to be a threat to *A. proimanthus* now or in the foreseeable future.

Off-Road Vehicle Use

The use of ORVs is both a means of transportation and recreation in Wyoming. Approximately 35.5 percent of Wyoming's 506,000 residents use ORVs for recreational purposes (Foulke *et al.* 2006, p. 3). During 2004 and 2005, Sweetwater County had the fifth highest ORV permit sales in the State (Foulke *et al.* 2006, pp. 8–9).

The area of BLM-administered land in Sweetwater County, Wyoming, where *Astragalus proimanthus* occurs has not experienced the high level of ORV use seen in some other areas of Wyoming (Glennon 2010a, pers. comm.). There are no large communities nearby to support local ORV recreational activities. The closest town (within 3.2 km (2 mi) of the nearest populations of *A. proimanthus*) is McKinnon, with a population of 49 in 2000 (U.S. Census Bureau 2010, unpaginated). The larger communities of Green River (estimated population of 12,411 in 2009), Rock Springs (estimated population of 20,905 in 2009), and Evanston (estimated population of 11,958 in 2009) (U.S. Census Bureau 2009, unpaginated) are 78.9, 106.2, and 120.7 km (49, 66, and 75 mi) from McKinnon, respectively. There are many ORV opportunities closer to these communities than those on the BLM-administered lands near the town of McKinnon.

In addition, *Astragalus proimanthus* habitat is generally not attractive to ORV users. Recreational destinations in the area where *A. proimanthus* occurs are largely limited to a few historic sites and trails (BLM 1997, pp. 4–6). Available two-track vehicle trails provide access to most common destinations, such as water sources and hunting campsites, so that off-road access is not often necessary (Glennon 2010a, pers. comm.). Additionally, *A. proimanthus* occurs on slopes and ridges (Fertig and Welp 2001, p. 11) that are not conducive to ORV travel that is destination-oriented.

Finally, the ACEC is closed to ORV use (BLM 1997, p. 72). However, there are no physical barriers to keep ORVs out of the ACEC, except for in the 48.6-ha (120-ac) fenced exclosure (Glennon 2010a, pers. comm.). At other locations in southwestern Wyoming, violators of BLM and U.S. Forest Service travel restrictions on ORV use have been reported (WGFD 2010, unpaginated). The potential for impacts from illegal ORV use on BLM-administered lands is possible even within the ACEC. However, impacts from illegal ORV use are unlikely due to the low human populations in the area, the difficulty of traversing the habitats occupied by *Astragalus proimanthus,* and the greater likelihood of enforcement of the prohibition of ORV use within an ACEC due to critical resource concerns (BLM 1997, p. 110). Therefore, we do not consider ORV use to be a threat to *A. proimanthus* now or in the foreseeable future.

Range Improvements

Habitat modifications due to range improvement projects for livestock have been identified as a potential threat to *Astragalus proimanthus* (Marriott 1989, p. 8). However, this was prior to the designation of the ACEC that provides special protections for *A. proimanthus* (BLM 1997, p. 34). As stated in the Green River RMP, within the ACEC: "Livestock grazing objectives and management practices will be evaluated and, as needed, modified to be consistent with the management objectives for this area" (BLM 1997, p. 34). The plan also specifies, "Grazing systems will be designed to achieve desired plant communities and proper functioning conditions of watersheds (upland and riparian)" (BLM 1997, p. 34). Additionally, no wild horse traps will be constructed within this area (BLM 1997, p. 34). Movement of

livestock between areas of known use and range improvements will be evaluated and monitored, and locations of range improvements will be modified, if necessary, to ensure that the habitat where *A. proimanthus* occurs will not be trampled (Glennon 2010a, pers. comm.). The fact that populations from 1989 through 2000 were relatively stable (Fertig and Welp 2001, p. 14) suggests that range management did not adversely affect *A. proimanthus* populations during that time. No impacts from livestock have been noted recently (Glennon 2010a, pers. comm.). Since 1997, range management practices also are evaluated pursuant to the management objectives of the ACEC (BLM 1997, p. 19). Additionally, known locations of *A. proimanthus* are protected and closed to surface-disturbing activities or any disruptive activity that could adversely affect the plants or their habitat (BLM 1997, p 19). Therefore, we do not consider range improvements to be a threat to *A. proimanthus* now or in the foreseeable future.

Disposal Sites

Disturbance associated with garbage disposal sites (dumps) has been identified as a potential threat to *Astragalus proimanthus* (Marriott 1989, p. 8). Surveys conducted by the BLM in 1993 and 1994 documented disturbances to the habitat of *A. proimanthus* due to the presence of the McKinnon Dump (BLM 1997, p. 199). The McKinnon Dump was an illegal dump located on BLM land (Board of County Commissioners of Sweetwater County 1992, unpaginated). The BLM and Sweetwater County worked together to clean up and reclaim the McKinnon Dump (Board of County Commissioners of Sweetwater County 1992, unpaginated; BLM 1997, p. 199). Since 1997, the ACEC appears to have effectively protected *A. proimanthus* from surface disturbance, such as dumps, on BLM-administered lands (BLM 1997, p. 34). Therefore, we do not view disposal sites to be a threat to *A. proimanthus* now or in the foreseeable future.

Nonnative Invasive Plants

For general background information on nonnative invasive plants, please refer to the first paragraph of "Nonnative Invasive Plants" under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range* in the Five Factor Evaluation for *Abronia ammophila* section.

We have no evidence of impacts to *Astragalus proimanthus* from nonnative invasive plants. *A. proimanthus* grows in shallow, dry soils that support only sparse vegetation (Fertig and Welp 2001, pp. 11–12). The characteristics of its harsh habitat may explain why no nonnative invasive plants have been reported in proximity to the known occurrences. Therefore, we do not consider nonnative invasive plants to be a threat to this species now or in the foreseeable future.

Fire

We find the potential impact of wildfire to the species to be minimal due to the sparse vegetation cover in habitats occupied by *Astragalus proimanthus.* From 1980 through 2009 (29 years), seven wildfires occurred in the area BLM mapped as potential habitat for *Astragalus proimanthus* (Caldwell 2011, pers. comm.). However, no fires burned in areas with known occurrences of *A. proimanthus;* moreover, the total acreage burned during this 29-year period was 0.3 ha (0.7 ac) (Caldwell 2011, pers. comm.). All seven wildfires were caused by lightning strikes to isolated junipers, and only that individual tree burned (Stephenson 2011, pers. comm.). Areas of barren ground between widely spaced vegetation and low fuel loads prevent fires from spreading far beyond points of ignition (Brooks and Pyke 2002, p. 5), as the existence of adequate fuels is one of the requirements for a fire to start and continue to burn (Moritz Lab 2010, entire). Therefore, we do not consider fire to be a threat to this species now or in the foreseeable future.

Climate Change and Drought

For general background information on climate change, please refer to the first paragraphs of "Climate Change" under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range* in the Five Factor Evaluation for *Abronia ammophila* section.

Although assessing the magnitude and type of effect climate change may have on *Astragalus proimanthus* is complex, we believe climate change has the potential to affect the species given the predictions discussed previously of increased springtime temperatures, decreased springtime precipitation, and increased drought. The importance of yearly fluctuations in precipitation and temperature on the establishment and survival of *A. proimanthus* is unknown (Fertig and Welp 2001, p. 14). However, drought is not unusual or unnatural in Wyoming. Severe or extreme drought conditions occur more than 20 percent of the time over the southwestern regions of the State (Curtis and Grimes 2004, Chapter 6.2). As noted previously, monitoring data suggest that the main population along the bluffs of the Henrys Fork River was relatively stable from 1998 to 2000 (Fertig and Welp 2001, p. 14). During this same period, this species' habitat experienced drought conditions, including severe droughts (Curtis 2004, unpaginated). Although climate change may affect the duration and severity of drought in some locations, we do not have information to suggest *A. proimanthus* is unlikely to be able to respond to this potential stressor. Therefore, we do not consider climate change and drought to be a threat to this species now or in the foreseeable future.

Summary of Factor A

Occurrences of *Astragalus proimanthus* have experienced historical impacts from road development and illegal trash dumps. Additionally, seismic exploration for oil and gas occurred near one population where associated road construction may have disturbed *A. proimanthus* habitat, but there is no indication that plants were destroyed. Currently, the habitat disturbance due to the McKinnon dump has effectively been addressed. The special species status of *A. proimanthus* and the provisions in the ACEC are adequate to alleviate the threats to *A. proimanthus* from energy development, road construction, ORV use, range improvements, and other land uses that have the potential to disturb the habitat of *A. proimanthus.* Although potential threats on State and private lands may exist, such as ORV use or range improvements, only 5 percent of this species' distribution occurs on private lands, and no impacts to the species on private lands has been documented.

In summary, we note that procedural considerations for amending the Green River RMP to ensure that all individual *Astragalus proimanthus* plants on BLM-administered lands are protected by the Special Status Plant Species ACEC (BLM 1997, pp. 19–20, 34) are lengthy and may not accurately delineate the oscillating distributions and new discoveries of this species. However, maintenance actions may be used in certain situations including new population discoveries and species' range shifts (see Factor D: Bureau of Land Management below). Therefore, we find that the protections provided by the special status plant species designation (BLM 1997, p. 19) in combination with the protections provided by the Special Status Plant ACEC, as documented in the Green River RMP (BLM 1997, p. 34), provide

effective protection to 95 percent of the population of *A. proimanthus.*

We conclude that the best scientific and commercial information available indicates that *Astragalus proimanthus* is not in danger of extinction or likely to become so within the foreseeable future because of the present or threatened destruction, modification, or curtailment of its habitat or range.

*Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

*Astragalus proimanthus* is not known to be collected for any purposes. One species of this genus, *Astragalus membranaceus* (Huang qi), has been used in traditional Chinese medicine for thousands of years (University of Maryland 2006, unpaginated). However, this species is native to Asia, and *Astragalus* species that grow in the United States do not share similar medicinal properties (University of Maryland 2006, unpaginated). We have no information to indicate that *A. proimanthus* is threatened by overutilization for commercial, recreational, scientific, or educational purposes.

We conclude that the best scientific and commercial information available indicates that *Astragalus proimanthus* is not in danger of extinction or likely to become so within the foreseeable future because of overutilization for commercial, recreational, scientific, or educational purposes.

*Factor C. Disease or Predation*

Disease

*Astragalus proimanthus* is not known to be affected or threatened by any disease. Therefore, we do not consider disease to be a threat to *A. proimanthus* now or in the foreseeable future.

Predation—Grazing and Herbivory

Grazing and herbivory effects on *Astragalus proimanthus* have not been studied. Bird or insect predation on many *A. proimanthus* flowers was noted on at least one occasion (Barneby 1964, p. 1154). Most occurrence reports do not mention any instances of herbivory (WNDD *in litt.* 2010, unpaginated; Marriot 1989, p. 16). Domestic sheep apparently do not graze *A. proimanthus* (Mutz 1981, p. 6), and direct impacts from grazing are thought to be unlikely due to the plant's low stature, coarse pubescence (fine, short hairs), and low palatability (Mutz 1981, p. 6; Marriott 1989, unpaginated; Fertig and Welp 2001, p. 14). Therefore, we do not consider predation to be a threat to *A. proimanthus* now or in the foreseeable future.

Summary of Factor C

We conclude that the best scientific and commercial information available indicates that *Astragalus proimanthus* is not in danger of extinction or likely to become so within the foreseeable future because of disease or predation.

*Factor D. The Inadequacy of Existing Regulatory Mechanisms*

The Act requires us to examine the adequacy of existing regulatory mechanisms with respect to threats that may place *Astragalus proimanthus* in danger of extinction or likely to become so in the future. Existing regulatory mechanisms that could have an effect on potential threats to *A. proimanthus* include (1) Federal laws and regulations; (2) State laws and regulations; and (3) local land use laws, processes, and ordinances. Most (95 percent) of *A. proimanthus* occurs on Federal land; therefore, the discussion below focuses on Federal laws. Actions adopted by local groups, States, or Federal entities that are discretionary, including conservation strategies and guidance, are not regulatory mechanisms; however, we may discuss them in relation to their effects on potential threats to the species.

Federal Laws and Regulations

Bureau of Land Management

As discussed previously, the special status species designation and the Special Status Plant Species ACEC, as documented in the Green River RMP (BLM 1997, pp. 19, 34), have adequate provisions to effectively protect 95 percent of the population distribution of *Astragalus proimanthus.* An RMP, the primary management tool that implements regulatory mechanisms, goes through revisions approximately every 15 years, and a revision to the Green River RMP is anticipated by 2013 (Dana 2010b, pers. comm.). This revision has been started and the special status plant designation, based on the BLM State Directors' designation, will carry over into the newly revised RMP.

*Astragalus proimanthus* was designated by the BLM State Director as a BLM State-sensitive species (BLM 2010b, p. 23). The BLM focuses sensitive species management on maintaining species habitat in functional ecosystems, ensuring the species is considered in land management decisions, preventing a need to list the species under the Act, and prioritizing conservation that emphasizes habitat (BLM 2010b, p. 1). The BLM sensitive species are automatically included as special status plant species, along with candidate, threatened, and endangered plant species (BLM 1997, p. 19), and locations of special status plant species are closed to activities that could adversely affect them or their habitat (BLM 1997, p. 19). Additionally, the ACEC delineates known distributions of *A. proimanthus* and its essential habitat, while furthering the protection of newly discovered locations on BLM lands (BLM 1997, p. 34). The BLM conducts searches to identify additional areas where *A. proimanthus* may be located (BLM 1997 p. 34). In January 2011, the BLM took a maintenance action on the Green River RMP to include all newly discovered locations of *A. proimanthus* on BLM-administered lands in the ACEC (BLM 2011, unpaginated). Maintenance actions are based on new or changed data, and document or refine previously approved decisions incorporated into an RMP (43 CFR 1610.5–4). A maintenance action does not require formal public involvement and interagency coordination as this action is limited to refining or documenting a previously approved decision incorporated in the plan (43 CFR 1610.5–4). As a result of this maintenance action 100 percent of the known locations of *A. proimanthus* occurring on BLM-administered lands are protected by the ACEC (BLM 2011, unpaginated).

National Environmental Policy Act

All Federal agencies are required to adhere to the NEPA for projects they fund, authorize, or carry out. For more information about NEPA, please refer to *Factor D. The Inadequacy of Existing Regulatory Mechanisms* in the Five Factor Evaluation for *Abronia ammophila* section.

State and Local Laws and Regulations

The remaining 5 percent of the distribution of *A. proimanthus* occurs on State and private lands, and are not protected by regulatory mechanisms.

Summary of Factor D

The existing ACEC appears to adequately protect the majority (95 percent) of the habitat of *Astragalus proimanthus.* We expect that *A. proimanthus* and its habitat will be generally protected from direct human disturbance. We have no evidence of impacts to *A. proimanthus* from inadequate regulatory mechanisms.

We conclude that the best scientific and commercial information available indicates that *Astragalus proimanthus* is not in danger of extinction or likely to become so within the foreseeable future because of inadequate regulatory mechanisms.

*Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence*

Natural and manmade factors with the potential to affect *Astragalus proimanthus* include: (1) Small population size, (2) pollination, and (3) genetic diversity.

Small Population Size

For background information, please refer to the first paragraph of "Small Population Size" under *Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence* in the Five Factor Evaluation for *Abronia ammophila* section.

We have no evidence that the populations of *Astragalus proimanthus* are experiencing the problems that occur in some species with small population size. We do not have any indication that *A. proimanthus* was ever present on the landscape over a more extensive range. We also have no information indicating that random demographic or environmental events are a threat to the species because of its small population size. Therefore, we do not consider small population size to be a threat to *A. proimanthus* now or in the foreseeable future.

Pollination

Please refer to the first paragraph of "Pollination" under *Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence* in the Five Factor Evaluation for *Abronia ammophila* section for background information. *Astragalus proimanthus* is believed to have been historically rare, with populations appearing to be stable (Fertig and Welp 2001, p. 13). We have no information indicating that a lack of pollinators is a threat to the species. Therefore, we do not consider lack of pollinators to be a threat to *A. proimanthus* now or in the foreseeable future.

Genetic Diversity

For background information, please refer to the first paragraph of "Genetic Diversity" under *Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence* in the Five Factor Evaluation for *Abronia ammophila* section. We have no information indicating that a lack of genetic diversity is a threat to the species. Therefore, we do not consider lack of genetic diversity to be a threat to *A. proimanthus* now or in the foreseeable future.

Summary of Factor E

We have no information to suggest that *Astragalus proimanthus* was ever present across the landscape with a broader range. We have no indication that *A. proimanthus* is suffering from any problems associated with small population size. We also have no information showing that *A. proimanthus* is suffering from low pollination rates or reduced genetic diversity. Therefore, we conclude that the best scientific and commercial information available indicates that *Astragalus proimanthus* is not in danger of extinction or likely to become so within the foreseeable future because of small population size, reduced pollination, or reduced genetic diversity.

**Finding**

As required by the Act, we considered the five factors in assessing whether *Astragalus proimanthus* is threatened or endangered throughout all of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by the species. We reviewed the petition, information available in our files, other available published and unpublished information, and we consulted other Federal and State agencies.

Occurrences of *Astragalus proimanthus* experienced historical impacts from road development and illegal trash dumps. Additionally, seismic exploration for oil and gas occurred near one population, with no known impacts to the species. However, the provisions in the ACEC now in place are adequately alleviating any potential threats to *A. proimanthus* from energy development, road construction, ORV use, range improvements, and other land uses that have potential to disturb *A. proimanthus* and its habitat. Although potential threats on State and private lands exist, such as ORV use or range improvements, no impacts to the plants on these lands have been documented or are reasonably anticipated. We have no information to show that *A. proimanthus* is threatened by overutilization for commercial, recreational, scientific, or educational purposes at this time. We conclude that the best scientific and commercial information available indicates that *Astragalus proimanthus* is not in danger of extinction or likely to become so within the foreseeable future because of climate change, drought, nonnative invasive plants, fire, small population size, lack of pollinators, or reduced genetic diversity. We have no information regarding actual or potential adverse impacts due to overutilization, disease, inadequate regulatory mechanisms, reduced genetic diversity, or reduced pollination.

Based on our review of the best available scientific and commercial information pertaining to the five factors, we find that the threats are not of sufficient imminence, intensity, or magnitude to indicate that *Astragalus proimanthus* is in danger of extinction (endangered), or likely to become endangered within the foreseeable future (threatened), throughout all of its range. Therefore, we find that listing *A. proimanthus* as a threatened or endangered species is not warranted throughout all of its range.

*Significant Portion of the Range*

Having determined that *Astragalus proimanthus* does not meet the definition of a threatened or endangered species, we must next consider whether there are any significant portions of the range where *A. rossiae* is in danger of extinction or is likely to become endangered in the foreseeable future.

In determining whether *Astragalus proimanthus* is threatened or endangered in a significant portion of its range, we first addressed whether any portions of the range of *A. proimanthus* warrant further consideration. We evaluated the current range of *A. proimanthus* to determine if there is any apparent geographic concentration of the primary stressors potentially affecting the species including energy development, road construction, ORV use, range improvements, and other land uses. This species' small range suggests that stressors are likely to affect it in a uniform manner throughout its range. However, we found the stressors are not of sufficient imminence, intensity, magnitude, or geographically concentrated such that it warrants evaluating whether a portion of the range is significant under the Act. We do not find that *A. proimanthus* is in danger of extinction now, nor is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. Therefore, listing *A. proimanthus* as threatened or endangered under the Act is not warranted at this time.

We request that you submit any new information concerning the status of, or threats to, *Astragalus proimanthus* to our Wyoming Ecological Services Field Office (see **ADDRESSES** section) whenever it becomes available. New information will help us monitor *A. proimanthus* and encourage its conservation. If an emergency situation develops for *A. proimanthus,* or any other species, we will act to provide immediate protection.

**Species Information for *Penstemon gibbensii***

*Species Description*

*Penstemon gibbensii* is a perennial forb (herbaceous plant that is not a grass) averaging approximately 23 cm (9 in.) in height (Dorn 1990a, p. 3). Its leaves are long and narrow, often folded down the length of the mid-rib, pubescent (covered with fine, short hairs) to smooth, and typically less than 5 mm (0.2 in.) wide (Fertig and Neighbours 1996, p. 4). Populations at lower elevations are conspicuously more pubescent, possibly as an adaptation to conserve moisture in warmer habitats (Dorn 1990a, p. 6). The bright blue flower is tube-shaped, 15 to 20 mm (0.6 to 0.8 in.) long, and may appear from early June to September, depending on moisture levels (Fertig 2000d, unpaginated).

*Taxonomy*

*Penstemon,* with an estimated 271 species, is the largest plant genus endemic to North America, and the Intermountain Region represents the center of diversity (Wolfe *et al.* 2006, p. 1699). In the early 1970s, Robert Gibbens collected the first specimens of *Penstemon gibbensii* in Sweetwater County, Wyoming (Dorn 1982, p. 334). These specimens were sent to a *Penstemon* specialist for identification and subsequently lost (Dorn 1990a, p. 1). In 1981, Robert Dorn resurveyed the area and relocated *P. gibbensii* in the field (Dorn 1982, p. 334; Heidel 2009, p. 1). *P. gibbensii* was determined to be a new, undescribed species based on its morphology (Dorn 1982, p. 334; Fertig and Neighbours 1996, pp. 4–6). This species has been reproductively isolated for some time as each known population of *P. gibbensii* exhibits slight morphological and habitat differences (Dorn 1989 as cited in Fertig and Neighbours 1996, pp. 3–4).

*Penstemon gibbensii* is a member of the Scrophulariaceae (figwort or snapdragon) family (Dorn 1982, p. 334; Fertig and Neighbours 1996, p. 2). Similar species include *Penstemon cyananthus* (Wasatch beardtongue), *Penstemon fremontii* (Fremont's beardtongue), *Penstemon saxosorum* (upland beardtongue), and *Penstemon scariosus* (White River beardtongue) (Fertig 2000d, unpaginated). *P. gibbensii,* which occurs at a lower elevation than *P. saxosorum,* can be distinguished by stems that are pubescent nearly to the base, narrower leaves, and corollas (all the petals of the flower) that are pubescent inside and out (Dorn 1982, p. 334). *P. gibbensii* is more pubescent than *P. cyananthus,* and has much narrower leaves (Dorn 1982, p. 334). The current taxonomic status of *P. gibbensii* is accepted (Integrated Taxonomic Information System 2010b, unpaginated). We recognize *P. gibbensii* as a valid species and a listable entity.

*Biology and Life History*

Reproduction of *Penstemon gibbensii* is by seed, with no evidence of vegetative reproduction (Fertig and Neighbours 1996, p. 16). Based upon flower color and shape, this species is probably insect pollinated (Fertig and Neighbours 1996, p. 16). Bees have been seen visiting flowers at sites in Colorado and Utah (Langton 2010, pers. comm.). Fruits are oval, light-brown capsules (Fertig 2000d, unpaginated). Seeds are probably dispersed primarily by gravity or wind (Fertig and Neighbours 1996, p. 16). *P. gibbensii* appears to have minimal reproductive success, as evidenced by below-normal seedling numbers in most years due to dry conditions (Heidel 2009, p. 21). In 1985, 1988, and 1991, at three transects in the Cherokee Basin occurrence, 0 to 56 percent of *P. gibbensii* plants were seedlings (Warren *in litt.* 1992, Table 2). Seedling establishment is probably episodic and dependent on occasional years with adequate summer moisture (Fertig and Neighbours 1996, p. 16). *P. gibbensii* is able to take advantage of summer precipitation, as it is a warm-season species (Warren *in litt.* 1992, unpaginated).

No information was available regarding chilling requirements for seeds of *P. gibbensii.* However, close relatives (*i.e., Penstemon cyananthus, Penstemon fremontii,* and *Penstemon scariosus*) have seeds that are largely dormant at harvest and require a long chilling period prior to germination (Meyer and Kitchen 1994, p. 354). These species have evolved seed germination mechanisms that permit the carryover of seeds between years as a persistent seed bank, which maximizes the probability of seedling survival in favorable years (Meyer and Kitchen 1994, p. 363). Recognizing the similarities between these *Penstemon* species and their climatic conditions, we assume that *P. gibbensii* also requires a chilling period and has a persistent seed bank.

*Habitat*

*Penstemon gibbensii* occurs in a cold steppe climate on barren shale or sandy-clay slopes (Dorn 1990a, p. 6). Habitat is often located on steep upper or middle slopes eroding below a more resistant caprock (Heidel 2009, p. 13). Slopes are generally 20 to 30 degrees and predominately south- or west-facing (Dorn 1990a, p. 8). These conditions reduce percolation (water seeping into the ground) and increase evaporation (Heidel 2009, p. 20). *P. gibbensii* has been reported at elevations from 1,634 to 2,347 m (5,360 to 7,700 ft) (Dorn 1990a, p. 5; CNHP 2010a, unpaginated). Soils are typically highly erodible, with low nutrient levels, low soil moisture, and high selenium content (Spackman and Anderson 1999, p. 3).

Biological soil crusts are well-developed in *Penstemon gibbensii* habitat in Colorado and Utah, but were not noted at any sites in Wyoming (Heidel 2009, p. 14). Biological soil crusts are commonly found in semiarid and arid environments such as the Great Basin and Colorado Plateau, and are formed by a community of living organisms that can include cyanobacteria, green algae, microfungi, mosses, liverworts, and lichens (USGS 2006, unpaginated). These crusts provide many positive benefits for the larger biotic community including decreased erosion, improved water infiltration, increased seed germination, and improved plant growth (Spackman and Anderson 1999, p 3; USGS 2006, p. 2).

*Penstemon gibbensii* exploits a largely barren, challenging environment (Dorn 1990a, p. 3). This species is generally not tolerant of competition from other species or other *Penstemon* plants; individual plants are usually spaced one to several meters (3 or more ft) apart (Dorn 1990a, pp. 8–9). Total vegetative cover is typically 5 to 10 percent (Fertig 2000, p. 2). Associated species include *Elymus spicatus* (bluebunch wheatgrass), *Achnatherum hymenoides* (Indian ricegrass), *Herperostipa comata* (needle-and-thread grass), *Eriogonum brevicaule* (shortstem wild buckwheat), *Eremogone hookeri* (Hooker's sandwort), and *Minuartia nuttallii* (Nuttall's stitchwort) (Heidel 2009, p. 13). Adjacent vegetative communities may include pinyon-juniper woodlands, sagebrush shrublands, or greasewood-saltbush shrublands (Dorn 1990a, p. 9).

*Distribution*

*Penstemon gibbensii* is a regional endemic, with a range that includes Carbon and Sweetwater Counties in Wyoming, Moffat County in Colorado, and Daggett County in Utah (Dorn 1990a, p. 6; Heidel 2009, p. 31). *P. gibbensii* was not recognized as a new species until 1981 (Dorn 1982, p. 334; Fertig and Neighbours 1996, pp. 4–6). Consequently, its historical range is unknown. However, *P. gibbensii* was possibly always uncommon (Heidel 2009, pp. 5, 8). The species is currently known from nine occurrences including: Cherokee Basin, Sand Creek,

Flat Top Mountain, T84N R18W, Willow Creek, and Red Creek Rim in Wyoming; Spitzie Draw and Sterling Place in Colorado; and Dagget County, Utah. These nine occurrences are spread across 193 km (120 mi) and occupy approximately 109 ha (270 ac) in Wyoming, 10 ha (25 ac) in Colorado, and 2 ha (5 ac) in Utah (Heidel 2009, p. 31). Three of the six Wyoming occurrences and the Colorado and Utah occurrences are within 5 to 8 km (3 to 5 mi) of each other (Heidel 2009, p. 9). In Wyoming, surveys for additional occurrences have been conducted in over 100 sections (each section is 259 ha (640 ac)), primarily along the Carbon-Sweetwater County line (Heidel 2009, p. 12). Additional potential habitat also has been searched in Moffat County, Colorado, and in Daggett County, Utah; no new populations have been found in these areas (Dorn 1990a, p. 6; Spackman and Anderson 1999, p. 31).

Most known *Penstemon gibbensii* (approximately 77 percent) occur on State and Federal land. All Wyoming occurrences, with the exception of the T84N R18W occurrence and a small portion of the Sand Creek occurrence are on land managed by BLM (Heidel 2009, p. 27). The Nature Conservancy (TNC) manages the T84N R18W occurrence, which is on State and private land (Heidel 2009, p. 31). A small portion of the Sand Creek occurrence also is on State land (Heidel 2009, p. 27). In Colorado, the Spitzie Draw occurrence is on Browns Park National Wildlife Refuge (NWR) (managed by the Service) and BLM land, and the Sterling Place occurrence is on BLM land. The Daggett County, Utah, occurrence is on State land (Heidel 2009, p. 27). Management responsibilities are described in Table 2 below.

*Abundance*

Table 2 presents available information regarding the known occurrences of *Penstemon gibbensii.* The plant numbers and occupied habitat do not sum to the exact current total due to slight differences between references. Most estimates are based on walking surveys through occupied habitat; two sites (Cherokee Basin and Flat Top Mountain) also have permanent transects for trend monitoring (Heidel 2009, Appendix B).

TABLE 2—KNOWN OCCURRENCES OF PENSTEMON GIBBENSII

| Species occurrence (year identified) | Estimated plant numbers (year surveyed) | Occupied habitat | Management |
|---|---|---|---|
| Cherokee Basin, WY (1981) | 450 (1985)<br>1,400 (1988)<br>2,766 (1991)<br>1,000 (1995)<br>50–100 (2007) | 6.2 ha (15.2 ac) | BLM-Rawlins Field Office. |
| Sand Creek, WY (1987) | 2,000 (1989)<br>1,900–2,000 (1995)<br>3,000 (2005) | 48.1 ha (118.7 ac) | BLM-Rawlins Field Office and State of WY. |
| Flat Top Mountain, WY (1987) | 300 (1989)<br>1,000–1,200 (1995)<br>300 (2008) | 7.2 ha (17.9 ac) | BLM-Rawlins Field Office. |
| T84N R18W, WY (1997) | 4,500–5,000 (1999)<br>500–1,000 (2008) | 28.8 ha (71.2 ac) | TNC. |
| Willow Creek, WY (2004) | 2,200 (2008) | 15.6 ha (38.5 ac) | BLM-Rawlins Field Office. |
| Red Creek Rim, WY (2008) | 120 (2008) | 3.3 ha (8.1 ac) | BLM-Rawlins Field Office. |
| Spitzie Draw, CO (1982) | 263 (2009) | ~5 ha (12 ac) | Service-Browns Park NWR. |
| Sterling Place, CO (1984) | 656 (2010) | ~4 ha (9 ac) | BLM-Little Snake Field Office. |
| Daggett County, UT (1989) | 300 (2010) | 5 ha (12 ac) | BLM-Little Snake Field Office.<br>State of UT. |
| Current Total | ~11,000–14,000 | ~122 ha (300 ac) | |

*Table 2 References:* Heidel 2009, pp. 22, 31; CNHP *in litt.* 2009a, p. 2; *in litt.* 2009b, p. 2; *in litt.* 2010a, p. 2.

The Colorado Natural Heritage Program (CNHP) has designated *Penstemon gibbensii* as a plant species of special concern (CNHP 2010b, unpaginated). The WYNDD also has designated *P. gibbensii* as a plant species of concern (Heidel 2007, p. 18). The Utah Native Plant Society ranks *P. gibbensii* as a rare plant of "extremely high priority" (Utah Rare Plants 2010, unpaginated). These designations are typically based on TNC's natural heritage State rank. *P. gibbensii* is ranked S1 in all three States because of its extreme rarity. These designations indicate that particular consideration may be taken by the States with regard to management decisions potentially affecting *P. gibbensii,* but do not result in any regulatory protection for the species.

*Trends*

Long-term population trend data for *Penstemon gibbensii* is not available. Short-term trends can be examined at four of the nine occurrences, where population estimates are available for more than 1 year (see Table 1). Only a single population estimate is available from the two most recently discovered sites in Wyoming and the three sites in Colorado and Utah. Short-term trends for the three Wyoming populations of *P. gibbensii* that have been surveyed more frequently were described as stable to slightly increasing in 2000; this was attributed to favorable climatic conditions in the preceding years (Fertig 2000d, unpaginated). Since 2000, populations appear to be stable to increasing at the Sand Creek occurrence and declining at the other three Wyoming sites. Seedling establishment is probably episodic (occurring at irregular intervals) and dependent on rare years of adequate summer moisture (Fertig and Neighbours 1996, p. 16; Heidel 2009, p. 22). The resultant uneven survival of seedlings may account for short-term population fluctuations in this species (Fertig and Neighbours 1996, p. 16). Survey results from 1995 may represent peak

population estimates due to ideal climatic conditions, rather than mean or low estimates (Heidel 2009, p. 23). Overall, there is not enough information to conclusively determine rangewide trends for the species.

**Five Factor Evaluation for *Penstemon gibbensii***

Information pertaining to *Penstemon gibbensii* in relation to the five factors provided in section 4(a)(1) of the Act is discussed below.

*Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range*

The following potential factors that may affect the habitat or range of *Penstemon gibbensii* are discussed in this section: (1) Energy development, (2) roads, (3) trampling, (4) nonnative invasive plants, and (5) climate change and drought.

Energy Development

As previously discussed, many activities associated with energy development can destroy or modify habitat. Since 1989, energy exploration has increased in the Wyoming portion of the range of *Penstemon gibbensii* (Heidel 2009, p. 28). However, most occurrences of *P. gibbensii* are on unstable slopes that are unlikely to be developed for roads, pipelines, or well pads (Fertig and Neighbours 1996, pp. 19–20; Heidel 2009, p. 28). However, the Sand Creek occurrence, which is on flatter terrain, is located in an active oil and gas field, with one pipeline passing through a subpopulation of *P. gibbensii* and an accompanying access road intersecting a limited portion (does not impact a lot of potential habitat of *P. gibbensii*) of another subpopulation (Heidel 2009, p. 43). A well pad also is located nearby (Heidel 2009, p. 28).

While this development has destroyed some *P. gibbensii* habitat, some of the land disturbances at Sand Creek have provided additional habitat by exposing appropriate substrate for plant establishment (Dorn 1990a, p. 13; Heidel 2009, p. 43). Two pipelines have been laid at the Willow Creek occurrence, one adjacent to a subpopulation and the other through a subpopulation that may have destroyed plants (Heidel 2009, p. 55). However, these developments dissect limited areas of occupied habitat at Willow Creek, and the current impacts are likely not severe as most of *P. gibbensii* is located on unstable slopes (Heidel 2009, p. 28). The sale of leases for oil and gas development continues in Carbon and Sweetwater Counties in Wyoming (BLM 2010c, pp. 51–63, 75–77, 83). Consequently, further energy development is possible within the foreseeable future; however, potential impacts from it are unknown.

In addition to oil and gas development, uranium is mined near the Red Creek Rim occurrence (Heidel 2009, p. 28). No impacts to *Penstemon gibbensii* have been documented as a result of uranium mining. Sub-bituminous coal underlies portions of the range of *Penstemon gibbensii;* however, this coal is not suitable for strip mining (Heidel 2009, p. 28). Oil shale rock also is present (Heidel 2009, p. 28). Wind energy development and gravel quarry development are possible, but have not occurred to date (Heidel 2009, p. 28).

In conclusion, minimal impacts to *Penstemon gibbensii* were noted from oil and gas development, no impacts have been documented from uranium mining, and the other types of development are currently only speculative. Therefore, we do not consider energy development to be a threat to *P. gibbensii* now or in the foreseeable future.

Roads

Roads can destroy or modify habitat. Roads also can increase access, leading to trampling or the introduction of nonnative invasive plants (discussed below). A few roads cross or are adjacent to occurrences of *Penstemon gibbensii.* As mentioned under energy development, one access road intersects a limited portion of a subpopulation at the Sand Creek occurrence, but also may provide additional habitat as *P. gibbensii* is able to colonize the margins of disturbed areas (Heidel 2009, pp. 28, 43). Another road crosses the edge of the Willow Creek occurrence (Heidel 2009, p. 43). At the Spitzie Draw occurrence, State Route 318 passes within 0.4 km (0.25 mi), and an access road passes within 200 m (656 ft) (Spackman and Anderson 1999, p. 23). State Route 318 also passes within 50 m (164 ft) of a portion of the Sterling Place occurrence (CNHP *in litt.* 2010a, p. 3). A steep road is adjacent to the Flat Top Mountain occurrence (Fertig and Neighbours 1996, p. 35). The Flat Top Mountain road is experiencing erosion that, if unchecked, could eventually encroach on *P. gibbensii* occupied habitat (Fertig and Neighbours 1996, p. 35; Heidel 2009, p. 59). We have no information on the building of future roads, but do not anticipate any based on the topography and isolated nature of most of *P. gibbensii*'s distribution. Although some roads occur in and near the habitat of *P. gibbensii,* we do not have any indication that they have significant negative effects to the species. Additionally, we have no information on dust or levels of travel on these roads impacting *P. gibbensii* or its habitat.

In conclusion, only minimal impacts to *Penstemon gibbensii* were noted from roads. Therefore, we do not consider roads to be a threat to *P. gibbensii* now or in the foreseeable future.

Trampling

Trampling by livestock, ORVs, or human foot traffic can destroy plants and increase soil erosion, especially at sites with steep, loose soils. It has been mentioned as a potential concern at seven of nine occurrences (Warren *in litt.* 1992, unpaginated; Fertig and Neighbours 1996, p. 20; Spackman and Anderson 1999, p. 31; Fertig 2000d, unpaginated; Heidel 2009, p. 28; CNHP *in litt.* 2010a, p. 4). *Penstemon gibbensii* may colonize the margins of disturbed areas, but cannot become established within an area of active use (Heidel 2009, p. 28). Soil disturbance has been noted at the Sterling Place occurrence from cattle bedding down (CNHP *in litt.* 2010a, p. 4) and at the Cherokee Basin occurrence from humans (Warren *in litt.* 1992, unpaginated). Survey activities at Cherokee Basin in 1988 left distinct footprints that were still distinguishable in places 3 years later (Warren *in litt.* 1992, unpaginated).

As stated above, biological soil crusts have been noted at occurrences in Colorado and Utah, but not in Wyoming (Spackman and Anderson 1999, pp. 22, 26; Heidel 2009, pp. 14, 20; CNHP 2010a, unpaginated; *in litt.* 2010d, p. 2). The absence of biological soil crusts in Wyoming may reflect the effects of trampling from historically heavy sheep (*Ovis aries*) grazing (Heidel 2009, p. 27).

In summary, trampling is a potential concern at most sites and has been documented at two sites. However, we have no information regarding whether any *Penstemon gibbensii* plants were actually trampled. Additionally, *P. gibbensii* is able to colonize the margins of disturbed habitats and is able to live in Wyoming where there is no evidence of biological crusts in their habitat. We have no information indicating that trampling is a threat to the species. Therefore, we do not consider trampling to be a threat to *P. gibbensii* now or in the foreseeable future.

Nonnative Invasive Plants

For general background information on nonnative invasive plants, please refer to the first paragraph of "Nonnative Invasive Plants" under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range* in the Five Factor

Evaluation for *Abronia ammophila* section.

Encroachment of nonnative invasive plants may potentially impact *Penstemon gibbensii.* However, *P. gibbensii* is typically restricted to bare, sparsely vegetated slopes with large areas of exposed soil where competition with other plant species, including nonnative invasive species, is minimal (Heidel 2009, p. 26). Nonnative invasive plant numbers are generally low in, and adjacent to, *P. gibbensii* occurrences, and are most common near roads (Spackman and Anderson 1999, p. 23; Heidel 2009, p. 29). *Alyssum desertorum* (desert madwort) has been documented at or near Cherokee Basin and Red Creek Rim; *Bromus tectorum,* at or near Cherokee Basin, Red Creek Rim, Sand Creek, Sterling Place, and Dagget County; *Halogeton glomeratus* (halogeton), at or near Cherokee Basin, Red Creek Rim, Spitzie Draw, and Sterling Place; and *Salsola australis* (Russian thistle), at or near Spitzie Draw and Sterling Place (Heidel 2009, p. 29; CNHP 2010a, p. 2; *in litt* 2010d, p. 2). These species have been occasionally noted for at least 10 years (Spackman and Anderson 1999, pp. 23, 27; Heidel 2009, p. 29; CNHP 2010a, unpaginated; CNHP 2010e, unpaginated), but there is no evidence of increasing trends regarding their numbers at these sites. There is no evidence that any of these nonnative invasive species have had a negative impact on *P. gibbensii.*

Nonnative invasive plants are present at or near six occurrences of *Penstemon gibbensii.* However, their numbers are generally low, and there is no evidence that they are problematic. We have no information indicating that nonnative invasive plants are a threat to the species. Therefore, we do not consider nonnative invasive plants to be a threat to *P. gibbensii* now or in the foreseeable future.

Climate Change and Drought

For general background information on climate change, please refer to the first paragraphs of "Climate Change" under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range* in the Five Factor Evaluation for *Abronia ammophila* section.

Plant species with restricted ranges that also are climatically limited may experience population declines as a result of climate change (Schwartz and Brigham 2003, p. 11). Whether *Penstemon gibbensii* would be positively impacted by an increase in barren land due to drought that provided potential habitat, or negatively impacted by a loss of current marginal habitat, cannot be predicted. Dorn (1990a, p. 6) noted that *P. gibbensii* has fewer and smaller flowers than most species of *Penstemon* and hypothesized that this species may have once grown under moister conditions and could be in long-term decline due to climatic change. However, no additional supporting data were provided. He also noted that populations at lower, hotter elevations are more pubescent, a possible adaptation to conserve moisture (Dorn 1990a, p. 6).

Drought is a natural and common phenomenon within the range of *Penstemon gibbensii* (Dorn 1990a, p. 6). Average annual precipitation ranges from approximately 26 cm (10 in.) at Wyoming occurrences to about 41 cm (16 in.) at Colorado and Utah occurrences (Heidel 2009, pp. 19–20). As discussed above, *P. gibbensii* appears to have minimal reproductive success in most years because of dry conditions, but responds favorably to late-summer moisture that occurs infrequently (Fertig and Neighbours 1996, p. 16; Heidel 2009, p. 22). *Penstemon gibbensii* is a warm-season plant that remains succulent through the summer; therefore, it can take advantage of summer thunderstorms after other species have stopped growing or completed their life cycle (Warren *in litt.* 1992, unpaginated). Morphological adaptations discussed above (pubescent, narrow leaves in hotter climes) also indicate that the species is not limited by variations in the regional climate to a great degree.

We believe that *Penstemon gibbensii* has evolved to adapt to recurring drought conditions. Short-term population fluctuations, in response to varying climatic conditions from year to year, appear to be typical for the species. We have no information indicating that climate change or drought is a threat to the species. Therefore, we do not consider climate change or drought to be a threat to *P. gibbensii* now or in the foreseeable future.

Summary of Factor A

Two occurrences (Sand Creek and Willow Creek) have experienced minor impacts from energy development. Five occurrences (Sand Creek, Willow Creek, Spitzie Draw, Sterling Place, and Flat Top Mountain) have roads that are nearby or cross a portion of the occurrence. The Sand Creek occurrence, which appears to be experiencing more disturbances from energy development and road usage than the other sites, has had an increase in *P. gibbensii* numbers according to survey results despite these disturbances. We are not aware of any future energy development projects being planned in or near any of the *P. gibbensii* occurrences. Furthermore, the topography at most occurrences does not lend itself to energy development or road construction (Fertig and Neighbours 1996, pp. 19–20; Heidel 2009, p. 28). Therefore, we do not anticipate substantial habitat disturbance in the future. Trampling has been documented at two sites, but there is no information indicating that plants have been destroyed. Nonnative invasive plants are present at or near six occurrences of *P. gibbensii.* However, nonnative invasive plant numbers are generally low, and there is no evidence that they are problematic. Climate change and drought could potentially modify habitat at all occurrences. However, the species appears to have adapted to recurrent drought and variations in climatic conditions. Adverse impacts due to habitat destruction, modification, or curtailment appear minimal at the present time.

We conclude that the best scientific and commercial information available indicates that *Penstemon gibbensii* is not in danger of extinction or likely to become so within the foreseeable future because of the present or threatened destruction, modification, or curtailment of its habitat or range.

*Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

We are not aware of any adverse impacts to *Penstemon gibbensii* from overutilization for commercial, recreational, scientific, or educational purposes at this time. We conclude that the best scientific and commercial information available indicates that *P. gibbensii* is not in danger of extinction or likely to become so within the foreseeable future because of overutilization for commercial, recreational, scientific, or educational purposes.

*Factor C. Disease or Predation*

Disease

We are not aware of any adverse impacts to *Penstemon gibbensii* from disease at this time. Therefore, we do not consider disease to be a threat to *P. gibbensii* now or in the foreseeable future.

Predation—Grazing and Herbivory

*Penstemon gibbensii* is relatively succulent and may be grazed by mule deer (*Odocoileus hemionus*), pronghorn (*Antilocapra americana*), domestic cattle (*Bos taurus*), and other herbivores

during late summer when green vegetation is sparse (Heidel 2009, p. 26). Currently, there is no sheep grazing in the habitat of *P. gibbensii* (Fertig and Neighbours 1996, p. 19); as discussed above, historical sheep use may have been heavy in Wyoming (Heidel 2009, p. 14). Grazing appears to be restricted almost entirely to flowering stems, which could impact seed production, seed bank replenishment, and long-term viability (Fertig and Neighbours 1996, p. 19). However, steep slopes, unstable footing, and overall low forage production in *P. gibbensii* habitat may limit use by wildlife and livestock (Warren *in litt.* 1992, unpaginated; Heidel 2009, p. 27).

Grazing intensity often varies between years and between sites and does not appear to negatively affect *Penstemon gibbensii.* At the Spitzie Draw occurrence, variable levels of browsing by mule deer were noted in 2009 (CNHP *in litt.* 2009a, unpaginated; *in litt.* 2009b, unpaginated), but little evidence of grazing or browsing was found in 2010 (CNHP *in litt.* 2010c, p. 2). At the Sterling Place occurrence, there was little evidence of damage to *P. gibbensii* from mule deer or elk (*Cervus canadensis*), but there was moderate to heavy cattle grazing (CNHP *in litt.* 2010a, p. 2). At the Daggett County occurrence, there was little evidence of any grazing (CNHP *in litt.* 2010b, p. 2). *P. gibbensii* numbers at Flat Top Mountain were high in 1995 and low in 2008 (see Table 2). However, plants experienced low levels of herbivory (approximately 5 percent) in both years (Heidel 2009, p. 24). Cattle grazing also was observed at the Sand Creek occurrence in 2005 (Heidel 2009, p. 43).

The Cherokee Basin occurrence is the only site that is fenced. In 1985, the BLM fenced 95 percent of the site to exclude cattle, and 5 percent or less was left unfenced (Warren *in litt.* 1992, unpaginated). The allotment, an area larger than the *P. gibbensii* occurrence, was monitored to compare the effects of grazing pressure (Warren *in litt.* 1992, unpaginated). In 1992, the overall level of livestock use in the allotment was low to moderate, the range was in good to excellent condition with an improving trend, and a reduced stocking rate was not recommended (Warren *in litt.* 1992, unpaginated). The Cherokee Basin exclosure has been critical in ruling out grazing as the cause of recent declines at this occurrence, where plant numbers have declined since the early 1990s (see Table 1) (Heidel 2009, p. 30).

No specific information regarding grazing is available for the T84N R18W, Willow Creek, or Red Creek Rim occurrences, other than general observations regarding the potential for grazing by livestock and wildlife.

Grazing intensity is variable between years and sites, but appears to have minimal impact to *Penstemon gibbensii,* possibly because of steep slopes, unstable footing, and overall low forage production in the species' habitat. Fluctuations in plant numbers have occurred at Flat Top Mountain, despite consistent levels of grazing, and at Cherokee Basin, in the absence of grazing, which supports the conclusion that grazing causes minimal adverse impacts to *P. gibbensii.* Therefore, we do not consider grazing to be a threat to *P. gibbensii* now or in the foreseeable future.

Summary of Factor C

We have no evidence of adverse impacts to *Penstemon gibbensii* from disease. *P. gibbensii* is relatively succulent and may be grazed by both wildlife and livestock, particularly in late summer when most sympatric vegetation has dried. However, the typical habitat of *P. gibbensii* (steep slopes, loose substrate, and sparse vegetative cover) appears to limit heavy grazing at most sites and minimize impacts from grazing.

We conclude that the best scientific and commercial information available indicates that *Penstemon gibbensii* is not in danger of extinction or likely to become so within the foreseeable future because of disease or predation.

*Factor D. The Inadequacy of Existing Regulatory Mechanisms*

The Act requires us to examine the adequacy of existing regulatory mechanisms with respect to threats that may place *Penstemon gibbensii* in danger of extinction or likely to become so in the future. Existing regulatory mechanisms that could have an effect on potential threats to *P. gibbensii* include (1) Federal laws and regulations; (2) State laws and regulations; and (3) local land use laws, processes, and ordinances. Actions adopted by local groups, States, or Federal entities that are discretionary, including conservation strategies and guidance, are not regulatory mechanisms; however, we may discuss them in relation to their effects on potential threats to the species.

Federal Laws and Regulations

Bureau of Land Management

Most known *Penstemon gibbensii* occurrences are on BLM land (see Table 2). The BLM recognizes *P. gibbensii* as a sensitive species throughout its range (Heidel 2009, p. 6). Sensitive species designation requires that the species is: (1) Native, (2) at risk or populations trending downward throughout all or a significant portion of its range, and (3) dependent on special or unique habitat on BLM lands (Sierra 2009, *in litt.*). As discussed above, these species are managed to promote their conservation and minimize the likelihood and need for listing under the Act. The oldest known occurrence at Cherokee Basin was fenced by the BLM for added protection (see Factor C). Four occurrences (Cherokee Basin, Flat Top Mountain, Spitzie Draw, and Sterling Place) were recommended by the BLM for designation as ACECs (Heidel 2009, pp. 30–31). However, the final records of decision for the Rawlins RMP in Wyoming and the Little Snake River RMP in Colorado did not designate any of these occurrences as ACECs (Heidel 2009, pp. 30–31). Designation as an ACEC would have protected these sites from surface disturbances associated with energy and road development. Nevertheless, as discussed under Factor A, additional energy development is not anticipated, and the steep slopes found at these sites render them ill-suited for most road construction.

National Wildlife Refuge

Browns Park National Wildlife Refuge maintains a variety of native habitats and wildlife, with emphasis on migratory birds, threatened and endangered species, and species of special concern. The NWR has a portion of one occurrence of *Penstemon gibbensii,* which is protected by refuge regulations that require all vehicles to remain on developed roads and prohibit the collection, possession, or destruction of any plant (Service 2010, unpaginated).

National Environmental Policy Act

Most known *Penstemon gibbensii* (approximately 77 percent) occur on Federal and State land (Heidel 2009, pp. 22, 27). All Federal agencies are required to adhere to the NEPA for projects they fund, authorize, or carry out. Please refer to the NEPA discussion under *Factor D. The Inadequacy of Existing Regulatory Mechanisms* in the Five Factor Evaluation for *Abronia ammophila* section for additional information.

State Regulatory Mechanisms

The *Penstemon gibbensii* occurrence in Daggett County, Utah, and a portion of the T84N R18W, Wyoming occurrence are on State lands. *P. gibbensii* is designated as a rare plant in Utah and a species of concern in Wyoming (WNDD 2007, p. 2; Utah Rare Plants 2010, p. 2). These designations

signify recognition by the States regarding the rarity of the species, but do not confer any specific protection.

Local Land Use Laws, Ordinances, and Contracts

The Nature Conservancy

TNC has a conservation easement on the private land portion of the T84N R18W occurrence that protects the area from many development activities (Heidel 2009, p. 31). This is a permanent easement that includes surface rights, but not mineral rights (Browning 2010, pers. comm.).

Summary of Factor D

We have no evidence of impacts to *Penstemon gibbensii* from inadequate regulatory mechanisms. All but a portion of one occurrence are on Federal or State lands. The portion on private land is largely protected by a conservation easement. Seven of the nine known occurrences are managed all or in part by BLM, which promotes the conservation of sensitive species and minimizes the likelihood and need for their listing under the Act. The Service has refuge regulations that protect *P. gibbensii* occurring on their lands.

We conclude that the best scientific and commercial information available indicates that *Penstemon gibbensii* is not in danger of extinction or likely to become so within the foreseeable future because of inadequate regulatory mechanisms.

*Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence*

Natural and manmade factors with the potential to affect *Penstemon gibbensii* include: (1) Small population size, (2) pollination, and (3) genetic diversity.

Small Population Size

For general background information on small population size, please refer to the first paragraph of "Small Population Size" under *Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence* in the Five Factor Evaluation for *Abronia ammophila* section.

No information exists regarding the historical range or population numbers of *Penstemon gibbensii,* but experts familiar with the species conclude that it was likely historically rare (Dorn 1990a, p. 6; Fertig and Neighbours 1996, p. 4; Spackman and Anderson 1999, p. 32; Heidel 2009, p. 5). *P. gibbensii* is a local endemic that has evolved to exploit a barren, erodible habitat (Dorn 1990a, p. 3). The slight morphological differences, different substrates, and widely separated distribution suggest that the species is a paleoendemic (has been in existence for a long period of time in a single region) (Dorn 1990a, p. 6; Heidel 2009, p. 5). Detailed descriptions of the species' abundance and trends are provided under the *Abundance* and *Trends* sections for this species. No occurrences have been extirpated since the species was first identified in 1981, indicating some resilience to perturbation.

New occurrences of *Penstemon gibbensii* continue to be documented including Willow Creek in 2004 and Red Creek Rim in 2008 (Heidel 2009, p. 9). *P. gibbensii* is presently known from nine occurrences that span a distance of 193 km (120 mi) (Heidel 2009, p. 31). Some potentially suitable areas have not yet been surveyed (Heidel 2009, pp. 10–12), and more occurrences may be located.

*Penstemon gibbensii* is likely a historically rare plant that has nonetheless persisted. Existing sites are monitored, and surveys have located new occurrences. No occurrences have been extirpated. We have no information indicating that random demographic or environmental events are a threat to the species because of its small population size. Therefore, we do not consider small population size to be a threat to *P. gibbensii* now or in the foreseeable future.

Pollination

Penstemons are pollinated by a variety of insects and hummingbirds, but most commonly by insects from the Order Hymenoptera (Wolfe *et al.* 2006, pp. 1699, 1709). Bees have been seen visiting flowers at sites in Colorado and Utah (Langton 2010, pers. comm.). As discussed above, pollinators may regard small populations as inferior or unreliable food sources, leading to low visitation rates (Oostermeijer 2003, p. 23). Low visitation rates may be more of a concern in currently rare species that were historically abundant (Brigham 2003, p. 84). However, as identified above, *Penstemon gibbensii* is believed to have been historically rare (Dorn 1990a, p. 6; Fertig and Neighbours 1996, p. 4; Spackman and Anderson 1999, p. 32; Heidel 2009, p. 5).

Only very limited information is available regarding pollination of *Penstemon gibbensii.* However, we have no information indicating that poor pollination is a threat to the species. Therefore, we do not consider lack of pollinators to be a threat to *P. gibbensii* now or in the foreseeable future.

Genetic Diversity

For general background information on genetic diversity, please refer to the first paragraph of "Genetic Diversity" under *Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence* in the Five Factor Evaluation for *Abronia ammophila* section.

The risk of negative consequences to rare plants from reduced genetic diversity varies (Brigham 2003, p. 88). *Penstemon gibbensii* is one of several plant species being studied in a comparative population genetics analysis. Initial results from a study of two Wyoming populations document high variation of DNA sequences within populations examined to date; however, between-population differentiation analysis has not yet been conducted (Heidel 2009, p. 5). These results are preliminary and limited in scope, but indicate that an adequate level of genetic diversity exists in these populations. Genetic exchange could be possible as three of the Wyoming occurrences and the three occurrences in Colorado and Utah are within 5 to 8 km (3 to 5 mi) of each other (Heidel 2009, p. 9).

Only very limited information regarding the genetic diversity exhibited by *Penstemon gibbensii* is available. However, we have no information indicating that a lack of genetic diversity is a threat to the species. Therefore, we do not consider reduced genetic diversity to be a threat to *P. gibbensii* now or in the foreseeable future.

Summary of Factor E

We conclude that the best scientific and commercial information available indicates that *Penstemon gibbensii* is not in danger of extinction or likely to become so within the foreseeable future because of small population size, reduced pollination, or reduced genetic diversity.

**Finding**

As required by the Act, we considered the five factors in assessing whether *Penstemon gibbensii* is threatened or endangered throughout all of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by the species. We reviewed the petition, information available in our files, other available published and unpublished information, and we consulted other Federal and State agencies.

Five occurrences (Sand Creek, Willow Creek, Spitzie Draw, Sterling Place, and

Flat Top Mountain) have experienced some minimal adverse impacts to the habitat of *Penstemon gibbensii* due to oil and gas development and road construction. The topography at most occurrences does not lend itself to energy development or road construction; therefore, we do not anticipate substantial habitat disturbance in the future. All occurrences could experience increased temperatures and precipitation changes from climate change. Whether this would result in a net gain or net loss in potential habitat cannot be predicted. However, differing morphological adaptations at the various occurrences indicate that the species can adapt to variable climate conditions.

Five occurrences (Sand Creek, Flat Top Mountain, Spitzie Draw, Sterling Place, and Daggett County) have documentation of grazing. However, the typical habitat of *P. gibbensii* (steep slopes, loose substrate, and sparse vegetative cover) appears to limit heavy grazing. Two occurrences (Cherokee Basin and Sterling Place) have experienced some trampling by humans and livestock. However, we are not aware of any loss of *P. gibbensii* at either of these sites from trampling.

All occurrences experience drought as a natural and regular phenomenon, which likely results in short-term population fluctuations. However, *P. gibbensii* has evolved to adapt to recurring drought conditions. Six occurrences (Cherokee Basin, Sand Creek, Red Creek Rim, Spitzie Draw, Sterling Place, and Daggett County) have nonnative invasive plants at or near the site. However, the typical habitat of *P. gibbensii* is sparsely vegetated slopes with large areas of bare soil where competition with other plant species, including nonnative invasive plants, is minimal.

All occurrences have relatively small populations. However, *P. gibbensii* is considered historically rare. No occurrences have been extirpated since the species was first identified, and new occurrences continue to be documented. We have no information regarding actual or potential adverse impacts due to overutilization, disease, inadequate regulatory mechanisms, reduced genetic diversity, or reduced pollination.

Based on our review of the best available scientific and commercial information pertaining to the five factors, we find that the threats are not of sufficient imminence, intensity, or magnitude to indicate that *Penstemon gibbensii* is in danger of extinction (endangered), or likely to become endangered within the foreseeable future (threatened), throughout all of its range. Therefore, we find that listing *P. gibbensii* as a threatened or endangered species is not warranted throughout all of its range.

*Significant Portion of the Range*

Having determined that *Penstemon gibbensii* does not meet the definition of a threatened or endangered species, we must next consider whether there are any significant portions of the range where *P. gibbensii* is in danger of extinction or is likely to become endangered in the foreseeable future.

In determining whether *Penstemon gibbensii* is threatened or endangered in a significant portion of its range, we first addressed whether any portions of the range of *P. gibbensii* warrant further consideration. We evaluated the current range of *P. gibbensii* to determine if there is any apparent geographic concentration of the primary stressors potentially affecting the species including energy development, roads, climate change, grazing, trampling, drought, nonnative invasive plants, and small population size. *P. gibbensii* is likely a historically rare endemic plant known from nine occurrences spanning a distance of 193 km (120 mi) (Heidel 2009, p. 31). This species' small range suggests that stressors are likely to affect it in a uniform manner throughout its range. All stressors occur at or near most sites, with the exception of energy development, which has been documented at or near three occurrences. However, the sale of oil and gas leases is ongoing; consequently, it is a potential stressor at most sites. Effects to *P. gibbensii* from these stressors are not disproportionate in any portion of the species' range. As we explained in detail in our analysis of the status of the species, none of the stressors faced by the species are sufficient to place it in danger of extinction now (endangered) or in the foreseeable future (threatened). Therefore, no portion is likely to warrant further consideration, and a determination of significance is not necessary.

We do not find that *Penstemon gibbensii* is in danger of extinction now, nor is it likely to become endangered within the foreseeable future throughout all or a significant portion of its range. Therefore, listing *P. gibbensii* as threatened or endangered under the Act is not warranted at this time.

We request that you submit any new information concerning the status of, or threats to, *Penstemon gibbensii* to our Wyoming Ecological Services Field Office (see **ADDRESSES** section) whenever it becomes available. New information will help us monitor *P. gibbensii* and encourage its conservation. If an emergency situation develops for *P. gibbensii,* or any other species, we will act to provide immediate protection.

**Species Information for *Boechera pusilla***

*Species Description*

*Boechera pusilla* (Fremont County rockcress or small rockcress) is a perennial herb with several decumbent (lying down), unusually slender stems up to 17 cm (6.7 in.) long. The plant has basal leaves that are linear (at least 10 times longer than wide) and erect, with relatively sparse forked spreading hairs located on the leaves. Plants generally have three to five stem leaves that are nonclasping (not encircling the stem) and widely spaced. Flowers are small, light lavender, four-petaled, and blossom from May to mid-June. The fruits, which are present from mid-June to July, are hairless linear siliques (narrow elongated seed capsule) that spread at right angles from the drooping main stem on pedicels (small stalks) less than 3 mm (0.12 in.) (Marriott 1986, p. 3; Dorn 1990b, pp. 2–3; Fertig 1994, unpaginated; Heidel 2005, p. 3).

*Discovery and Taxonomy*

*Boechera pusilla* was first collected near South Pass in Fremont County, Wyoming, in 1981 (Dorn 1990b, p. 1). *B. pusilla* is a member of the *Brassicaceae* (mustard) family and was formerly classified as *Arabis pusilla* (Fertig 1994, unpaginated), which was the name used in the petition (Forest Guardians 2007, p. 23). However, studies in 2003 suggest that most North American *Arabis* species should be placed in the *Boechera* genus (Al-Shehbaz 2003, entire). This determination was based on their distinct chromosome numbers and on molecular data indicating that American and Eurasian species that were classified as *Arabis* have more dissimilarities between them than they do with many other widely recognized genera in the mustard family (Al-Shehbaz 2003, pp. 382–383). Although some botanists do not fully support the change (Murray and Elven 2009, unpaginated), reclassification to the *Boechera* genus has been widely accepted (Holmgren *et al.* 2005, p. 537; Flora of North America 2010b, unpaginated). For the purposes of this finding, we primarily refer to the species as *Boechera pusilla,* but consider *Arabis pusilla* to be the same species.

*Boechera pusilla* is genetically closely related to *Boechera demissa* var. *languida* (nodding rockcress), *Boechera*

*pendulina* var. *russeola* (Daggett rockcress), and *Boechera oxylobula* (Glenwood Springs rockcress) and occurs in a similar geographic area as *B. demissa* var. *languida* and *B. pendulina* var. *russeola* (Dorn 1990b, p. 5; Heidel 2005, p. 2). Five additional species of rockcress occur in or near *B. pusilla* habitat, representing a high amount of diversity within the genus (Heidel 2005, p. 2). *B. pusilla* requires a highly specialized habitat (discussed below under *Habitat*) that is newly formed, which suggests the species is relatively recently derived from a common ancestor (Dorn 1990b, p. 5). Based on morphological evidence, *B. pusilla* may be a hybrid of *B. pendulina* and *B. lemmonii* (Lemmon's rockcress) (Flora of North America 2010b, unpaginated). We recognize *B. pusilla* as a valid species and a listable entity.

*Biology and Life History*

Due to the short growing season (approximately 30 days) in the areas that *Boechera pusilla* occupies, the plant only flowers in May and June with fruits maturing several weeks later (Dorn 1990b, p. 9; Fertig 1994, unpaginated; Heidel 2005, pp. 3, 15). Fruits are only evident during the short frost-free period during the middle of summer (primarily July) and shatter thereafter (Heidel 2005, p. 15). Remnant flower stalks persist through the winter and into the next flowering season (Heidel 2005, p. 15).

Not all plants produce fruit in a particular year (Heidel 2005, pp. 15–16), which is thought to be caused by freezing conditions in spring or possibly drought (Heidel 2005, pp. 15–16). All *Boechera pusilla* reproduction is apparently by seed (Dorn 1990b, p. 9; Heidel 2005, p. 15), and the species is apomictic (*i.e.,* reproduces by seed with no fertilization, resulting in offspring that are essentially clones) (Flora of North America 2010b, unpaginated). However, similar *Boechera* species have variation in the amount of sexual and asexual reproduction (Roy 1995, pp. 874–876), and we are unsure whether *B. pusilla* exhibits a mixed-mating system. We do not have information about how long the species' seeds remain viable or under what conditions they germinate. Apomictic species within the *Boechera* genus result from hybridization of sexual *Boechera* species (Flora of North America 2010b, unpaginated). Reproduction of *B. pusilla* is by (nonwinged) seeds that likely drop near the parent plant, with some seeds dispersed via wind or water (Dorn 1990b, p. 9). It has relatively few seeds per fruit compared to some other *Boechera* species (Dorn 1990b, p. 9). Dispersal vector information is unknown at this time (Heidel 2005, p. 15).

*Habitat*

*Boechera pusilla* occupies sparsely vegetated, coarse granite soil pockets in exposed granite-pegmatite outcrops, with slopes generally less than 10 degrees, at an elevation between 2,438 to 2,469 m (8,000 to 8,100 ft) (Dorn 1990b, pp. 3, 6). A pegmatite is a very coarse-grained igneous (formed from magma or lava) rock that usually occurs in dikes (sheet-like body of magma) (Heidel 2005, p. 8). The soils are sandy to loamy (mixture of clay, silt and sand), poorly developed, very shallow, and possibly subirrigated by runoff from the adjacent exposed bedrock (solid consolidated rock) (Dorn 1990b, pp. 6–8). *B. pusilla* is likely restricted in distribution by the limited occurrence of pegmatite in the area (Heidel 2005, p. 8). A distribution model shows potential habitat could occur in an area no greater than two townships (186.5 $km^2$; 72 $mi^2$) (Heidel 2005, p. 7). The dense nature of pegmatite does not allow for fertile soil, therefore restricting vegetation growth (Heidel 2005, p. 15). The specialized habitat requirements of *B. pusilla* have allowed the plant to persist without competition from other herbaceous plants or sagebrush-grassland species that are present in the surrounding landscape (Dorn 1990b, pp. 6, 8).

Although the surrounding vegetation is sparse (less than 10 percent cover), *Boechera pusilla* is associated with numerous mat-forming perennial herbs (*e.g., Erigeron caespitosus* (tufted fleabane)), perennial grasses (*e.g., Achnatherum hymenoides* (Indian ricegrass)), and shrubs (*e.g., Artemesia arbuscula* (dwarf sagebrush)) (Heidel 2005, p. 9). Rolling hills with a gradual sloping impediment are the predominant landscape features in the area, which is a transition zone between the montane conifer forests and the high sagebrush desert (Heidel 2005, pp. 8–9). The adjacent vegetation consists primarily of sagebrush-grassland or open *Pinus flexilis* (limber pine) habitat (Dorn 1990b, p. 8).

Annual precipitation in the area averages 30.5 cm (12 in.), with the majority falling in the form of winter snow (Marriott 1986, p. 9). Average minimum and maximum temperatures in this area range between −16.1 and −3.9 °C (3 and 25 °F) in January and 4.6 and 24.4 °C (42 and 76 °F) in July (Dorn 1990b, p. 6), with strong, frequent winds present year-round (Heidel 2005, p. 10). This area has a very short growing season; approximately 30 frost-free days occur between mid-June and mid-July (Marriott 1986, p. 9). *Boechera pusilla* may be adapted to wide fluctuations in available moisture as the soil goes through cycles of rapid drying and saturation (Dorn 1990b, p. 6).

*Distribution and Abundance*

The distribution of *Boechera pusilla* is extremely limited due to its very specific habitat requirements (Dorn 1990b, p. 8). The only known population of *B. pusilla* is located on lands administered by the BLM Rock Springs Field Office in the southern foothills of the Wind River Range (Fertig 2000a, p. 39; Heidel 2005, pp. ii, 6). The species' range is approximately 64.8 ha (160 ac), with occupied habitat estimates ranging from 2.4 to 6.5 ha (6 to 16 ac) (Dorn 1990b, p. 8; Heidel 2005, p. 15). Botanists have surveyed for *B. pusilla* systematically in other areas and discovered no additional populations, but some areas with potential habitat have not been surveyed (Marriott 1986, p. 8; Heidel 2005, p. 6).

To explain the trend of *Boechera pusilla* numbers, we use the estimates of total flowering plants in the entire population (*i.e.,* total for the species) and the total flowering plants in a plot located in the largest subpopulation. These two indicators are the most consistently documented information we could find. The number of flowering plants is used, at least in part, to ensure identification of the species (Heidel 2010d, pers. comm.). In 1988, the total population estimate was 800 to 1,000 flowering individuals (Heidel 2005, p. 14). This was an increase from the 50 plants found in 1986; however, only 1 subpopulation was discovered that year (Marriott 1986, p. 15). In 1990, numbers were down to about 600 flowering plants for the entire population (Dorn 1990b, p. 8). Although the 1988 survey indicated no evidence that *B. pusilla* was affected by the 1988 drought (Marriott and Horning *in litt.* 1988, p. B2), drought impacts, such as reduced seed fecundity or germination, may not be immediately apparent (Heidel 2010c, pers. comm.; 2010d, pers. comm.). The decrease to 600 flowering plants documented in 1990 may be due to a pattern of short-term decline under drought conditions that occurred in this area between 1988 and 1990 (Heidel 2005, p. 14).

In 2003, WYNDD estimated total flowering plants for the entire population at 150 to 250 (Heidel 2005, p. 14). The mean density of flowering plants derived from the 1988 and 2003 surveys indicate that the density dropped from 1.68 down to 0.33 flowering plants per $m^2$ (0.156 down to 0.031 flowering plants per $ft^2$) during

this 15-year period (Heidel 2005, p. 14). Declines in 2003 may be attributed to severe drought conditions recorded in the Wind River Range between 2000 and 2003 (NOAA 2005 as cited in Heidel 2005, p. 14). Flowering plants for the entire population in 2010 were estimated at approximately 350 individuals (Heidel 2010d, pers. comm.).

The subpopulation plot, where the largest number of plants is found, had 671 individual flowering *Boechera pusilla* plants in 1988 (Heidel 2005, p. 14). This area had 87 flowering plants when it was counted again in 2003 (Heidel 2005, p. 14). In 2010, the plot had 56 flowering plants (Heidel 2010c, pers. comm.). Flowering plant numbers in the subpopulation plot has consistently declined. However, numbers of flowering plants for the entire subpopulation where the plot is located increased from between 100 and 150 in 2003 (Heidel 2005, p. 14) to 283 in 2010 (Heidel 2010c, pers. comm.). The decrease of plants in the plot but increase in the subpopulation over this period suggests the distribution of the subpopulation shifted over that period of time (Heidel 2010c, pers. comm.).

*Boechera pusilla* has at least eight subpopulations (Amidon 1994, *in litt.,* unpaginated), the largest of which has been surveyed periodically as described above (Heidel 2005, p. 14; Heidel 2010c, pers. comm.). Additional subpopulations are small; in 2003, 1 subpopulation had 30 to 50 flowering plants, another had 10 to 15 flowering plants, and 5 of the subpopulations had less than 5 flowering plants each (Heidel 2005, p. 14).

Based on a limited number of surveys, the plant appears to have an overall pattern of decline documented since estimates were first provided in 1988 (Heidel 2005, p. 17; Heidel 2010c, pers. comm.; Windham 2010, pers. comm.). *Boechera pusilla* numbers increased in 2010 compared to 2003, but the overall trend is downward, with 2010 population numbers at 350 compared to 800 to 1000 in 1988.

Reproductive success may vary considerably from year to year depending on climate conditions, leading to wide fluctuations in populations (Dorn 1990b, p. 10). Possible evidence of these fluctuations is low levels of fruit production in 2003 that visibly increased in 2010 (Heidel 2010c, pers. comm.). However, 2010 plant numbers are low compared to those documented in 1988 and 1990.

**Five Factor Evaluation for *Boechera pusilla***

Information pertaining to *Boechera pusilla* in relation to the five factors provided in section 4(a)(1) of the Act is discussed below.

*Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range*

The following potential factors that may affect the habitat or range of *Boechera pusilla* are discussed in this section: (1) Recreational activities, (2) energy development, (3) nonnative invasive plants, (4) climate change, and (5) drought.

Recreational Activities

*Boechera pusilla's* current known range is highly restricted. All known occurrences are on BLM land, which is public land managed for multiple use (Dorn, 1990, p. 10; Heidel 2005, p. 6). Prior to the development of a Habitat Management Plan (BLM 1994, entire) and the closure of vehicle access in 1994 (59 FR 37258), *B. pusilla* was more readily exposed to recreation activity from ORV use associated with fishing and camping, unauthorized ORV use, horse boarding and feeding, plant collecting, mountain biking and pedestrian use. In addition, a nearby quarry, that is now inactive, may have destroyed potential habitat (Dorn 1990b, p. 11; Heidel 2005, p. 17). Previously, ORV use has been identified as a potential threat; however, conservation measures, such as the habitat management plan, have been implemented to eliminate this threat. Currently, the only access to the area occupied by *B. pusilla* is by foot, but due to the rocky substrate associated with the habitat, recreational use in the area primarily occurs on adjacent riparian areas, away from occupied habitat (Dana 2010a, pers. comm.). Therefore, recreational activities are not considered a threat now or in the foreseeable future.

Energy Development

The extraction of natural gas occurs in several developments in southwest Wyoming, which could be a potential threat to the habitat of *Boechera pusilla* (USGS 2010, p. 3). However, the area occupied by *B. pusilla* is incorporated into a Special Recreation Management Area (SRMA), which is closed to mineral and energy development (BLM 1997, pp. 17–18). Currently the nearest gas development occurs approximately 10.1 km (6.3 mi) from the location of *B. pusilla* (Kile 2010, pers. comm.) and does not appear to be a threat to the plant.

In addition, on February 23, 1998, the Secretary of the Interior issued Public Land Order No. 7312, the Withdrawal of Public Land for the Protection of *Arabis Pusilla* Plant Habitat. This order pursuant to Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1994), withdrew from "settlement, sale, location, or entry under the general land laws, including the United States mining laws (30 U.S.C. Ch. 2 (1994)), but not from leasing under the mineral leasing laws" on 412.8 ha (1,020 ac) to protect *Boechera pusilla* habitat (63 FR 9012). This withdrawal expires in 50 years (2048) unless the Secretary determines that the withdrawal shall be extended. Therefore, we do not consider energy development to be a threat to *B. pusilla* now or in the foreseeable future.

Nonnative Invasive Plants

For general background information on nonnative invasive plants, please refer to the first paragraph of "Nonnative Invasive Plants" under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range* in the Five Factor Evaluation for *Abronia ammophila* section.

The habitat adjacent to the area occupied by *Boechera pusilla* is primarily sagebrush steppe, which is highly vulnerable to nonnative invasive species (Anderson and Inouye 2001, pp. 531–532); however, surveys conducted by WNDD in 2003 found the area generally free of nonnative invasive species (Heidel 2005, p. 10). As noted previously, the restrictive habitat occupied by *B. pusilla* may limit the potential for competition from other herbaceous plants (Dorn 1990b, pp. 6, 8). We have no information that nonnative invasive plants are a threat to *B. pusilla.* Therefore, we do not consider nonnative invasive plants to be a threat to *B. pusilla* now or in the foreseeable future.

Climate Change

For general background information on climate change, please refer to the first paragraphs of "Climate Change" under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range* in the Five Factor Evaluation for *Abronia ammophila* section.

Plant species with restricted ranges may experience population declines as a result of climate change. The habitat for *Boechera pusilla* appears to be exposed to variation in moisture, and *B. pusilla* may be adapted to some variation in moisture availability (Dorn 1990b, p. 6). Climate change has the

potential to affect the species' habitat, but we lack scientific information on what those changes may ultimately mean for *B. pusilla.* Climate change may affect the timing and amount of precipitation as well as other factors linked to habitat conditions for this species. However, at this time the available scientific information does not indicate that climate change is likely to threaten the species. Therefore, we do not consider climate change to be a threat to *B. pusilla* now or in the foreseeable future.

Drought

Limited evidence shows there may be some response of *Boechera pusilla* to drought conditions, but those effects may be delayed (Heidel 2010c, pers. comm.). As discussed above, a 1988 survey, conducted during a drought year, found increased abundance of plants from 1986 (Marriott and Horning *in litt.* 1988, p. B2), but surveys conducted in 1990 found reduced numbers (Dorn 1990b, p. 8) that may have been caused by continued drought conditions (Heidel 2005, p. 14). Reproductive success may vary considerably from year to year depending on climate conditions, leading to wide fluctuations in populations (Dorn 1990b, p. 10). Overall reductions in population size since 1988 may be linked to periods of drought conditions that have occurred between 1988 and 2010, but *B. pusilla* monitoring efforts are not sufficient during this period to understand the role of drought in population decline. Therefore, because of lack of evidence, we do not consider drought to be a threat to *B. pusilla* now or in the foreseeable future.

Summary of Factor A

In summary, we found that numerous management actions taken previously by the BLM alleviated several potential threats to *Boechera pusilla* and its habitat. These potential threats included ORV use, heavy foot traffic, and mining. The ORV use and mining are no longer permitted in the area due to the implementation of numerous regulatory mechanisms (see *Factor D. Inadequacy of existing regulatory mechanisms* below) in addition to the construction of an exclosure. We have no information that nonnative invasive plants are a threat to the species. Other activities in the area, such as limited foot traffic, are not considered threats. Although climate change may be a potential long-term stressor to *B. pusilla,* the limited information available regarding climate change impacts on *B. pusilla* and the species' adaptations to an already-variable climate do not suggest that climate change currently, or in the foreseeable future, will threaten this species' existence. We do not fully understand the response of *B. pusilla* to drought conditions, but limited evidence indicates that drought may be contributing to this species' reduced population size (see *Factor E. Other Natural Or Manmade Factors Affecting Its Continued Existence* discussion below). However, we do not have sufficient information to say that drought alone, or in combination with other factors, threatens the species currently or is likely to do so in the foreseeable future.

We conclude that the best scientific and commercial information available indicates that *Boechera pusilla* is not in danger of extinction or likely to become so within the foreseeable future because of the present or threatened destruction, modification, or curtailment of its habitat or range.

*Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

Field notes from 1993 suggest that some *Boechera pusilla* seed had been collected and sent to the DBG; however, they do not have a record of receiving any *B. pusilla* seeds (Neale 2010b, pers. comm.). Some specimens collected in the 1980s were provided to the Gray Herbarium of Harvard University, the New York Botanical Garden, and the Rocky Mountain Herbarium at the University of Wyoming (Dorn 1990b, p. 5, 14). We have no other indication that any collections or utilization have been made of *B. pusilla.* Therefore, we find that *B. pusilla* is not in danger of extinction or likely to become so within the foreseeable future because of overutilization for commercial, recreational, scientific, or educational purposes.

*Factor C. Disease or Predation*

Disease

*Boechera pusilla* is not specifically known to be affected or threatened by any disease. Systemic rust disease is known to affect many *Boechera* species (Ladyman 2005, p. 26), but we have no information that it is found in *B. pusilla.* Therefore, we do not consider disease to be a threat to *B. pusilla* now or in the foreseeable future.

Predation—Grazing and Herbivory

Prior to conservation measures taken by the BLM, the habitat of *Boechera pusilla* was grazed by cattle. Prior to 1982, cattle grazing may have formed a threat, but the establishment of an ACEC that covers all known locations of *B. pusilla* (BLM 1997, p. 34) and the presence of an exclosure fence that encloses all of the occupied habitat (Dunder 1984, unpaginated; Marriott 1986, p. 14) have resolved this potential threat. These protections are described in additional detail under *Factor D. Inadequacy of Existing Regulatory Mechanisms* below. Insects, such as caterpillars, do not appear to favor *B. pusilla* over other vegetation (Heidel 2005, p. 10), and no known observations suggest that herbivory from wild ungulates or small mammals is a threat. Therefore, we do not consider predation to be a threat to *B. pusilla* now or in the foreseeable future.

Summary of Factor C

We do not have any information to suggest that disease or predation are a threat to this species. We conclude that the best scientific and commercial information available indicates that *Boechera pusilla* is not in danger of extinction or likely to become so within the foreseeable future because of disease or predation.

*Factor D. Inadequacy of Existing Regulatory Mechanisms*

The Act requires us to examine the adequacy of existing regulatory mechanisms with respect to threats that may place *Boechera pusilla* in danger of extinction or likely to become so in the future. Existing regulatory mechanisms that could have an effect on potential threats to *B. pusilla* include (1) Federal laws and regulations; (2) State laws and regulations; and (3) local land use laws, processes, and ordinances. Because the entire population of *Boechera pusilla* occurs on BLM lands, we focus our discussion on Federal laws. Actions adopted by local groups, States, or Federal entities that are discretionary, including conservation strategies and guidance, are not regulatory mechanisms; however, we may discuss them in relation to their effects on potential threats to the species.

Federal Laws and Regulations

Bureau of Land Management

Several regulatory mechanisms are in place to protect *Boechera pusilla,* some of which were mentioned under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range* above. The BLM has excluded grazing from the habitat area, developed a habitat management plan for the species, designated the habitat area as an ACEC, incorporated the habitat area into a SRMA, and designated *B. pusilla* as a sensitive species. Additionally, the

Secretary of the Interior removed essentially the entire area with occupied habitat from mineral development. The Service previously published a notice of review in 2000 removing *B. pusilla* as a candidate species, largely based on protections provided by these regulatory mechanisms and land management approaches.

The BLM designated the Pine Creek Special Management Area in 1978 (Heidel 2005, p. 16) and built an exclosure fence in 1982 to keep cattle out of the 35.6-ha (88-ac) area where recreational activities occur (Dunder 1984, unpaginated). *Boechera pusilla* occurs within this management area (Marriott 1986, p. 14). The fenced portion of the area is smaller than that of the known species range, but protects much of the occupied habitat. As described under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range* above, the BLM provided a Habitat Management Plan for *B. pusilla* (BLM 1994, entire) and processed an emergency closure of vehicle access to 202.3 ha (500 ac) in a Habitat Management Area for the species in 1994 (59 FR 17718).

The BLM 6840 Manual requires that RMPs should address sensitive species, and that implementation "should consider all site-specific methods and procedures needed to bring species and their habitats to the condition under which management under the Bureau sensitive species policies would no longer be necessary" (BLM 2008, p. 2A1). The Federal Land Policy and Management Act of 1976 mandates Federal land managers to develop and revise land use plans. The RMPs are the basis for all actions and authorizations involving BLM-administered lands and resources (43 CFR 1601.0–5(n)). The 1997 RMP for the area that includes *Boechera pusilla* habitat provided designation of a Special Status Plant ACEC that closed the area to: (1) Direct surface-disturbing activities, (2) mining claims, (3) surface occupancy and surface-disturbance activities, (4) mineral material sales, and (5) use of explosives and blasting (BLM 1997, p. 34). *B. pusilla* habitat also fits within an SRMA designated in the RMP, which: (1) Prohibited major facilities (*e.g.,* power lines), (2) closed the area to mineral leasing, (3) closed the ACEC to ORV use, and (4) required avoidance and extensive planning of long, linear facilities (*e.g.,* roads) (BLM 1997, pp 17–18). All activities concerning *B. pusilla* in the RMP have been implemented (Glennon 2010b, pers. comm.). The next RMP revision for the area is currently underway, with an estimated completion date of 2013 (Dana 2010b, pers. comm.). Existing protections for the species will likely remain in place in the revised RMP as a no-action alternative under NEPA, but we are uncertain whether additional protections for *B. pusilla* will be developed.

National Environmental Policy Act

The entire known population of *Boechera pusilla* occurs on Federal land. All Federal agencies are required to adhere to the NEPA for projects they fund, authorize, or carry out. Please refer to the NEPA discussion under *Factor D. The Inadequacy of Existing Regulatory Mechanisms* in the Five Factor Evaluation for *Abronia ammophila* section for additional information.

Public Land Order No. 7312

On February 23, 1998, the Secretary of the Interior issued Public Land Order No. 7312 to withdraw public land from certain uses for 50 years as a measure to protect *Boechera pusilla.* This order withdrew 412.8 ha (1,020 ac) from settlement, sale, location of minerals, or entry under the general land laws, including mining laws; this did not eliminate the area from being leased under the mineral leasing laws (63 FR 9012). In addition to these measures, *B. pusilla* was listed as a BLM sensitive species in 2002 (BLM 2002, p. 9).

Summary of Factor D

Because the entire population of *Boechera pusilla* occurs on BLM lands, this agency has responsibility for the land management decisions that protect *B. pusilla* and its habitat. *B. pusilla* receives adequate protection from the BLM in the form of regulatory mechanisms, designations, and the construction of animal exclosures. These protections greatly limit the amount of disturbance that can occur within the plant's limited range. Although these mechanisms do not entirely exclude the area from foot traffic, they have adequately reduced this potential threat. Various regulatory mechanisms are in place to address potential threats over which the BLM has control. We expect that *B. pusilla* and its habitat will be generally protected from direct human disturbance.

We have no evidence of impacts to *Boechera pusilla* from inadequate regulatory mechanisms. We recognize that the existing regulatory mechanisms have not been able to stem the decline of the species, but we are not able to identify that regulatory mechanisms are inadequate. We are uncertain what is causing reduced population levels and consider the reduction to be an indicator that a threat is present; however, we are not able to fully describe this threat at this time (see *Factor E. Other Natural Or Manmade Factors Affecting Its Continued Existence* discussion below). The current small population size creates a vulnerability that may work in combination with the threat that we are not able to explain. Since the primary management tool that implements regulatory mechanisms, the RMP, goes through revisions approximately every 15 years (Dana 2010b, pers. comm.), it will be important for the BLM to ensure that the protective measures are sustained in future revisions to the Green River RMP and that measures be taken to alleviate any potential vulnerabilities created by small population size.

We conclude that the best scientific and commercial information available indicates that *Boechera pusilla* is not in danger of extinction or likely to become so within the foreseeable future because of inadequate regulatory mechanisms. We recognize that the existing regulatory mechanisms do not appear to have protected the species from decline; however, we are unable to conclude that regulatory mechanisms are inadequate since the cause for decline is unidentified.

*Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence*

Natural and manmade factors with the potential to affect *Boechera pusilla* include: (1) Small population size, and (2) threats not yet fully identified.

Small Population Size

For general background information on small population size, please refer to the first paragraph of "Small Population Size" under *Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence* in the Five Factor Evaluation for *Abronia ammophila* section.

In order for a population to sustain itself, there must be enough reproducing individuals and habitat to ensure its survival. Conservation biology defines this as the "minimum viable population" requirement (Grumbine 1990, pp. 127–128). This requirement may be between 500 and 5,000 individuals for other species of *Boechera* depending on variability among species, demographic constraints, and evolutionary history (Ladyman 2005, p. 26). *Boechera pusilla* occurs in relatively small numbers, with the total population size no greater than

1,000 flowering plants in the past (Heidel 2005, p. 14) and at 350 flowering plants in 2010 (Heidel 2010d, pers. comm.). Plant numbers are at levels that may not ensure this species' continued existence over the long term. As noted above, botanists who have studied *B. pusilla* note an overall declining trend of the species (Heidel 2005, p. 14; Heidel 2010c, pers. comm.; Windham 2010, pers. comm.). This decline has been rapid compared to declines observed in other rare species and has continued after habitat protections were put in place (Windham 2010, pers. comm.). As established in an earlier section, the number of flowering plants in the population in 2010 was approximately 350, an increase from 2003 estimates of 150 to 250. However, if a decline similar to the significant decrease between 1988 (800 to 1,000 flowering plants) and 2003 (150 to 250 flowering plants) occurs again, the species may have difficulty perpetuating itself into the future.

*Boechera pusilla* relies on soils formed from a certain type of granitic outcrop that is limited in extent, so the range of the species is not likely to expand beyond this area in the future. The relatively small area that *B. pusilla* occurs within also may predispose the species to be more sensitive to stochastic events that might occur (Menges 1990, p. 53; Boyce 1992, pp. 482–484), such as climate shift that the species is not adapted to or factors that lead to reduced reproductive success (Ladyman 2005, pp. 30–31). A single unforeseen event in a relatively small area could eliminate the species.

*Boechera pusilla* is apomictic, so when it uses this reproductive process, the species essentially clones itself. We are uncertain how long the species' apomictic seeds remain viable or under what conditions they germinate. This reproductive process may reduce some of the risks associated with small population size for species that only sexually reproduce. If the species reproduces only asexually, risks related to lack of genetic variability may increase, but we are uncertain if *B. pusilla* also reproduces sexually as do some other species of *Boechera.* Apomixis has been shown to reduce extinction risk if certain other variables are present, such as high levels of biomass and no soil acidity (Freville *et al.* 2007, p. 2666). However, information on what apomixis means for conservation of a species remains limited (Freville *et al.* 2007, p. 2669).

Threats Not Yet Fully Identified

In addition to the small population size of *Boechera pusilla,* an unknown threat or threats may be present that is causing reduced numbers of the plant. The species was removed from the candidate list in 2000 based on the regulatory protections that were in place. Based on our current understanding of the species, these regulatory protections appear appropriate and sufficient. However, the species still has small population numbers that have declined overall since the implementation of these protections. We do not understand the nature of the threat or threats, but the reduced population numbers demonstrate that some type of threat is present. We have limited data to inform our understanding of what this threat could be. The decline could be linked to drought cycles, but we do not have sufficient data to correlate numbers of *B. pusilla* with drought. A disease could be present in the species, but we have no information to indicate disease is reducing the number of plants.

Summary of Factor E

*Boechera pusilla* has a small population size that is confined to a small area because of habitat requirements. The species may be vulnerable to stochastic events due to its small population size. *B. pusilla* reproduces itself asexually, which may reduce some risks of a small population size, but does not fully eliminate this threat. Declines have occurred in the species, even after habitat protection measures were put in place. Although the population numbers increased from 2003 (150–250 flowering plants) to 2010 (350 flowering plants), numbers remain low, the plant appears to have an overall trend of decline, and this overall trend may continue in the foreseeable future. A viable population for the species may be 500 to 5,000 plants (Ladyman 2005, p. 26), and species numbers are below that level. We are uncertain what is causing reduced population levels and consider the reduction to be an indicator that a threat is present for the species. We are not able to fully describe this threat. Some of the decline may be attributable to drought conditions, but we do not fully understand the cause of the decline. Additionally, disease may be present but has not been documented. The small population size creates a vulnerability that may work in combination with the threat that we are not able to explain. Therefore, the species appears likely to be in danger of extinction or likely to become so within the foreseeable future because of the combination of small population size and a threat that we cannot fully identify but that is manifest by an overall declining population.

*Five Factor Evaluation Summary for Boechera pusilla*

*Boechera pusilla* has a threat that is not identified, but that is indicated by the small and declining population size. The population size may be declining from a variety of unknown causes, with drought or disease possibly contributing to the trend. The trend may have been reversed somewhat, but without improved population numbers, the species may reach a population level at which other stressors become threats. The species may already be below the minimum viable population, so other stressors may begin to present threats to the species. We are unable to determine how climate change may affect the species in the future. To the extent that we understand the species, other potential habitat-related threats have been removed through the implementation of Federal regulatory mechanisms and associated actions. Overutilization, predation, and the inadequacy of regulatory mechanisms are not viewed as threats to the species.

**Finding**

As required by the Act, we considered the five factors in assessing whether *Boechera pusilla* is threatened or endangered throughout all of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by *B. pusilla.* We reviewed the petition, information available in our files, other available published and unpublished information, and we consulted with recognized *B. pusilla* experts and other Federal agencies.

This status review identified threats to *Boechera pusilla* attributable to Factor E. The primary threat to the species is from a threat that is not fully identified, but is indicated by the species' small, declining population size. This threat to *B. pusilla* is not fully understood, but may be connected with drought conditions, disease, or other factors. Protective measures have been taken previously to maintain the species' habitat, but the species continues to experience declines. *B. pusilla* has only one population, with most of the individuals occurring in a single subpopulation. The range of the species is small due to limitations of a highly specialized habitat. Although population levels increased in 2010, the species is experiencing an overall pattern of decline that we anticipate will continue. *B. pusilla* numbers already may be below the minimum viable population requirement, so other vulnerabilities associated with the small population may now present threats to

the species. Therefore, the species appears likely to be in danger of extinction currently, or in the foreseeable future, as result of a threat that is not fully identified, but is manifest by an ongoing declining population trend.

On the basis of the best scientific and commercial information available, we find that the petitioned action to list *Boechera pusilla* under the Act is warranted. We will make a determination on the status of the species as threatened or endangered when we do a proposed listing determination. However, as explained in more detail below, an immediate proposal of a regulation implementing this action is precluded by higher priority listing actions, and progress is being made to add or remove qualified species from the Lists of Endangered and Threatened Wildlife and Plants.

We reviewed the available information to determine if the existing and foreseeable threats render the species at risk of extinction now such that issuing an emergency regulation temporarily listing the species under section 4(b)(7) of the Act is warranted. We determined that issuing an emergency regulation temporarily listing the species is not warranted for this species at this time, because threats to the species would not be further controlled with a change in status. Additionally, the most recent survey information suggests that, while the population has not rebounded to previous highs, the population declines also have not continued. However, if at any time we determine that issuing an emergency regulation temporarily listing *Boechera pusilla* is warranted, we will initiate this action at that time.

**Listing Priority Number**

The Service adopted guidelines on September 21, 1983 (48 FR 43098), to establish a rational system for utilizing available resources for the highest priority species when adding species to the Lists of Endangered or Threatened Wildlife and Plants or reclassifying species listed as threatened to endangered status. These guidelines, titled "Endangered and Threatened Species Listing and Recovery Priority Guidelines" address the immediacy and magnitude of threats, and the level of taxonomic distinctiveness by assigning priority in descending order to monotypic genera (genus with one species), full species, and subspecies (or equivalently, distinct population segments of vertebrates).

As a result of our analysis of the best available scientific and commercial information, we have assigned *Boechera pusilla* a Listing Priority Number (LPN) of 8, based on our finding that the species faces threats that are of moderate magnitude and are imminent. These threats include a threat that is not fully identified that may work in combination with the small population. Our rationale for assigning *B. pusilla* an LPN of 8 is outlined below.

Under the Service's guidelines, the magnitude of threat is the first criterion we look at when establishing a listing priority. The guidance indicates that species with the highest magnitude of threat are those species facing the greatest threats to their continued existence. These species receive the highest listing priority. We consider the threats that *Boechera pusilla* faces to be moderate in magnitude. Although the threat, as described in *Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence* under Five Factor Evaluation for *Boechera pusilla,* is not fully understood, we know it exists as indicated by the declining population. Because we have not detected the source or nature of the threat, we consider the threat to be moderate in magnitude. The population levels have decreased significantly from the recorded high in 1988 (800 to 1,000), but they also increased between 2003 (150 to 250) and 2010 (350), so we do not consider the magnitude of the threat to be high. The threat is not fully understood, but is manifest by a declining population that may have stabilized somewhat; therefore, we consider the magnitude of the threat to be moderate.

Under our LPN guidelines, the second criterion we consider in assigning a listing priority is the immediacy of threats. This criterion is intended to ensure that the species facing actual, identifiable threats are given priority over those for which threats are only potential or that are intrinsically vulnerable but are not known to be presently facing such threats. We consider the threat to *Boechera pusilla* as described in *Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence* under Five Factor Evaluation for *Boechera pusilla* to be imminent because, although not fully identified, we have evidence that the species is currently facing a threat indicated by reduced population size. The threat appears to be ongoing, although we are unsure of the extent and timing of its effects on *B. pusilla.* The threat is occurring in the only known population in the United States, and the population may already be below the minimum viable population requirement, which may allow population reductions and increases in population vulnerability to occur more quickly in the future. We expect some additional declines will occur in the future, and if declines occur at rates similar to those in the past, population levels could be precariously low. Therefore, we consider the threat to be imminent.

The third criterion in our Listing Priority Number guidance is intended to devote resources to those species representing highly distinctive or isolated gene pools as reflected by taxonomy. *Boechera pusilla* is a valid taxon at the species level and, therefore, receives a higher priority than subspecies, but a lower priority than species in a monotypic genus. Therefore, we assigned *B. pusilla* an LPN of 8.

We will continue to monitor the threats to *Boechera pusilla* and the species' status on an annual basis, and should the magnitude or the imminence of the threats change, we will revisit our assessment of the LPN.

While we conclude that listing *Boechera pusilla* is warranted, an immediate proposal to list this species is precluded by other higher priority listings, which we address in the Preclusion and Expeditious Progress section below. Because we have assigned *B. pusilla* an LPN of 8, work on a proposed listing determination for the species is precluded by work on higher priority listing actions with absolute statutory, court-ordered, or court-approved deadlines and final listing determinations for those species that were proposed for listing with funds from Fiscal Year (FY) 2010. This work includes all the actions listed in the tables below under Preclusion and Expeditious Progress.

**Preclusion and Expeditious Progress**

Preclusion is a function of the listing priority of a species in relation to the resources that are available and the cost and relative priority of competing demands for those resources. Thus, in any given FY, multiple factors dictate whether it will be possible to undertake work on a listing proposal regulation or whether promulgation of such a proposal is precluded by higher priority listing actions.

The resources available for listing actions are determined through the annual Congressional appropriations process. The appropriation for the Listing Program is available to support work involving the following listing actions: Proposed and final listing rules; 90-day and 12-month findings on petitions to add species to the Lists of Endangered and Threatened Wildlife and Plants (Lists) or to change the status

of a species from threatened to endangered; annual "resubmitted" petition findings on prior warranted-but-precluded petition findings as required under section 4(b)(3)(C)(i) of the Act; critical habitat petition findings; proposed and final rules designating critical habitat; and litigation-related, administrative, and program-management functions (including preparing and allocating budgets, responding to Congressional and public inquiries, and conducting public outreach regarding listing and critical habitat).

The work involved in preparing various listing documents can be extensive and may include, but is not limited to: Gathering and assessing the best scientific and commercial data available and conducting analyses used as the basis for our decisions; writing and publishing documents; and obtaining, reviewing, and evaluating public comments and peer review comments on proposed rules and incorporating relevant information into final rules. The number of listing actions that we can undertake in a given year also is influenced by the complexity of those listing actions; that is, more complex actions generally are more costly. The median cost for preparing and publishing a 90-day finding is $39,276; for a 12-month finding, $100,690; for a proposed rule with critical habitat, $345,000; and for a final listing rule with critical habitat, the median cost is $305,000.

We cannot spend more than is appropriated for the Listing Program without violating the Anti-Deficiency Act (see 31 U.S.C. 1341(a)(1)(A)). In addition, in FY 1998 and for each FY since then, Congress has placed a statutory cap on funds which may be expended for the Listing Program, equal to the amount expressly appropriated for that purpose in that FY. This cap was designed to prevent funds appropriated for other functions under the Act (for example, recovery funds for removing species from the Lists), or for other Service programs, from being used for Listing Program actions (see House Report 105–163, 105th Congress, 1st Session, July 1, 1997).

Since FY 2002, the Service's budget has included a critical habitat subcap to ensure that some funds are available for other work in the Listing Program ("The critical habitat designation subcap will ensure that some funding is available to address other listing activities" (House Report No. 107–103, 107th Congress, 1st Session, June 19, 2001)). In FY 2002 and each year until FY 2006, the Service had to use virtually the entire critical habitat subcap to address court-mandated designations of critical habitat, and consequently none of the critical habitat subcap funds were available for other listing activities. In some FYs since 2006, we have been able to use some of the critical habitat subcap funds to fund proposed listing determinations for high-priority candidate species. In other FYs, while we were unable to use any of the critical habitat subcap funds to fund proposed listing determinations, we did use some of this money to fund the critical habitat portion of some proposed listing determinations so that the proposed listing determination and proposed critical habitat designation could be combined into one rule, thereby being more efficient in our work. In FY 2011 we anticipate that we will be able to use some of the critical habitat subcap funds to fund proposed listing determinations.

We make our determinations of preclusion on a nationwide basis to ensure that the species most in need of listing will be addressed first and also because we allocate our listing budget on a nationwide basis. Through the listing cap, the critical habitat subcap, and the amount of funds needed to address court-mandated critical habitat designations, Congress and the courts have in effect determined the amount of money available for other listing activities nationwide. Therefore, the funds in the listing cap, other than those needed to address court-mandated critical habitat for already listed species, set the limits on our determinations of preclusion and expeditious progress.

Congress identified the availability of resources as the only basis for deferring the initiation of a rulemaking that is warranted. The Conference Report accompanying Pub. L. 97–304, which established the current statutory deadlines and the warranted-but-precluded finding, states that the amendments were "not intended to allow the Secretary to delay commencing the rulemaking process for any reason other than that the existence of pending or imminent proposals to list species subject to a greater degree of threat would make allocation of resources to such a petition [that is, for a lower-ranking species] unwise." Although that statement appeared to refer specifically to the "to the maximum extent practicable" limitation on the 90-day deadline for making a "substantial information" finding, that finding is made at the point when the Service is deciding whether or not to commence a status review that will determine the degree of threats facing the species, and therefore the analysis underlying the statement is more relevant to the use of the warranted-but-precluded finding, which is made when the Service has already determined the degree of threats facing the species and is deciding whether or not to commence a rulemaking.

In FY 2010, $10,471,000 is the amount of money that Congress appropriated for the Listing Program (that is, the portion of the Listing Program funding not related to critical habitat designations for species that are already listed). Therefore, a proposed listing is precluded if pending proposals with higher priority will require expenditure of at least $10,471,000, and expeditious progress is the amount of work that can be achieved with $10,471,000. Since court orders requiring critical habitat work will not require use of all of the funds within the critical habitat subcap, we used $1,114,417 of our critical habitat subcap funds in order to work on as many of our required petition findings and listing determinations as possible. This brings the total amount of funds we had for listing actions in FY 2010 to $11,585,417.

The $11,585,417 was used to fund work in the following categories: Compliance with court orders and court-approved settlement agreements requiring that petition findings or listing determinations be completed by a specific date; section 4 (of the Act) listing actions with absolute statutory deadlines; essential litigation-related, administrative, and listing program-management functions; and high-priority listing actions for some of our candidate species. For FY 2011, on September 29, 2010, Congress passed a continuing resolution which provides funding at the FY 2010 enacted level. Until Congress appropriates funds for FY 2011, we will fund listing work based on the FY 2010 amount. In 2009, the responsibility for listing foreign species under the Act was transferred from the Division of Scientific Authority, International Affairs Program, to the Endangered Species Program. Therefore, starting in FY 2010, we use a portion of our funding to work on the actions described above as they apply to listing actions for foreign species. This has the potential to further reduce funding available for domestic listing actions. Although there are currently no foreign species issues included in our high-priority listing actions at this time, many actions have statutory or court-approved settlement deadlines, thus increasing their priority. The budget allocations for each specific listing action are identified in the Service's FY 2011 Allocation Table (part of our administrative record).

Based on our September 21, 1983, guidance for assigning an LPN for each candidate species (48 FR 43098), we have a significant number of species with a LPN of 2. Using this guidance, we assign each candidate an LPN of 1 to 12, depending on the magnitude of threats (high or moderate to low), immediacy of threats (imminent or nonimminent), and taxonomic status of the species (in order of priority: monotypic genus (a species that is the sole member of a genus); species; or part of a species (subspecies, distinct population segment, or significant portion of the range)). The lower the listing priority number, the higher the listing priority (that is, a species with an LPN of 1 would have the highest listing priority).

Because of the large number of high-priority species, we have further ranked the candidate species with an LPN of 2 by using the following extinction-risk type criteria: International Union for the Conservation of Nature and Natural Resources (IUCN) Red list status/rank, Heritage rank (provided by NatureServe), Heritage threat rank (provided by NatureServe), and species currently with fewer than 50 individuals, or 4 or fewer populations. Those species with the highest IUCN rank (critically endangered), the highest Heritage rank (G1), the highest Heritage threat rank (substantial, imminent threats), and currently with fewer than 50 individuals, or fewer than 4 populations, originally comprised a group of approximately 40 candidate species (''Top 40''). These 40 candidate species have had the highest priority to receive funding to work on a proposed listing determination. As we work on proposed and final listing rules for those 40 candidates, we apply the ranking criteria to the next group of candidates with an LPN of 2 and 3 to determine the next set of highest priority candidate species. Finally, proposed rules for reclassification of threatened species to endangered are lower priority, since as listed species, they are already afforded the protection of the Act and implementing regulations. However, for efficiency reasons, we may choose to work on a proposed rule to reclassify a species to endangered if we can combine this with work that is subject to a court-determined deadline.

We assigned *Boechera pusilla* an LPN of 8. This is based on our finding that the species faces immediate and moderate magnitude threats from a threat we do not fully understand but is manifest by reduced population levels that may be below the minimum viable population requirement. Under our 1983 Guidelines, a ''species'' facing imminent moderate-magnitude threats is assigned an LPN of 7, 8, or 9 depending on its taxonomic status. Because *B. pusilla* is a species, we assigned it an LPN of 8. Therefore, work on a proposed listing determination for *B. pusilla* is precluded by work on higher priority candidate species (*i.e.,* species with LPN of 7); listing actions with absolute statutory, court ordered, or court-approved deadlines; and final listing determinations for those species that were proposed for listing with funds from previous FYs. This work includes all the actions listed in the tables below under expeditious progress.

With our workload so much bigger than the amount of funds we have to accomplish it, it is important that we be as efficient as possible in our listing process. Therefore, as we work on proposed rules for the highest priority species in the next several years, we are preparing multi-species proposals when appropriate, and these may include species with lower priority if they overlap geographically or have the same threats as a species with an LPN of 2. In addition, we take into consideration the availability of staff resources when we determine which high-priority species will receive funding to minimize the amount of time and resources required to complete each listing action.

As explained above, a determination that listing is warranted but precluded also must demonstrate that expeditious progress is being made to add and remove qualified species to and from the Lists of Endangered and Threatened Wildlife and Plants. As with our ''precluded'' finding, the evaluation of whether progress in adding qualified species to the Lists has been expeditious is a function of the resources available for listing and the competing demands for those funds. (Although we do not discuss it in detail here, we also are making expeditious progress in removing species from the list under the Recovery program in light of the resource available for delisting, which is funded by a separate line item in the budget of the Endangered Species Program. During FY 2010, we have completed two proposed delisting rules and two final delisting rules.) Given the limited resources available for listing, we find that we made expeditious progress in FY 2010 in the Listing Program and are making expeditious progress in FY 2011. This progress included preparing and publishing the following determinations:

FY 2010 AND FY 2011 COMPLETED LISTING ACTIONS

| Publication date | Title | Actions | FR pages |
|---|---|---|---|
| 10/08/2009 ..... | Listing *Lepidium papilliferum* (Slickspot Peppergrass) as a Threatened Species Throughout Its Range. | Final Listing Threatened ..... | 74 FR 52013–52064. |
| 10/27/2009 ..... | 90-day Finding on a Petition To List the American Dipper in the Black Hills of South Dakota as Threatened or Endangered. | Notice of 90-day Petition Finding, Not substantial. | 74 FR 55177–55180. |
| 10/28/2009 ..... | Status Review of Arctic Grayling (*Thymallus arcticus*) in the Upper Missouri River System. | Notice of Intent to Conduct Status Review for Listing Decision. | 74 FR 55524–55525. |
| 11/03/2009 ..... | Listing the British Columbia Distinct Population Segment of the Queen Charlotte Goshawk Under the Endangered Species Act: Proposed rule. | Proposed Listing Threatened ..... | 74 FR 56757–56770. |
| 11/03/2009 ..... | Listing the Salmon-Crested Cockatoo as Threatened Throughout Its Range with Special Rule. | Proposed Listing Threatened ..... | 74 FR 56770–56791. |
| 11/23/2009 ..... | Status Review of Gunnison sage-grouse (*Centrocercus minimus*). | Notice of Intent to Conduct Status Review for Listing Decision. | 74 FR 61100–61102. |
| 12/03/2009 ..... | 12-Month Finding on a Petition to List the Black-tailed Prairie Dog as Threatened or Endangered. | Notice of 12-month petition finding, Not warranted. | 74 FR 63343–63366. |
| 12/03/2009 ..... | 90-Day Finding on a Petition to List Sprague's Pipit as Threatened or Endangered. | Notice of 90-day Petition Finding, Substantial. | 74 FR 63337–63343. |

FY 2010 AND FY 2011 COMPLETED LISTING ACTIONS—Continued

| Publication date | Title | Actions | FR pages |
|---|---|---|---|
| 12/15/2009 ..... | 90-Day Finding on Petitions To List Nine Species of Mussels From Texas as Threatened or Endangered With Critical Habitat. | Notice of 90-day Petition Finding, Substantial. | 74 FR 66260–66271. |
| 12/16/2009 ..... | Partial 90-Day Finding on a Petition to List 475 Species in the Southwestern United States as Threatened or Endangered With Critical Habitat. | Notice of 90-day Petition Finding, Not substantial & Substantial. | 74 FR 66865–66905. |
| 12/17/2009 ..... | 12-month Finding on a Petition To Change the Final Listing of the Distinct Population Segment of the Canada Lynx To Include New Mexico. | Notice of 12-month petition finding, Warranted but precluded. | 74 FR 66937–66950. |
| 01/05/2010 ..... | Listing Foreign Bird Species in Peru & Bolivia as Endangered Throughout Their Range. | Proposed Listing Endangered ..... | 75 FR 605–649. |
| 01/05/2010 ..... | Listing Six Foreign Birds as Endangered Throughout Their Range. | Proposed Listing Endangered ..... | 75 FR 286–310. |
| 01/05/2010 ..... | Withdrawal of Proposed Rule to List Cook's Petrel ..... | Proposed rule, withdrawal ..... | 75 FR 310–316. |
| 01/05/2010 ..... | Final Rule to List the Galapagos Petrel & Heinroth's Shearwater as Threatened Throughout Their Ranges. | Final Listing Threatened ..... | 75 FR 235–250. |
| 01/20/2010 ..... | Initiation of Status Review for *Agave eggersiana* & *Solanum conocarpum*. | Notice of Intent to Conduct Status Review for Listing Decision. | 75 FR 3190–3191. |
| 02/09/2010 ..... | 12-month Finding on a Petition to List the American Pika as Threatened or Endangered. | Notice of 12-month petition finding, Not warranted. | 75 FR 6437–6471. |
| 02/25/2010 ..... | 12-Month Finding on a Petition To List the Sonoran Desert Population of the Bald Eagle as a Threatened or Endangered Distinct Population Segment. | Notice of 12-month petition finding, Not warranted. | 75 FR 8601–8621. |
| 02/25/2010 ..... | Withdrawal of Proposed Rule To List the Southwestern Washington/Columbia River Distinct Population Segment of Coastal Cutthroat Trout (*Oncorhynchus clarki clarki*) as Threatened. | Withdrawal of Proposed Rule to List ..... | 75 FR 8621–8644. |
| 03/18/2010 ..... | 90-Day Finding on a Petition to List the Berry Cave salamander as Endangered. | Notice of 90-day Petition Finding, Substantial. | 75 FR 13068–13071. |
| 03/23/2010 ..... | 90-Day Finding on a Petition to List the Southern Hickorynut Mussel (*Obovaria jacksoniana*) as Endangered or Threatened. | Notice of 90-day Petition Finding, Not substantial. | 75 FR 13717–13720. |
| 03/23/2010 ..... | 90-Day Finding on a Petition to List the Striped Newt as Threatened. | Notice of 90-day Petition Finding, Substantial. | 75 FR 13720–13726. |
| 03/23/2010 ..... | 12-Month Findings for Petitions to List the Greater Sage-Grouse (*Centrocercus urophasianus*) as Threatened or Endangered. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 13910–14014. |
| 03/31/2010 ..... | 12-Month Finding on a Petition to List the Tucson Shovel-Nosed Snake (*Chionactis occipitalis klauberi*) as Threatened or Endangered with Critical Habitat. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 16050–16065. |
| 04/05/2010 ..... | 90-Day Finding on a Petition To List Thorne's Hairstreak Butterfly as threatened or Endangered. | Notice of 90-day Petition Finding, Substantial. | 75 FR 17062–17070. |
| 04/06/2010 ..... | 12-month Finding on a Petition To List the Mountain Whitefish in the Big Lost River, Idaho, as Endangered or Threatened. | Notice of 12-month petition finding, Not warranted. | 75 FR 17352–17363. |
| 04/06/2010 ..... | 90-Day Finding on a Petition to List a Stonefly (*Isoperla jewetti*) & a Mayfly (*Fallceon eatoni*) as Threatened or Endangered with Critical Habitat. | Notice of 90-day Petition Finding, Not substantial. | 75 FR 17363–17367. |
| 04/7/2010 ..... | 12-Month Finding on a Petition to Reclassify the Delta Smelt From Threatened to Endangered Throughout Its Range. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 17667–17680. |
| 04/13/2010 ..... | Determination of Endangered Status for 48 Species on Kauai & Designation of Critical Habitat. | Final Listing Endangered ..... | 75 FR 18959–19165. |
| 04/15/2010 ..... | Initiation of Status Review of the North American Wolverine in the Contiguous United States. | Notice of Initiation of Status Review for Listing Decision. | 75 FR 19591–19592. |
| 04/15/2010 ..... | 12-Month Finding on a Petition to List the Wyoming Pocket Gopher as Endangered or Threatened with Critical Habitat. | Notice of 12-month petition finding, Not warranted. | 75 FR 19592–19607. |
| 04/16/2010 ..... | 90-Day Finding on a Petition to List a Distinct Population Segment of the Fisher in Its United States Northern Rocky Mountain Range as Endangered or Threatened with Critical Habitat. | Notice of 90-day Petition Finding, Substantial. | 75 FR 19925–19935. |
| 04/20/2010 ..... | Initiation of Status Review for Sacramento splittail (*Pogonichthys macrolepidotus)*. | Notice of Initiation of Status Review for Listing Decision. | 75 FR 20547–20548. |
| 04/26/2010 ..... | 90-Day Finding on a Petition to List the Harlequin Butterfly as Endangered. | Notice of 90-day Petition Finding, Substantial. | 75 FR 21568–21571. |
| 04/27/2010 ..... | 12-Month Finding on a Petition to List Susan's Purse-making Caddisfly (*Ochrotrichia susanae*) as Threatened or Endangered. | Notice of 12-month petition finding, Not warranted. | 75 FR 22012–22025. |

FY 2010 AND FY 2011 COMPLETED LISTING ACTIONS—Continued

| Publication date | Title | Actions | FR pages |
|---|---|---|---|
| 04/27/2010 ..... | 90-day Finding on a Petition to List the Mohave Ground Squirrel as Endangered with Critical Habitat. | Notice of 90-day Petition Finding, Substantial. | 75 FR 22063–22070. |
| 05/04/2010 ..... | 90-Day Finding on a Petition to List Hermes Copper Butterfly as Threatened or Endangered. | Notice of 90-day Petition Finding, Substantial. | 75 FR 23654–23663. |
| 06/01/2010 ..... | 90-Day Finding on a Petition To List *Castanea pumila* var. *ozarkensis*. | Notice of 90-day Petition Finding, Substantial. | 75 FR 30313–30318. |
| 06/01/2010 ..... | 12-month Finding on a Petition to List the White-tailed Prairie Dog as Endangered or Threatened. | Notice of 12-month petition finding, Not warranted. | 75 FR 30338–30363. |
| 06/09/2010 ..... | 90-Day Finding on a Petition To List van Rossem's Gull-billed Tern as Endangered or Threatened. | Notice of 90-day Petition Finding, Substantial. | 75 FR 32728–32734. |
| 06/16/2010 ..... | 90-Day Finding on Five Petitions to List Seven Species of Hawaiian Yellow-faced Bees as Endangered. | Notice of 90-day Petition Finding, Substantial. | 75 FR 34077–34088. |
| 06/22/2010 ..... | 12-Month Finding on a Petition to List the Least Chub as Threatened or Endangered. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 35398–35424. |
| 06/23/2010 ..... | 90-Day Finding on a Petition to List the Honduran Emerald Hummingbird as Endangered. | Notice of 90-day Petition Finding, Substantial. | 75 FR 35746–35751. |
| 06/23/2010 ..... | Listing *Ipomopsis polyantha* (Pagosa Skyrocket) as Endangered Throughout Its Range, & Listing *Penstemon debilis* (Parachute Beardtongue) & *Phacelia submutica* (DeBeque Phacelia) as Threatened Throughout Their Range. | Proposed Listing Endangered Proposed Listing Threatened. | 75 FR 35721–35746. |
| 06/24/2010 ..... | Listing the Flying Earwig Hawaiian Damselfly & Pacific Hawaiian Damselfly As Endangered Throughout Their Ranges. | Final Listing Endangered ..... | 75 FR 35990–36012. |
| 06/24/2010 ..... | Listing the Cumberland Darter, Rush Darter, Yellowcheek Darter, Chucky Madtom, & Laurel Dace as Endangered Throughout Their Ranges. | Proposed Listing Endangered ..... | 75 FR 36035–36057. |
| 06/29/2010 ..... | Listing the Mountain Plover as Threatened ..... | Reinstatement of Proposed Listing Threatened. | 75 FR 37353–37358. |
| 07/20/2010 ..... | 90-Day Finding on a Petition to List *Pinus albicaulis* (Whitebark Pine) as Endangered or Threatened with Critical Habitat. | Notice of 90-day Petition Finding, Substantial. | 75 FR 42033–42040. |
| 07/20/2010 ..... | 12-Month Finding on a Petition to List the Amargosa Toad as Threatened or Endangered. | Notice of 12-month petition finding, Not warranted. | 75 FR 42040–42054. |
| 07/20/2010 ..... | 90-Day Finding on a Petition to List the Giant Palouse Earthworm (*Driloleirus americanus*) as Threatened or Endangered. | Notice of 90-day Petition Finding, Substantial. | 75 FR 42059–42066. |
| 07/27/2010 ..... | Determination on Listing the Black-Breasted Puffleg as Endangered Throughout its Range; Final Rule. | Final Listing Endangered ..... | 75 FR 43844–43853. |
| 07/27/2010 ..... | Final Rule to List the Medium Tree-Finch (*Camarhynchus pauper*) as Endangered Throughout Its Range. | Final Listing Endangered ..... | 75 FR 43853–43864. |
| 08/03/2010 ..... | Determination of Threatened Status for Five Penguin Species. | Final Listing Threatened ..... | 75 FR 45497–45527. |
| 08/04/2010 ..... | 90-Day Finding on a Petition To List the Mexican Gray Wolf as an Endangered Subspecies With Critical Habitat. | Notice of 90-day Petition Finding, Substantial. | 75 FR 46894–46898. |
| 08/10/2010 ..... | 90-Day Finding on a Petition to List *Arctostaphylos franciscana* as Endangered with Critical Habitat. | Notice of 90-day Petition Finding, Substantial. | 75 FR 48294–48298. |
| 08/17/2010 ..... | Listing Three Foreign Bird Species from Latin America & the Caribbean as Endangered Throughout Their Range. | Final Listing Endangered ..... | 75 FR 50813–50842. |
| 08/17/2010 ..... | 90-Day Finding on a Petition to List Brian Head Mountainsnail as Endangered or Threatened with Critical Habitat. | Notice of 90-day Petition Finding, Not substantial. | 75 FR 50739–50742. |
| 08/24/2010 ..... | 90-Day Finding on a Petition to List the Oklahoma Grass Pink Orchid as Endangered or Threatened. | Notice of 90-day Petition Finding, Substantial. | 75 FR 51969–51974. |
| 09/01/2010 ..... | 12-Month Finding on a Petition to List the White-Sided Jackrabbit as Threatened or Endangered. | Notice of 12-month petition finding, Not warranted. | 75 FR 53615–53629. |
| 09/08/2010 ..... | Proposed Rule To List the Ozark Hellbender Salamander as Endangered. | Proposed Listing Endangered ..... | 75 FR 54561–54579. |
| 09/08/2010 ..... | Revised 12-Month Finding to List the Upper Missouri River Distinct Population Segment of Arctic Grayling as Endangered or Threatened. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 54707–54753. |
| 09/09/2010 ..... | 12-Month Finding on a Petition to List the Jemez Mountains Salamander (*Plethodon neomexicanus*) as Endangered or Threatened with Critical Habitat. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 54822–54845. |
| 09/15/2010 ..... | 12-Month Finding on a Petition to List Sprague's Pipit as Endangered or Threatened Throughout Its Range. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 56028–56050. |
| 09/22/2010 ..... | 12-Month Finding on a Petition to List *Agave eggersiana* (no common name) as Endangered. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 57720–57734. |

FY 2010 AND FY 2011 COMPLETED LISTING ACTIONS—Continued

| Publication date | Title | Actions | FR pages |
|---|---|---|---|
| 09/28/2010 | Determination of Endangered Status for the African Penguin. | Final Listing Endangered | 75 FR 59645–59656. |
| 09/28/2010 | Determination for the Gunnison Sage-grouse as a Threatened or Endangered Species. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 59803–59863. |
| 09/30/2010 | 12-Month Finding on a Petition to List the Pygmy Rabbit as Endangered or Threatened. | Notice of 12-month petition finding, Not warranted. | 75 FR 60515–60561. |
| 10/06/2010 | Endangered Status for the Altamaha Spinymussel & Designation of Critical Habitat. | Proposed Listing Endangered | 75 FR 61664–61690. |
| 10/7/2010 | 12-month Finding on a Petition to list the Sacramento Splittail as Endangered or Threatened. | Notice of 12-month petition finding, Not warranted. | 75 FR 62070–62095. |
| 10/28/2010 | Endangered Status & Designation of Critical Habitat for Spikedace & Loach Minnow. | Proposed Listing Endangered (uplisting) | 75 FR 66481–66552. |
| 11/2/2010 | 90-Day Finding on a Petition to List the Bay Springs Salamander as Endangered. | Notice of 90-day Petition Finding, Not substantial. | 75 FR 67341–67343. |
| 11/2/2010 | Determination of Endangered Status for the Georgia Pigtoe Mussel, Interrupted Rocksnail, & Rough Hornsnail & Designation of Critical Habitat. | Final Listing Endangered | 75 FR 67511–67550. |
| 11/2/2010 | Listing the Rayed Bean & Snuffbox as Endangered | Proposed Listing Endangered | 75 FR 67551–67583. |
| 11/4/2010 | 12-Month Finding on a Petition to List *Cirsium wrightii* (Wright's Marsh Thistle) as Endangered or Threatened. | Notice of 12-month petition finding, Warranted but precluded. | 75 FR 67925–67944. |

Our expeditious progress also includes work on listing actions that we funded in FY 2010 and FY 2011 but have not yet been completed to date. These actions are listed below. Actions in the top section of the table are being conducted under a deadline set by a court. Actions in the middle section of the table are being conducted to meet statutory timelines, that is, timelines required under the Act. Actions in the bottom section of the table are high-priority listing actions. These actions include work primarily on species with an LPN of 2, and, as discussed above, selection of these species is partially based on available staff resources, and when appropriate, include species with a lower priority if they overlap geographically or have the same threats as the species with the high priority. Including these species together in the same proposed rule results in considerable savings in time and funding, as compared to preparing separate proposed rules for each of them in the future.

ACTIONS FUNDED IN FY 2010 AND FY 2011 BUT NOT YET COMPLETED

| Species | Action |
|---|---|
| **Actions Subject to Court Order/Settlement Agreement** | |
| 6 Birds from Eurasia | Final listing determination. |
| Flat-tailed horned lizard | Final listing determination. |
| Mountain plover [4] | Final listing determination. |
| 6 Birds from Peru | Proposed listing determination. |
| Pacific walrus | 12-month petition finding. |
| Wolverine | 12-month petition finding. |
| *Solanum conocarpum* | 12-month petition finding. |
| Desert tortoise—Sonoran population | 12-month petition finding. |
| Thorne's Hairstreak butterfly [3] | 12-month petition finding. |
| Hermes copper butterfly [3] | 12-month petition finding. |
| Utah prairie dog (uplisting) | 90-day petition finding. |
| **Actions With Statutory Deadlines** | |
| Casey's june beetle | Final listing determination. |
| 7 Bird species from Brazil | Final listing determination. |
| Southern rockhopper penguin—Campbell Plateau population | Final listing determination. |
| 5 Bird species from Colombia and Ecuador | Final listing determination. |
| Queen Charlotte goshawk | Final listing determination. |
| 5 species southeast fish (Cumberland darter, rush darter, yellowcheek darter, chucky madtom, and laurel dace) [4]. | Final listing determination. |
| Ozark hellbender [4] | Final listing determination. |
| Altamaha spinymussel [3] | Final listing determination. |
| 3 Colorado plants (*Ipomopsis polyantha* (Pagosa Skyrocket), *Penstemon debilis* (Parachute Beardtongue), and *Phacelia submutica* (DeBeque Phacelia)) [4]. | Final listing determination. |
| Salmon crested cockatoo | Final listing determination. |
| Loggerhead sea turtle (assist National Marine Fisheries Service) [5] | Final listing determination. |
| 2 mussels (rayed bean (LPN = 2), snuffbox No LPN) [5] | Final listing determination. |
| Mt Charleston blue [5] | Proposed listing determination. |
| CA golden trout [4] | 12-month petition finding. |
| Black-footed albatross | 12-month petition finding. |

ACTIONS FUNDED IN FY 2010 AND FY 2011 BUT NOT YET COMPLETED—Continued

| Species | Action |
|---|---|
| Mount Charleston blue butterfly | 12-month petition finding. |
| Mojave fringe-toed lizard [1] | 12-month petition finding. |
| Kokanee—Lake Sammamish population [1] | 12-month petition finding. |
| Cactus ferruginous pygmy-owl [1] | 12-month petition finding. |
| Northern leopard frog | 12-month petition finding. |
| Tehachapi slender salamander | 12-month petition finding. |
| Coqui Llanero | 12-month petition finding/Proposed listing. |
| Dusky tree vole | 12-month petition finding. |
| 3 MT invertebrates (mist forestfly(*Lednia tumana*), *Oreohelix* sp.3, *Oreohelix* sp. 31) from 206 species petition. | 12-month petition finding. |
| 5 UT plants (*Astragalus hamiltonii, Eriogonum soredium, Lepidium ostleri, Penstemon flowersii, Trifolium friscanum*) from 206 species petition. | 12-month petition finding. |
| 2 CO plants (*Astragalus microcymbus, Astragalus schmolliae*) from 206 species petition | 12-month petition finding. |
| 5 WY plants (*Abronia ammophila, Agrostis rossiae, Astragalus proimanthus, Boechere* (*Arabis*) *pusilla, Penstemon gibbensii*) from 206 species petition. | 12-month petition finding. |
| Leatherside chub (from 206 species petition) | 12-month petition finding. |
| Frigid ambersnail (from 206 species petition) [3] | 12-month petition finding. |
| Platte River caddisfly (from 206 species petition) [5] | 12-month petition finding. |
| Gopher tortoise—eastern population | 12-month petition finding. |
| Grand Canyon scorpion (from 475 species petition) | 12-month petition finding. |
| *Anacroneuria wipukupa* (a stonefly from 475 species petition) [4] | 12-month petition finding. |
| Rattlesnake-master borer moth (from 475 species petition) [3] | 12-month petition finding. |
| 3 Texas moths (*Ursia furtiva, Sphingicampa blanchardi, Agapema galbina*) (from 475 species petition). | 12-month petition finding. |
| 2 Texas shiners (*Cyprinella* sp., *Cyprinella lepida*) (from 475 species petition) | 12-month petition finding. |
| 3 South Arizona plants (*Erigeron piscaticus, Astragalus hypoxylus, Amoreuxia gonzalezii*) (from 475 species petition). | 12-month petition finding. |
| 5 Central Texas mussel species (3 from 475 species petition) | 12-month petition finding. |
| 14 parrots (foreign species) | 12-month petition finding. |
| Berry Cave salamander [1] | 12-month petition finding. |
| Striped Newt [1] | 12-month petition finding. |
| Fisher—Northern Rocky Mountain Range [1] | 12-month petition finding. |
| Mohave Ground Squirrel [1] | 12-month petition finding. |
| Puerto Rico Harlequin Butterfly [3] | 12-month petition finding. |
| Western gull-billed tern | 12-month petition finding. |
| Ozark chinquapin (*Castanea pumila* var. *ozarkensis*) [4] | 12-month petition finding. |
| HI yellow-faced bees | 12-month petition finding. |
| Giant Palouse earthworm | 12-month petition finding. |
| Whitebark pine | 12-month petition finding. |
| OK grass pink (*Calopogon oklahomensis*) [1] | 12-month petition finding. |
| Ashy storm-petrel [5] | 12-month petition finding. |
| Southeastern pop snowy plover & wintering pop. of piping plover [1] | 90-day petition finding. |
| Eagle Lake trout [1] | 90-day petition finding. |
| Smooth-billed ani [1] | 90-day petition finding. |
| 32 Pacific Northwest mollusks species (snails and slugs) [1] | 90-day petition finding. |
| 42 snail species (Nevada & Utah) | 90-day petition finding. |
| Red knot *roselaari* subspecies | 90-day petition finding. |
| Peary caribou | 90-day petition finding. |
| Plains bison | 90-day petition finding. |
| Spring Mountains checkerspot butterfly | 90-day petition finding. |
| Spring pygmy sunfish | 90-day petition finding. |
| Bay skipper | 90-day petition finding. |
| Unsilvered fritillary | 90-day petition finding. |
| Texas kangaroo rat | 90-day petition finding. |
| Spot-tailed earless lizard | 90-day petition finding. |
| Eastern small-footed bat | 90-day petition finding. |
| Northern long-eared bat | 90-day petition finding. |
| Prairie chub | 90-day petition finding. |
| 10 species of Great Basin butterfly | 90-day petition finding. |
| 6 sand dune (scarab) beetles | 90-day petition finding. |
| Golden-winged warbler [4] | 90-day petition finding. |
| Sand-verbena moth | 90-day petition finding. |
| 404 Southeast species | 90-day petition finding. |
| Franklin's bumble bee [4] | 90-day petition finding. |
| 2 Idaho snowflies (straight snowfly & Idaho snowfly) [4] | 90-day petition finding. |
| American eel [4] | 90-day petition finding. |
| Gila monster (Utah population) [4] | 90-day petition finding. |
| Arapahoe snowfly [4] | 90-day petition finding. |
| Leona's little blue [4] | 90-day petition finding. |
| Aztec gilia [5] | 90-day petition finding. |
| White-tailed ptarmigan [5] | 90-day petition finding. |
| San Bernardino flying squirrel [5] | 90-day petition finding. |

ACTIONS FUNDED IN FY 2010 AND FY 2011 BUT NOT YET COMPLETED—Continued

| Species | Action |
|---|---|
| Bicknell's thrush [5] | 90-day petition finding. |
| Sonoran talussnail [5] | 90-day petition finding. |
| 2 AZ Sky Island plants (*Graptopetalum bartrami* & *Pectis imberbis*) [5] | 90-day petition finding. |
| I'iwi [5] | 90-day petition finding. |
| **High-Priority Listing Actions** | |
| 19 Oahu candidate species [2] (16 plants, 3 damselflies) (15 with LPN = 2, 3 with LPN = 3, 1 with LPN =9). | Proposed listing. |
| 19 Maui-Nui candidate species [2] (16 plants, 3 tree snails) (14 with LPN = 2, 2 with LPN = 3, 3 with LPN = 8). | Proposed listing. |
| Dune sagebrush lizard (formerly Sand dune lizard) [4] (LPN = 2) | Proposed listing. |
| 2 Arizona springsnails [2] (*Pyrgulopsis bernadina* (LPN = 2), *Pyrgulopsis trivialis* (LPN = 2)) | Proposed listing. |
| New Mexico springsnail [2] (*Pyrgulopsis chupaderae* (LPN = 2) | Proposed listing. |
| 2 mussels [2] (sheepnose (LPN = 2), spectaclecase (LPN = 4),) | Proposed listing. |
| 8 Gulf Coast mussels (southern kidneyshell (LPN = 2), round ebonyshell (LPN = 2), Alabama pearlshell (LPN = 2), southern sandshell (LPN = 5), fuzzy pigtoe (LPN = 5), Choctaw bean (LPN = 5), narrow pigtoe (LPN = 5), and tapered pigtoe (LPN = 11)) [4]. | Proposed listing. |
| Umtanum buckwheat (LPN = 2) [4] | Proposed listing. |
| Grotto sculpin (LPN = 2) [4] | Proposed listing. |
| 2 Arkansas mussels (Neosho mucket (LPN =2) & Rabbitsfoot (LPN = 9)) [4] | Proposed listing. |
| Diamond darter (LPN = 2) [4] | Proposed listing. |
| Gunnison sage-grouse (LPN =2) [4] | Proposed listing. |
| Miami blue (LPN = 3) [3] | Proposed listing. |
| 4 Texas salamanders (Austin blind salamander (LPN = 2), Salado salamander (LPN = 2), Georgetown salamander (LPN = 8), Jollyville Plateau (LPN = 8)) [3]. | Proposed listing. |
| 5 SW aquatics (Gonzales Spring Snail (LPN = 2), Diamond Y springsnail (LPN =2), Phantom springsnail (LPN = 2), Phantom Cave snail (LPN = 2), Diminutive amphipod (LPN = 2)) [3]. | Proposed listing. |
| 2 Texas plants (Texas golden gladecress (*Leavenworthia texana*) (LPN = 2), Neches River rose-mallow (*Hibiscus dasycalyx*) (LPN = 2)) [3]. | Proposed listing. |
| FL bonneted bat (LPN =2) [3] | Proposed listing. |
| Kittlitz's murrelet (LPN = 2) [5] | Proposed listing. |
| Umtanum buckwheat (LPN = 2) [3] | Proposed listing. |
| 21 Big Island (HI) species [5] (includes 8 candidate species—5 plants & 3 animals; 4 with LPN = 2, 1 with LPN = 3, 1 with LPN = 4, 2 with LPN = 8). | Proposed listing. |
| Oregon spotted frog (LPN = 2) [5] | Proposed listing. |
| 2 TN River mussels (fluted kidneyshell (LPN = 2), slabside pearlymussel (LPN = 2) [5] | Proposed listing. |
| Jemez Mountain salamander (LPN = 2) [5] | Proposed listing. |

[1] Funds for listing actions for these species were provided in previous FYs.
[2] Although funds for these high-priority listing actions were provided in FY 2008 or 2009, due to the complexity of these actions and competing priorities, these actions are still being developed.
[3] Partially funded with FY 2010 funds and FY 2011 funds.
[4] Funded with FY 2010 funds.
[5] Funded with FY 2011 funds.

We have endeavored to make our listing actions as efficient and timely as possible, given the requirements of the relevant law and regulations, and constraints relating to workload and personnel. We are continually considering ways to streamline processes or achieve economies of scale, such as by batching related actions together. Given our limited budget for implementing section 4 of the Act, these actions described above collectively constitute expeditious progress.

*Boechera pusilla* will be added to the list of candidate species upon publication of this 12-month finding. We will continue to evaluate this species as new information becomes available. Continuing review will determine if a change in status is warranted, including the need to make prompt use of emergency listing procedures.

We intend that any proposed listing determination for *Boechera pusilla* will be as accurate as possible. Therefore, we will continue to accept additional information and comments from all concerned governmental agencies, the scientific community, industry, or any other interested party concerning this finding.

## References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Wyoming Ecological Services Field Office (see **ADDRESSES** section).

## Author(s)

The primary authors of this notice are the staff members of the Wyoming Ecological Services Field Office.

**Authority:** The authority for this section is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: May 16, 2011.

**Rowan W. Gould,**

*Acting Director, Fish and Wildlife Service.*

[FR Doc. 2011–13910 Filed 6–8–11; 8:45 am]

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**S. 990/P.L. 112–14**

PATRIOT Sunsets Extension Act of 2011 (May 26, 2011; 125 Stat. 216)

**H.R. 793/P.L. 112–15**

To designate the facility of the United States Postal Service located at 12781 Sir Francis Drake Boulevard in Inverness, California, as the ''Specialist Jake Robert Velloza Post Office''. (May 31, 2011; 125 Stat. 217)

**H.R. 1893/P.L. 112–16**

Airport and Airway Extension Act of 2011, Part II (May 31, 2011; 125 Stat. 218)

**S. 1082/P.L. 112–17**

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