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Presidential Documents

Title 3—

The President

Presidential Determination No. 2004–31 of May 25, 2004

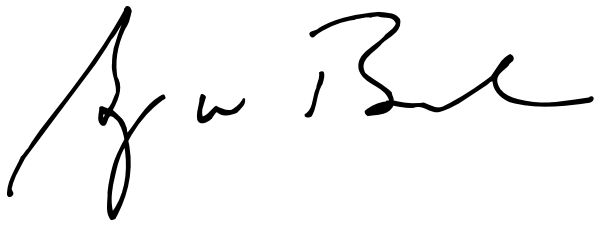
Waiving Prohibition on United States Military Assistance with Respect to Burkina Faso and Dominica

Memorandum for the Secretary of State

Consistent with the authority vested in me by section 2007 of the American Servicemembers' Protection Act of 2002 (the ''Act''), title II of Public Law 107–206 (22 U.S.C. 7421 *et seq.*), I hereby:

- Determine that Burkina Faso and Dominica have each entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal Court from processing against U.S. personnel present in such countries; and
- Waive the prohibition of section 2007(a) of the Act with respect to these countries for as long as such agreement remains in force.

You are authorized and directed to report this determination to the Congress and to arrange for its publication in the **Federal Register**.



[FR Doc. 04–12801
Filed 6–3–04; 8:45 am]
Billing code 4710–10–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.

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 1

[Docket No. 98–106–3]

RIN 0579–AB69

Animal Welfare; Definition of Animal

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the Animal Welfare Act (AWA) regulations to reflect an amendment to the Act's definition of the term *animal.* The Farm Security and Rural Investment Act of 2002 amended the definition of *animal* to specifically exclude birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research. While the definition of *animal* in the regulations has excluded rats of the genus *Rattus* and mice of the genus *Mus* bred for use in research, that definition has also excluded all birds (*i.e.*, not just those birds bred for use in research). To make the definition of *animal* in the regulations consistent with the definition of *animal* in the AWA, this final rule amends the regulations by narrowing the scope of the exclusion for birds to only those birds bred for use in research. This final rule is intended only to make the definition of *animal* in the regulations consistent with the definition of *animal* in AWA. In the Proposed Rules section of today's **Federal Register**, we are publishing an advance notice of proposed rulemaking in which we solicit comments from the public to aid in the development of regulations and standards for birds not specifically bred for use in research. In addition, our advance notice of proposed rulemaking also requests public comment on issues related to the humane handling, care, treatment, and transportation of rats and mice covered by the AWA.

DATES: This rule is effective June 5, 2004.

FOR FURTHER INFORMATION CONTACT: Dr. Jerry DePoyster, Senior Veterinary Medical Officer, Animal Care, APHIS, 4700 River Road Unit 84, Riverdale, MD 20737–1234; (301) 734–7586.

SUPPLEMENTARY INFORMATION:

Background

Under the Animal Welfare Act (AWA) (7 U.S.C. 2131 *et seq.*), the Secretary of Agriculture is authorized to promulgate standards and other requirements governing the humane handling, care, treatment, and transportation of certain animals by dealers, research facilities, exhibitors, operators of auction sales, and carriers and intermediate handlers. Within the U.S. Department of Agriculture, responsibility for administering the AWA has been delegated to the Administrator of the Animal and Plant Health Inspection Service (APHIS). Within APHIS, the responsibility for administering the AWA has been delegated to the Deputy Administrator for Animal Care. Regulations established under the AWA are contained in the Code of Federal Regulations (CFR) in 9 CFR parts 1, 2, and 3. Part 1 contains definitions for terms used in parts 2 and 3; part 2 provides administrative requirements and sets forth institutional responsibilities for regulated parties; and part 3 contains specifications for the humane handling, care, treatment, and transportation of animals covered by the AWA. Currently, part 3 consists of subparts A through E, which contain standards for specific animals, and subpart F, which sets forth general standards for warmblooded animals not otherwise specified in that part.

Definition of Animal

Under Section 2(g) of the AWA (7 U.S.C. 2132(g)), the term *animal* includes, with certain exceptions, any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warmblooded animal, as the Secretary may determine is being used, or is intended for use for research, teaching, testing, experimentation, or exhibition purposes, or as a pet. The Farm Security and Rural Investment Act of 2002 (Pub. L. 107–171, signed into law on May 13, 2002), included provisions that amended the definition of *animal* in the AWA by specifically excluding birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research. In this document, we are amending the definition of *animal* in the regulations to be consistent with the definition of *animal* in the AWA.

Prior to the effective date of this final rule, the definition of *animal* in 9 CFR 1.1 excluded rats of the genus *Rattus* and mice of the genus *Mus* bred for use in research, as well as all birds (*i.e.*, not just those birds bred for use in research). As a result, this final rule will narrow the scope of the exclusion for birds to only those birds bred for use in research. This final rule is intended only to make the definition of *animal* in the regulations consistent with the definition of *animal* in the AWA.

Advance Notice of Proposed Rulemaking

We are currently considering several changes to the regulations to help promote the humane handling, care, treatment, and transportation of birds, rats, and mice not specifically excluded from coverage under the AWA. In the Proposed Rules section of today's **Federal Register** (APHIS Docket No. 98–106–4), we are publishing an advance notice of proposed rulemaking in which we solicit public comment to aid in the development of regulations and standards for birds not bred for use in research. In addition, our advance notice of proposed rulemaking also requests responses to help determine if we should continue to regulate rats and mice, except for rats of the genus *Rattus* and mice of the genus *Mus* bred for use in research, under the general standards in subpart F of part 3 or if we should establish specific standards for them. Finally, our advance notice of proposed rulemaking solicits data and information from the public concerning the potential economic effects on entities that may be affected if we were to establish specific standards for those birds, rats, and mice.

Neither this final rule nor the advance notice of proposed rulemaking published in the Proposed Rules section of today's **Federal Register** will immediately result in any change in our Animal Care program. We will continue to cover rats and mice, except for rats of the genus *Rattus* and mice of the

genus *Mus* bred for use in research, under the regulations and standards in part 2 and subpart F of part 3. When we determine how to regulate birds not bred for use in research and what, if any, specific standards should be established for covered rats and mice, we will publish a proposed rule for public comment in the **Federal Register**. Any changes to our Animal Care program that may result from such a proposal will be addressed in that document.

Effective Date

We are taking this action to update our regulations to reflect an amendment to the definition of *animal* that has already occurred in the Animal Welfare Act. This final rule is intended only to make the definition of *animal* in the regulations consistent with the definition of *animal* in the AWA. In the Proposed Rules section of today's **Federal Register**, we are publishing an advance notice of proposed rulemaking in which we solicit comments from the public to aid in the development of regulations and standards for birds not specifically bred for use in research.

Accordingly, pursuant to the administrative procedure provisions in 5 U.S.C. 553, we find upon good cause that prior notice and other public procedure with respect to this rule are unnecessary. We also find good cause for making this rule effective less than 30 days after publication in the **Federal Register**.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

This final rule amends the regulations to reflect an amendment to the Act's definition of the term *animal*. The Farm Security and Rural Investment Act of 2002 amended the definition of *animal* to specifically exclude birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research. While the definition of *animal* in the regulations has excluded rats of the genus *Rattus* and mice of the genus *Mus* bred for use in research, that definition has also excluded all birds (*i.e.*, not just those birds bred for use in research). Therefore, this final rule will narrow the scope of the exclusion for birds to only those birds bred for use in research.

Until a determination is made concerning how to regulate the care and use of birds not specifically bred for use in research, this amendment to the regulations' definition of *animal* will not have any economic effects on any entities, large or small. Therefore, there are no entities that are affected by this rule at this time. Given the absence of economic effects associated with this rule, there are likewise no costs or benefits associated with this rule.

As noted earlier, in the Proposed Rules section of today's **Federal Register**, we are publishing an advance notice of proposed rulemaking in which we solicit public comment to aid in the development of regulations and standards for birds not bred for use in research. In addition, our advance notice of proposed rulemaking also requests responses to help determine if we should continue to regulate rats and mice covered by the AWA under the general standards in subpart F of part 3 or if we should establish specific standards for them. When we determine how to regulate the handling, treatment, care, and transportation of birds not specifically bred for use in research and what, if any, specific standards should be established for covered rats and mice, we will publish a proposed rule for public comment in the **Federal Register**. Any economic effects that may result from such a proposal will be addressed in that document.

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

Executive Order 12372

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

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. The Act does not provide administrative procedures which must be exhausted prior to a judicial challenge to the provisions of this rule.

Paperwork Reduction Act

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

List of Subjects in 9 CFR Part 1

Animal welfare, Pets, Reporting and recordkeeping requirements, Research.

■ Accordingly, we are amending 9 CFR part 1 as follows:

PART 1—DEFINITIONS OF TERMS

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

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

■ 2. In § 1.1, the definition of *animal* is revised to read as follows:

1.1 Definitions.

* * * * *

Animal means any live or dead dog, cat, nonhuman primate, guinea pig, hamster, rabbit, or any other warmblooded animal, which is being used, or is intended for use for research, teaching, testing, experimentation, or exhibition purposes, or as a pet. This term excludes birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research; horses not used for research purposes; and other farm animals, such as, but not limited to, livestock or poultry used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs, including those used for hunting, security, or breeding purposes.

* * * * *

Done in Washington, DC, this 1st day of June 2004.

Bill Hawks,

Under Secretary for Marketing and Regulatory Programs.

[FR Doc. 04–12693 Filed 6–3–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–110–AD; Amendment 39–13653; AD 2004–11–07]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD),

applicable to all McDonnell Douglas Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes, that requires implementation of a program of structural inspections of baseline structure to detect and correct fatigue cracking in order to ensure the continued airworthiness of these airplanes as they approach the manufacturer's original fatigue design life goal. This action is necessary to detect and correct fatigue cracking that could compromise the structural integrity of these airplanes. This action is intended to address the identified unsafe condition.

DATES: Effective July 9, 2004.

The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of July 9, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

FOR FURTHER INFORMATION CONTACT: Mike Lee, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5325; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all McDonnell Douglas Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes was published in the **Federal Register** on October 8, 2003 (68 FR 58046). That action proposed to require implementation of a program of structural inspections of baseline structure to detect and correct fatigue cracking in order to ensure the continued airworthiness of these airplanes as they approach the manufacturer's original fatigue design life goal.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Request To Clarify Paragraph (b) of the Notice of Proposed Rulemaking (NPRM)

One commenter, the airplane manufacturer, requests that paragraph (b) of the NPRM be clarified to specify what an operator should do to inspect a discrepant principal structural element (PSE). The commenter states that the preamble of the NPRM alludes to what to do, but that the body of the NPRM does not specify what actions to accomplish. Specifically, the commenter requests that the following clarification be added to paragraph (b) of the NPRM: ''If, during the inspection of the PSE per Supplemental Inspection Document Volume II, a discrepancy is determined to exist, then the following applies: For an inspection prior to $\frac{3}{4}N_{th}$ or N_{th}: The area of the PSE affected by the discrepancy must be inspected prior to N_{th} with a method approved by the Manager of the Los Angeles Aircraft Certification Office (ACO). For an inspection after N_{th}: The area of the PSE affected by the discrepancy must be inspected prior to the accumulation of an additional $\Delta NDI/2$, measured from the last non-discrepant inspection finding, with a method approved by the Los Angeles ACO.''

The FAA agrees that clarification is needed. We have added a new paragraph (c) of this AD to clarify the actions and compliance times required if any discrepancy is detected during the inspections required by paragraph (b) of this AD. Paragraphs subsequent to paragraph (b) of the NPRM have been renumbered accordingly in this AD.

Request To Clarify the Method for Approving a Repair

One commenter, the airplane manufacturer, requests clarification concerning the multiple state approach used for approving repairs. Specifically, the commenter requests that a ''note'' be added after paragraph (d) of the NPRM to clarify that Advisory Circular AC 25.1529–1, Instructions for Continued Airworthiness of Structural Repairs on Transport Airplanes, dated August 1, 1991, is appropriate guidance concerning the approval of repairs to PSEs.

We agree with the commenter's request and have revised the final rule to add a new ''Note 2'' advising that AC 25.1529–1 provides additional guidance concerning the approval of repairs.

Request To Clarify Compliance ''Threshold'' of Paragraph (d) of the NPRM

One commenter, the airplane manufacturer, requests that the ''threshold'' specified in paragraph (d)(2) of the NPRM be clarified. The commenter asserts that the ''threshold'' could be interpreted as reaching 75% of the PSE inspection threshold and not the repair threshold. The commenter requests that paragraph (d)(2) of the NPRM be revised as follows: ''(2) Prior to reaching 75% of the threshold as determined in paragraph (d)(1) of the NPRM, submit the inspection methods and repetitive inspection intervals for the repair for approval by the Manager of the Los Angeles ACO.'' The commenter notes that paragraph (d)(3) of the NPRM is clear concerning what threshold is being referred to.

We agree with the commenter that clarification is warranted. We have redesignated paragraph (d)(2) of the NPRM as paragraph (e)(2) of the final rule and revised the wording of new paragraph (e)(2) to clarify the threshold accordingly.

Request To Clarify the Compliance Times of Paragraph (e) of the NPRM

One commenter, the airplane manufacturer, requests that paragraph (e) of the NPRM be revised to delete the phrase that limits the applicability of paragraph (e) of the NPRM to airplanes that have exceeded the compliance times specified in paragraph (b) of the NPRM. The commenter states that, if the airplane has not exceeded these times, then the operator would only be required to comply per paragraph (b) of the NPRM.

We do not concur with the commenter's request. The purpose of this limitation is to avoid the need for air carriers to comply with this paragraph (redesignated as paragraph (f) in this final rule) if they are able to comply with paragraph (b) within the compliance times specified in paragraph (b) of the AD. Without this limitation, for example, an air carrier placing a relatively new airplane into service would either have to perform the inspections before placing it into service or obtain an FAA approval for performing them later.

In considering this comment, however, we recognize that the only time that an air carrier would need to address this issue is when the airplane

has exceeded the fatigue life threshold (N_{th}). Before that time, paragraph (b) of the AD allows for performance of the inspections within the compliance times specified in that paragraph. Therefore, we have revised paragraph (f) of the AD to reference only the fatigue life threshold (N_{th}).

Request To Revise Certain Terminology

One commenter, the airplane manufacturer, requests that the terms ''SSIP'' and ''SSI'' be removed from the NPRM and replaced with the terms ''SIP'' and ''PSE,'' respectively, to be consistent with the terminology used in the MD–80 Supplemental Inspection Document.

We agree with the commenter's request. We have redesignated paragraph (e) of the NPRM as paragraph (f) of the final rule, and where those terms appeared in paragraph (e) of the NPRM, paragraph (f) of the final rule reflects those changes. However, other sections where usage of those terms appeared in the preamble of the NPRM do not appear in the final rule, and it is not necessary to revise in the final rule in that regard.

Request To Clarify a Reference in the SID

One commenter, an airline operator, requests that clarification be given regarding possible misinterpretation of notes (**) and (***) of the Boeing MD80 SID, Volume 1. The commenter states that the two PSEs (PSEs 53.80.004 and 54.80.005) referenced in notes (**) and (***) can be inspected at ''intervals specified'' in the Maintenance Review Board (MRB) Report, and that the MRB Report mentions ''C'' check intervals. Therefore, the commenter suggests that the two PSEs could mistakenly be inspected at intervals of every ''C'' check.

We acknowledge the commenter's request for clarification, but note that no change is necessary to the final rule for the following reasons. The intent of notes (**) and (***) in the SID is to allow operators the opportunity to receive credit for MD80 SID inspections of the forward and aft engine pylon isolators land conebolts when inspections are performed at engine changes. However, the N_{th} still remains at 50,000 landings and ΔNDI/2 intervals still remain at 10,000 landings even if the inspections are performed at engine changes per notes (**) and (***) of the SID.

Request To Correct ''SIP Inspection Requirements'' of the Discussion

One commenter, the airplane manufacturer, points out that the first sentence of the ''SIP Inspection Requirements'' of the Discussion section of the NPRM should be revised to reflect the correct threshold requirements. Specifically, the commenter requests that the first sentence be revised to read, ''Paragraph (b) of this proposed AD also would require, for airplanes that have exceeded the $N_{th}/2$, that each PSE be inspected prior to reaching the established thresholds ($\frac{3}{4}N_{th}$ and N_{th}) or within 18 months after the effective date of this AD.'' The commenter notes that inspection of a PSE that exceeds N_{th} cannot be inspected prior to N_{th}.

We acknowledge the commenter's request to revise that paragraph of the Discussion section. Since that section of the preamble does not reappear in the final rule, no change to the final rule is necessary in that regard.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes previously described. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Interim Action

This is considered to be interim action. The FAA is currently considering requiring damage tolerance-based inspections and procedures that include all major structural repairs and modifications (RAMs), which may result in additional rulemaking.

Cost Impact

There are approximately 1,167 Model DC–9–80 and MD–88 airplanes of the affected design in the worldwide fleet. The FAA estimates that 665 airplanes of U.S. registry will be affected by this AD.

Incorporation of the SIP into an operator's maintenance program is estimated to require 1,062 work hours (per operator), at an average labor rate of $65 per work hour. Based on these figures, the cost to the 18 affected U.S. operators to incorporate the SIP is estimated to be $1,242,540.

The recurring inspection costs in this AD are estimated to be 362 work hours per airplane per year, at an average labor rate of $65 per work hour. Based on these figures, the recurring inspection costs are estimated to be $23,530 per airplane, per inspection, or $15,647,450 for the affected U.S. fleet.

Based on the above figures, the total cost impact of this AD on U.S. operators is estimated to be $1,242,540 for the first year, and $15,647,450 for each year thereafter. These ''total cost impact'' figures assume that no operator has yet accomplished any of the requirements of this AD.

Additionally, the number of required work hours for each required inspection (and the SIP), as indicated above, is presented as if the accomplishment of those actions are to be conducted as ''stand alone'' actions. However, in actual practice, these actions for the most part will be accomplished coincidentally or in combination with normally scheduled airplane inspections and other maintenance program tasks. Therefore, the actual number of necessary additional work hours will be minimal in many instances. Further, any cost associated with special airplane scheduling can be expected to be minimal.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) 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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (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. Section 39.13 is amended by adding the following new airworthiness directive:

2004–11–07 McDonnell Douglas: Amendment 39–13653. Docket 2000–NM–110–AD.

Applicability: Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct fatigue cracking that could compromise the structural integrity of these airplanes, accomplish the following:

Revision of the Maintenance Inspection Program

(a) Within 12 months after the effective date of this AD, incorporate a revision into the FAA-approved maintenance inspection program that provides for inspection(s) of the Principal Structural Elements (PSEs), in accordance with Section 3 of Volume I , Revision B, dated March 2003, of Boeing Report No. L26–022, ''MD–80 Supplemental Inspection Document (SID).'' PSEs are also specified in the SID. Unless otherwise specified, all references in this AD to the ''SID'' are to Revision B, dated March 2003.

Non-Destructive Inspections (NDIs)

(b) For all PSEs listed in Section 3 of Volume I of the SID, perform an NDI for fatigue cracking of each PSE in accordance with the NDI procedures specified in Section 2 of Volume II of the SID, at the times specified in paragraph (b)(1), (b)(2), or (b)(3) of this AD, as applicable.

(1) For airplanes that have less than three quarters of the fatigue life threshold ($\frac{3}{4}N_{th}$) as of the effective date of the AD: Perform an NDI for fatigue cracking no earlier than one-half of the threshold ($\frac{1}{2}N_{th}$) but prior to reaching three-quarters of the threshold ($\frac{3}{4}N_{th}$), or within 18 months after the effective date of this AD, whichever occurs later. Inspect again prior to reaching the threshold (N_{th}), but no earlier than ($\frac{3}{4}N_{th}$). Thereafter, after passing the threshold (N_{th}), repeat the inspection for that PSE at intervals not to exceed ΔNDI/2.

(2) For airplanes that have reached or exceeded three-quarters of the fatigue life threshold ($\frac{3}{4}N_{th}$), but less than the threshold (N_{th}), as of the effective date of the AD: Perform an NDI prior to reaching the threshold (N_{th}), or within 18 months after the effective date of this AD, whichever occurs later. Thereafter, after passing the threshold (N_{th}), repeat the inspection for that PSE at intervals not to exceed ΔNDI/2.

(3) For airplanes that have reached or exceeded the fatigue life threshold (N_{th}) as of the effective date of the AD: Perform an NDI within 18 months after the effective date of this AD. Thereafter, repeat the inspection for that PSE at intervals not to exceed ΔNDI/2.

Discrepant Findings

(c) If any discrepancy (*e.g.*, differences on the airplane from the NDI reference standard, such as PSEs that have been repaired, altered, or modified) is detected during any inspection required by paragraph (b) of this AD, accomplish the action specified in paragraph (c)(1) or (c)(2) of this AD, as applicable.

(1) If a discrepancy is detected during any inspection performed prior to $\frac{3}{4}N_{th}$ or N_{th}: The area of the PSE affected by the discrepancy must be inspected prior to N_{th} per a method approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA.

(2) If a discrepancy is detected during any inspection performed after N_{th}: The area of the PSE affected by the discrepancy must be inspected prior to the accumulation of an additional ΔNDI/2, measured from the last non-discrepant inspection finding, per a method approved by the Manager of the Los Angeles ACO.

Reporting Requirements

(d) All negative, positive, or discrepant (discrepant finding examples are described in paragraph (c) of this AD) findings of the inspections accomplished under paragraph (b) of this AD must be reported to Boeing, at the times specified in, and in accordance with the instructions contained in, Section 3 of Volume I of the SID. Information collection requirements contained in this regulation have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB Control Number 2120–0056.

Corrective Actions

(e) Any cracked structure of a PSE detected during any inspection required by paragraph (b) of this AD must be repaired before further flight in accordance with an FAA-approved method. Accomplish follow-on actions described in paragraphs (e)(1), (e)(2), and (e)(3) of this AD, at the times specified.

(1) Within 18 months after repair, perform a damage tolerance assessment (DTA) that defines the threshold for inspection of the repair and submit the assessment for approval to the Manager of the Los Angeles ACO.

(2) Prior to reaching 75% of the threshold as determined in paragraph (e)(1) of this AD, submit the inspection methods and repetitive inspection intervals for the repair for approval by the Manager of the Los Angeles ACO.

(3) Prior to the threshold as determined in paragraph (e)(1) of this AD, incorporate the inspection method and repetitive inspection intervals into the FAA-approved structural maintenance or inspection program for the airplane.

Note 1: For the purposes of this AD, the FAA anticipates that submissions of the damage tolerance assessment of the repair, if acceptable, should be approved within six months after submission.

Note 2: Advisory Circular AC 25.1529–1, Instructions for Continued Airworthiness of Structural Repairs on Transport Airplanes, dated August 1, 1991, is considered to be additional guidance concerning the approval of repairs to PSEs.

Inspection for Transferred Airplanes

(f) Before any airplane that has exceeded the fatigue life threshold (N_{th}) can be added to an air carrier's operations specifications, a program for the accomplishment of the inspections required by this AD must be established per paragraph (f)(1) or (f)(2) of this AD, as applicable.

(1) For airplanes that have been inspected per this AD, the inspection of each PSE must be accomplished by the new operator per the previous operator's schedule and inspection method, or the new operator's schedule and inspection method, at whichever time would result in the earlier accomplishment date for that PSE inspection. The compliance time for accomplishment of this inspection must be measured from the last inspection accomplished by the previous operator. After each inspection has been performed once, each subsequent inspection must be performed per the new operator's schedule and inspection method.

(2) For airplanes that have not been inspected per this AD, the inspection of each PSE required by this AD must be accomplished either prior to adding the airplane to the air carrier's operations specification, or per a schedule and an inspection method approved by the Manager, Los Angeles ACO. After each inspection has been performed once, each subsequent inspection must be performed per the new operator's schedule.

Inspections Accomplished Before the Effective Date of This AD

(g) Inspections per Boeing Report No. L26–022, ''MD–80 Supplemental Inspection Document (SID),'' Revision A, dated September 2000, accomplished prior to the effective date of this AD, are acceptable for compliance with the requirements of paragraph (b) of this AD.

Acceptable for Compliance

(h) McDonnell Douglas Report No. MDC 91K0263, ''DC–9/MD–80 Aging Aircraft Repair Assessment Program Document,'' dated July 1997, provides inspection/replacement programs for certain repairs to the fuselage pressure shell. These repairs and inspection/replacement programs are considered acceptable for compliance with the requirements of paragraphs (b) and (e) of this AD for repairs subject to that document.

Alternative Methods of Compliance

(i) In accordance with 14 CFR 39.19, the Manager, Los Angeles ACO, is authorized to approve alternative methods of compliance (AMOCs) for this AD.

Incorporation by Reference

(j) Unless otherwise specified in this AD, the actions shall be done in accordance with Section 3 of Volume I, Revision B, dated March 2003, of Boeing Report No. L26–022, ''MD–80 Supplemental Inspection Document (SID).'' This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention:

Data and Service Management, Dept. C1–L5A (D800–0024). Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Effective Date

(k) This amendment becomes effective on July 9, 2004.

Issued in Renton, Washington, on May 5, 2004.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service

[FR Doc. 04–12398 Filed 6–3–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–251–AD; Amendment 39–13655; AD 2004–11–09]

RIN 2120–AA64

Airworthiness Directives; Fokker Model F.28 Mark 0070 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Fokker Model F.28 Mark 0070 series airplanes, that requires inspection of cables installed on certain contactors in the electrical power center (EPC) for proper installation of wires, and reinstallation of wires if necessary. These actions are necessary to prevent a short circuit in the EPC, possibly leading to a fire in the main cabin and damage to the airplane, or injury to passengers and flightcrew. These actions are intended to address the identified unsafe condition.

DATES: Effective July 9, 2004.

The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of July 9, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Fokker Services B.V., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer; International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1137; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Fokker Model F.28 Mark 0070 series airplanes was published in the **Federal Register** on March 17, 2004 (69 FR 12580). That action proposed to require inspection of cables installed on certain contactors in the electrical power center for proper installation of wires, and reinstallation of wires if necessary.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Conclusion

The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

The FAA estimates that 2 airplanes of U.S. registry will be affected by this AD, that it will take approximately 2 work hours per airplane to accomplish the required inspection, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $260, or $130 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) 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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (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. Section 39.13 is amended by adding the following new airworthiness directive:

2004–11–09 Fokker Services B.V.: Amendment 39–13655. Docket 2002–NM–251–AD.

Applicability: Model F.28 Mark 0070 series airplanes, serial numbers 11521, and 11528 through 11585 inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent a short circuit in the electrical power center (EPC), possibly leading to a fire in the main cabin and damage to the airplane, or injury to passengers and flightcrew, accomplish the following:

Inspection, and Reinstallation if Necessary

(a) Within 6 months after the effective date of this AD, perform a general visual

inspection of the 4 contactors having part number 9124–9283 located in the EPC for proper installation of the wires; in accordance with the Accomplishment Instructions of Fokker Service Bulletin SBF100–24–035, dated May 27, 2002.

(1) If the installation is correct, no further action is required by this AD.

(2) If the installation is incorrect, prior to further flight, reinstall the wires in accordance with the Accomplishment Instructions of the service bulletin.

Note 1: For the purposes of this AD, a general visual inspection is defined as: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to enhance visual access to all exposed surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

Exception to Service Bulletin Reporting

(b) Although Fokker Service Bulletin SBF100–24–035, dated May 27, 2002, specifies that all inspection results be reported to Fokker Services B.V., this AD does not include such a requirement.

Alternative Methods of Compliance

(c) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate, is authorized to approve alternative methods of compliance for this AD.

Incorporation by Reference

(d) The actions shall be done in accordance with Fokker Service Bulletin SBF100–24–035, dated May 27, 2002. This incorporation by reference is approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Fokker Services B.V., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Note 2: The subject of this AD is addressed in Dutch airworthiness directive 2002–112, dated July 31, 2002.

Effective Date

(e) This amendment becomes effective on July 9, 2004.

Issued in Renton, Washington, on May 20, 2004.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–12397 Filed 6–3–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–SW–32–AD; Amendment 39–13652; AD 2004–11–06]

RIN 2120–AA64

Airworthiness Directives; Agusta S.p.A. Model A109E Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) for the specified Agusta S.p.A. (Agusta) model helicopters that requires disabling certain windshield wipers and thereafter modifying the electrical system of the windshield wipers by installing a new resistor and condenser, eliminating incompatibility problems with the relays, and replacing the timed relay for certain windshield wiper kits. This amendment is prompted by testing that revealed overheating of the electrical resistor on the electrical system of the windshield wipers due to a system overload because of a partial incompatibility of new timed relays with the configuration of the windshield wiper electrical system. The actions specified by this AD are intended to prevent the incompatibility of certain relays with the windshield wiper electrical system, overheating of the resistor due to system overload, and an electrical fire.

DATES: Effective July 9, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of July 9, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Agusta, 21017 Cascina Costa di Samarate (VA) Italy, Via Giovanni Agusta 520, telephone 39 (0331) 229111, fax 39 (0331) 229605–222595. This information may be examined at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Carroll Wright, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Regulations and Guidance Group, Fort Worth, Texas 76193–0111, telephone (817) 222–5120, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION: A proposal to amend 14 CFR part 39 to include an AD for the specified model helicopters was published in the **Federal Register** on January 8, 2004 (69 FR 1274). That action proposed to require disabling certain windshield wipers and thereafter modifying the electrical system of the windshield wipers by installing a new resistor and condenser, eliminating incompatibility problems with the relays, and replacing the timed relay for certain windshield wiper kits.

Ente Nazionale per l'Aviazione Civile (ENAC), the airworthiness authority for Italy, notified the FAA that an unsafe condition may exist on Agusta Model 109E helicopters. ENAC advises modifying the electrical installation of some windshield wiper kits as stated in the manufacturer's service information.

Agusta has issued Alert Bollettino Tecnico No. 109EP–27, Revision A, dated February 7, 2003 (ABT), which specifies modifying the electrical installation of windshield wiper kit, part number (P/N) 109–0741–65, by installing kit, P/N 109–0823–13, to replace the existing resistor and condenser to eliminate functional malfunction when timed relays, P/N TDH–8070–1001P or T412–2006, are installed. During a ground functional test, overheating of the electrical resistor was found in the windshield wiper electrical system due to a system overload. An investigation revealed that the source of the overheating was a functional malfunction caused by a partial incompatibility of new timed relays with the actual configuration of the windshield wiper electrical system. ENAC classified the ABT as mandatory and issued AD No. 2003–032, dated February 10, 2003, to ensure the continued airworthiness of these helicopters in Italy.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposal or the FAA's determination of the cost to the public. With the exception of changing the ABT No. from 109SP–27 as shown in the ''Discussion'' section of the notice to the correct No.

109EP–27 in the ''Supplementary'' section of the final rule, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

The FAA estimates that this AD will affect 18 helicopters of U.S. registry. It will take approximately 3 work hours to disable the windshield wipers and modify the electrical system of the windshield wipers and 4 work hours per helicopter if the timed relays must be replaced by modifying the electrical system of the windshield wipers. The average labor rate is $65 per work hour. Required parts will cost approximately $367 per helicopter. Based on these figures, we estimate the total cost impact of the AD on U.S. operators is $14,796, assuming the relays are replaced on the entire fleet. However, the manufacturer states in its ABT that it will reimburse owners for 3 or 4 work hours at a fixed rate of $40 per work hour and will provide the parts for free. Assuming a warranty credit of 4 work hours ($2,880) and free parts ($6,606), the estimated total cost impact of this AD is $5,310.

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) 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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (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. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

2004–11–06 Agusta S.p.A: Amendment 39–13652. Docket No. 2003–SW–32–AD.

Applicability: Model A109E helicopters, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent the incompatibility of certain relays with the windshield wiper electrical system, overheating of the resistor due to system overload, and an electrical fire, accomplish the following:

(a) For helicopters, serial number (S/N) 11502 through 11504, and 11122 through 11130, except 11123, 11127, and 11129:

(1) Within 5 hours time-in-service, do the following:

(i) Disable the windshield wipers by following the Compliance Instructions, Part I, paragraphs 2.1 through 2.5, of Agusta Alert Bollettino Tecnico No. 109EP–27, Revision A, dated February 7, 2003 (ABT).

(ii) Install a placard stating that the windshield wipers are inoperative by following the Compliance Instructions, Part I, paragraph 2.6, of the ABT.

(2) Within 6 months, modify the electrical system of the windshield wipers using the Compliance Instructions, Part II, paragraphs 1. through 15., of the ABT, and remove the placard that was installed as required by paragraph (a)(1)(ii) of this AD.

(b) For helicopters, S/Ns 11151, 11501, and 11001 through 11133, except 11122, 11124 through 11128, and 11130, with timed relay, part number (P/N) T412–DJ1001–C installed, on or before June 6, 2005, or when you replace a timed relay, P/N T412–DJ1001–C, with either relay, P/N TDH–8070–1001P or P/N T412–2006, whichever occurs first:

(1) If windshield wiper kit, P/N 109–0811–44–105 or –106 is installed, modify the windshield wiper electrical system and replace the timed relay, P/N T412–DJ1001–C, with a timed relay, P/N TDH–8070–1001P or P/N T412–2006, by following the Compliance Instructions, Part III, paragraphs 1. through 1.16, of the ABT.

(2) If windshield wiper kit, P/N 109–0811–44–101 or –102 is installed, modify the windshield wiper electrical system and replace the timed relay, P/N T412–DJ1001–C, with a timed relay, P/N TDH–8070–1001P or P/N T412–2006, by following the Compliance Instructions, Part III, paragraphs 2. through 2.19, of the ABT.

(c) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Contact the Safety Management Group, FAA, for information about previously approved alternative methods of compliance.

(d) Modifying the windshield wiper electrical system shall be done following the Agusta Alert Bollettino Tecnico No. 109EP–27, Revision A, dated February 7, 2003. The Director of the Federal Register approved this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Agusta, 21017 Cascina Costa di Samarate (VA) Italy, Via Giovanni Agusta 520, telephone 39 (0331) 229111, fax 39 (0331) 229605–222595. Copies may be inspected at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(e) This amendment becomes effective on July 9, 2004.

Note: The subject of this AD is addressed in Ente Nazionale per l'Aviazione Civile (Italy), AD No. 2003–032, dated February 10, 2003.

Issued in Fort Worth, Texas, on May 21, 2004.

David A. Downey,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 04–12440 Filed 6–3–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–SW–29–AD; Amendment 39–13650; AD 2004–11–05]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model EC 130 B4 and AS 350 B3 Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) for the specified Eurocopter France (Eurocopter) model helicopters that requires inspecting the fuel transfer line and air exhaust duct for chafing, inspecting the air exhaust duct for a hole, and if necessary, repositioning the air exhaust duct to achieve the minimum clearances. This amendment is prompted by a report of damage to the fuel transfer line due to wear associated with vibrations and chafing of the fuel transfer line and the air exhaust duct. The actions specified by this AD are intended to detect chafing wear of the air exhaust duct and the fuel transfer line, which could result in a hole in the fuel transfer line, fuel leaking into the

engine compartment and creating a fire hazard that could lead to a fire and a subsequent forced landing.

DATES: Effective July 9, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of July 9, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053–4005, telephone (972) 641–3460, fax (972) 641–3527. This information may be examined at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Ed Cuevas, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Safety Management Group, Fort Worth, Texas 76193–0111, telephone (817) 222–5355, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION: A proposal to amend 14 CFR part 39 to include an AD for the specified model helicopters was published in the **Federal Register** on January 8, 2004 (69 FR 1275). That action proposed to require inspecting the fuel transfer line and air exhaust duct for chafing, and if necessary, repositioning the air exhaust duct to achieve at least 20 mm (0.8 in) of clearance in interference Area A and 12 mm (0.5 in) of clearance in interference Area B as depicted in Figure 1 of Eurocopter Alert Service Bulletin (ASB) No. 71A001 for Model EC 130 B4 helicopters and ASB No. 71.00.16 for Model AS 350 B3 helicopters, both dated May 12, 2003. These are one-time inspections.

The Direction Generale De L'Aviation Civile (DGAC), the airworthiness authority for France, notified the FAA that an unsafe condition may exist on Eurocopter Model EC 130 B4 and AS 350 B3 helicopters. The DGAC advises of receiving a report of damage to the fuel transfer line due to interference associated with vibrations and chafing of the bleed valve air exhaust duct.

Eurocopter has issued ASB No. 71A001 for Model EC 130 B4 helicopters and ASB No. 71.00.16 for Model AS 350 B3 helicopters, both dated May 12, 2003, which specify checks for interference between the bleed valve air exhaust duct and the engine fuel line. The DGAC classified these ASBs as mandatory and issued ADs No. 2003–208(A) and 2003–209(A), both dated May 28, 2003, to ensure the continued airworthiness of these helicopters in France.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposal or the FAA's determination of the cost to the public. The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

The FAA estimates that this AD will affect 100 helicopters of U.S. registry, and the required actions will take approximately 0.5 work hour per helicopter to accomplish and 1 work hour to replace either the fuel transfer line or the air exhaust duct at an average labor rate of $65 per work hour. Required parts will cost approximately $817 for the fuel transfer line and $522 for the air exhaust duct. Based on these figures, we estimate the total cost impact of the AD on U.S. operators to be $6,188, assuming 2 fuel transfer lines and 2 air exhaust ducts are replaced.

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) 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. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (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. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

2004–11–05 Eurocopter France: Amendment 39–13650. Docket No. 2003–SW–29–AD.

Applicability: Model EC 130 B4 helicopters with an optional engine flushing system installed, and AS 350 B3 helicopters with an optional engine flushing system installed and modified in accordance with MOD 073098, certificated in any category.

Compliance: Required within 10 hours time-in-service, unless accomplished previously.

To detect chafing wear of the air exhaust duct and the fuel transfer line, which could result in a hole in the fuel transfer line, fuel leaking into the engine compartment and creating a fire hazard that could lead to a fire and a subsequent forced landing, accomplish the following:

(a) Inspect the fuel transfer line located between the bleed valve of the engine starting system and the engine fuel filter for chafing in the interference areas in accordance with the Operational Procedure, paragraph 2.B.1., of Eurocopter Alert Service Bulletin (ASB) No. 71A001, dated May 12, 2003, for Model EC 130 B4 helicopters, or Eurocopter ASB No. 71.00.16, dated May 12, 2003, for Model AS 350 B3 helicopters.

(1) If the depth of the deepest wear mark is less than or equal to 0.05 mm (0.002 in), apply the maintenance procedure stated in the Engine Maintenance Manual.

(2) If the depth of the deepest wear mark is more than 0.05 mm (0.002 in) and less than or equal to 0.2 mm (0.008 in), replace the fuel transfer line within the next 50 hours TIS or within one month, whichever occurs first.

(3) If the depth of the deepest wear mark is more than 0.2 mm (0.008 in), replace the fuel transfer line before further flight.

(b) Inspect the air exhaust duct located between the bleed valve of the engine starting system and the engine fuel filter for a hole in the interference areas in accordance with the Operational Procedure, paragraph 2.B.1., of Eurocopter ASB No. 71A001, dated May 12, 2003, for Model EC 130 B4 helicopters, or Eurocopter ASB No. 71.00.16, dated May 12, 2003, for Model AS 350 B3 helicopters. If there is a hole in the air exhaust duct, replace the air exhaust duct within one month or before performing any engine flushing operation, whichever occurs first.

(c) Measure the clearances between the fuel transfer line and the air exhaust duct located between the bleed valve of the engine starting system and the engine fuel filter in the interference areas in accordance with the Operational Procedure, paragraph 2.B.1., of Eurocopter ASB No. 71A001, dated May 12, 2003, for Model EC 130 B4 helicopters, or Eurocopter ASB No. 71.00.16, dated May 12,

2003, for Model AS 350 B3 helicopters. If the clearance is less than 20 mm (0.8 in) in interference Area A or less than 12 mm (0.5 in) in interference Area B, reposition the air exhaust duct in accordance with the Operational Procedure, paragraph 2.B.2., of Eurocopter ASB No. 71A001, dated May 12, 2003, for Model EC 130 B4 helicopters, or Eurocopter ASB No. 71.00.16, dated May 12, 2003, for Model AS 350 B3 helicopters.

(d) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Contact Manager, Safety Management Office, Rotorcraft Directorate, FAA, for information about previously approved alternative methods of compliance.

(e) The inspections, measuring, and repositioning, if necessary, shall be done in accordance with Eurocopter ASB No. 71A001 for Model EC 130 B4 helicopters and ASB No. 71.00.16 for Model AS 350 B3 helicopters, both dated May 12, 2003. The Director of the Federal Register approved this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053–4005. Copies may be inspected at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(f) This amendment becomes effective on July 9, 2004.

Note: The subject of this AD is addressed in Direction Generale De L'Aviation Civile (France) AD 2003–208(A) and AD 2003–209(A), both dated May 28, 2003.

Issued in Fort Worth, Texas, on May 21, 2004.

David A. Downey,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 04–12441 Filed 6–3–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 121 and 139

[Docket No. FAA–2000–7479; Amendment Nos. 121–304, 139–26]

RIN 2120–AG96

Certification of Airports; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: The Federal Aviation Administration (FAA) is making minor technical changes to a final rule published in the **Federal Register** on February 10, 2004 (69 FR 6380). That final rule revises the airport certification regulations and establishes certification requirements for certain airports.

FOR FURTHER INFORMATION CONTACT: Linda Bruce, Airport Safety and Operations Division, Office of Airport Safety and Standards, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–8553.

DATES: Effective Date: This correction is effective on June 9, 2004.

SUPPLEMENTARY INFORMATION: The FAA published in the **Federal Register** of February 10, 2004 (69 FR 6380), a final rule revising the airport certification regulation and establishing certification requirements for airports serving scheduled air carrier operations in aircraft designed for more than 9 passenger seats, but less than 31 passenger seats. The final rule also amends the air carrier operation regulations to conform with changes to airport certification requirements. The final rule is necessary to ensure safety in air transportation at all certificated airports and becomes effective June 9, 2004.

The final rule preamble states that air carriers can continue to operate aircraft with more than 9 seats, but less than 31 seats, into airports that are not obligated to obtain the appropriate airport operating certificate until December 9, 2005. However, the rule language is causing the regulated community some uncertainty in interpreting this provision. Therefore, the FAA is clarifying this rule language. This clarification is consistent with the intent of the preamble for the final rule and will remove uncertainty in the regulated community. In addition, there are several minor technical edits to the rule language.

We intend no substantive changes to any of the requirements established by the final rule. These corrections do not impose any additional requirements on operators affected by these regulations.

Justification for Expedited Rulemaking

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. We have determined there is good cause for making today's action final without prior proposal and opportunity for comment because the changes to the rule are minor technical corrections and do not change the requirements of the rule. Thus, notice and public procedure are unnecessary.

Corrections

■ In final rule FR Doc. 04–2255, published on February 10, 2004 (69 FR 6380), make the following corrections:

■ 1. On page 6380, in column 1 in the heading section, beginning on line four, correct ''Amendment Nos. 121–304, 135–94'' to read ''Amendment Nos. 121–304, 139–26''.

§ 121.590 [Corrected]

■ 2. On page 6424, in column 1, § 121.590(b), correctly designate paragraph (b) as (b)(1).

■ 3. On page 6424, in column 1, § 121.590, add paragraph (b)(2) to read as follows:

* * * * *

(2) Until December 9, 2005, an air carrier and a pilot being used by the air carrier in the conduct of domestic type operations and flag type operations, may operate an airplane designed for more than 9 but less than 31 passenger seats, at a land airport, in any State of the United States, the District of Columbia, or any territory or possession of the United States, that does not hold an airport operating certificate issued under part 139 of this chapter, and that serves small air carrier aircraft (as defined under ''Air carrier aircraft'' and ''Class III airport'' in § 139.5 of this Chapter).

* * * * *

§ 139.203 [Corrected]

* * * * *

■ 4. On page 6428, § 139.203(b), in item 23 of the table, in the fifth column, add an ''X'' under Class IV.

§ 139.303 [Corrected]

■ 5. On page 6429, in columns 1 and 2, § 139.303(e), correctly designate subparagraphs (i) through (vi) as (1) through (6).

§ 139.305 [Corrected]

■ 6. On page 6429, in column 2, § 139.305, correct the text of paragraph(a)(3) to read as follows:

* * * * *

(3) The pavement must be free of cracks and surface variations that could impair directional control of air carrier aircraft, including any pavement crack or surface deterioration that produces loose aggregate or other contaminants.

* * * * *

§ 139.315 [Corrected]

■ 7. On page 6431, in column 1, § 139.315(e), correctly designate

subparagraphs (i) through (iv) as (1) through (4).

§ 139.317 [Corrected]

■ 8. On page 6431, in column 3, on line six of § 139.317(k), add the date, ''June 9, 2004'', at the end of the sentence after the word ''after''.

§ 139.319 [Corrected]

■ 9. On page 6432, in column 1, on line three of § 139.319(g)(3), correct the reference ''(h)(1)'' to read ''(g)(1)''.

Issued in Washington, DC, on, May 27, 2004.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

[FR Doc. 04–12615 Filed 6–1–04; 12:58 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 20

RIN 2900–AJ85

Board of Veterans' Appeals: Rules of Practice—Motions for Revision of Decisions on Grounds of Clear and Unmistakable Error: Advancement on the Docket

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document affirms the interim final rule amending the Rules of Practice of the Board of Veterans' Appeals (Board) relating to challenges to Board decisions on the grounds of ''clear and unmistakable error'' (CUE). The amendment provides for advancing CUE motions on the docket.

DATES: *Effective Date:* This final rule is effective June 4, 2004.

FOR FURTHER INFORMATION CONTACT: Steven L. Keller, Senior Deputy Vice Chairman, Board of Veterans' Appeals, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 ((202) 565–5978).

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on September 12, 2003 (68 FR 53681), we published an interim final rule with request for comments, which amended the Board's Rule of Practice 1405(a) (38 CFR 20.1405(a)). Rule 1405(a) requires that motions challenging decisions of the Board on the grounds of CUE be decided in accordance with their place on the Board's docket. While appeals are subject to the same requirement, 38 U.S.C. 7107(a)(1), we noted that both section 7107(a)(2) and its implementing regulation provide for earlier consideration of appeals if good cause is shown. 38 CFR 20.900(c) (Rule 900(c)). Rule 900(c) sets forth the good cause reasons for advancing an appeal on the Board's docket and the requirements for filing a motion to advance an appeal on the docket. However, because CUE motions are not appeals, and thus not subject to the various rules relating to appeals, we realized there was no regulatory provision for advancing CUE motions.

We therefore amended Rule 1405(a) to provide that a CUE motion may be advanced on the docket subject to the substantive and procedural requirements of Rule 900(c). We asked interested parties to submit comments on or before October 14, 2003. We received no comments. Based on the rationale noted above and as set forth in the interim final rule, we are adopting the interim final rule as a final rule without change.

Administrative Procedure Act

This document affirms without any changes an interim final rule that is already in effect. Accordingly, we have concluded under 5 U.S.C. 553 that there is good cause for dispensing with a delayed effective date based on the conclusion that such procedure is impracticable and unnecessary.

Unfunded Mandates

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

Executive Order 12866

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

Paperwork Reduction Act

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

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This rule affects only the processing of claims by VA and does not affect small businesses, to include law firms. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Approved: April 22, 2004.

Anthony J. Principi,

Secretary of Veterans Affairs.

Accordingly, the interim final rule amending 38 CFR part 20 which was published at 68 FR 53681 on September 12, 2003 is adopted as a final rule without change.

[FR Doc. 04–12625 Filed 6–3–04; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 12-Month Finding for a Petition to Delist Astragalus magdalenae var. peirsonii (Peirson's Milk-vetch)

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 for a petition to delist *Astragalus magdalenae* var. *peirsonii* (Peirson's milk-vetch) under the Endangered Species Act (Act) of 1973, as amended, (16 U.S.C. 1531 *et seq.*). After reviewing the best scientific and commercial information available, we find that the petitioned action is not warranted. We ask the public to submit to us any new information that becomes available concerning the status of, or threats to, the species. This information will help us monitor and encourage the conservation of this species.

DATES: The finding announced in this document was made on May 28, 2004. Although no further action will result from this finding, we request that you submit new information concerning the status of, or threats to, this species, whenever it becomes available.

ADDRESSES: The complete file for this finding is available for inspection, by appointment, during normal business hours, at Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Carlsbad, California 92009. Submit new information, materials, comments, or questions concerning this plant to us at the above address.

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, Carlsbad Fish

and Wildlife Office; telephone (760–431–9440).

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(B) of the Act requires that within 12 months after receiving a petition to revise the List of Threatened and Endangered Species that contains substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings: (a) The petitioned action is not warranted, (b) the petitioned action is warranted, or (c) the petitioned action is warranted but precluded by pending proposals. Such 12-month findings are to be published promptly in the **Federal Register**.

The Peirson's milk-vetch was listed as threatened on October 6, 1998 (63 FR 53596). At the time of listing, the primary threat to the milk-vetch was the destruction of individuals and dune habitat from off-highway vehicle (OHV) use and the recreational development associated with it. On October 25, 2001, we received a petition to delist *Astragalus magdalenae* var. *peirsonii* dated October 24, 2001, from David P. Hubbard, Ted J. Griswold, and Philip J. Giacinti, Jr. of Procopio, Cory, Hargreaves & Savitch, LLP, that was prepared for the American Sand Association (ASA), the San Diego Off-Road Coalition, and the Off-Road Business Association (ASA *et al.* 2001). On September 5, 2003, we announced an initial petition finding in the **Federal Register** that the petition presented substantial information to indicate the petitioned action may be warranted (68 FR 52782). In accordance with section 4(b)(3)(A) of the Act, we have now completed a status review of the best available scientific and commercial information on the species, and have reached a determination regarding the petitioned action. This determination meets deadline requirements established by a court-approved settlement agreement (*ASA et. al.* v. *USFWS and Gale Norton*, Stipulated Settlement Agreement, Civ. No. 03–315L LAB).

Species Description

Astragalus magdalenae var. *peirsonii* is an erect to spreading, herbaceous, short-lived perennial in the Fabaceae (Pea family) (Barneby 1959, 1964). Plants may reach 8 to 27 inches (20 to 70 centimeters) in height and develop taproots (Barneby 1964) that penetrate to the deeper, moister sand. According to Phillips and Kennedy (2003), plants largely die back to a root crown in the summer. The stems and leaves are covered with fine, silky appressed hairs. Young seedlings often retain their cotyledons (Phillips and Kennedy 2003). The leaflets, which may fall off in response to drought, are small and widely spaced, giving the plants a brushy appearance. This taxon is unusual in that the terminal leaflet is continuous with the rachis rather than articulated with it. The purple flowers are arranged in 10- to 17-flowered axillary racemes. Romspert and Burk (1979) found inflorescences present from December through at least April. *Astragalus lentiginosus* var. *borreganus,* easily distinguished by its conspicuously broad leaflets, and *Astragalus insularis* var. *harwoodii,* easily distinguished by its smaller stature and shorter banner petals, are the only other *Astragalus* taxa found nearby.

Life History

Astragalus magdalenae var. *peirsonii* has variously been considered an annual or perennial (Munz 1932, 1974; Barneby 1959, 1964; Spellenberg 1993; Willoughby 2001). Willoughby (2001) states that *A. m.* var. *peirsonii* apparently is a short-lived perennial, and as such its response to rainfall was predictable. Documented persistence of individuals also attests to the perennial nature of *A. m.* var. *peirsonii* (Phillips and Kennedy 2002, 2003). The onset of germination may occur anytime between the beginning of January and the end of February (Porter *in litt.* 2003b). Plants are reportedly in flower from as early as mid-November through May (Barneby 1965; Porter *in litt.* 2003b; Phillips and Kennedy 2002).

As part of his studies of the natural history and pollination biology of *Astragalus magdalenae* var. *peirsonii,* Porter (*in litt.* 2002a) has identified a white-faced, medium-sized, solitary bee as the only effective pollinator. His preliminary experiments in the field and under greenhouse conditions indicate that *A. m.* var. *peirsonii* plants are not capable of self-pollination in the absence of pollinators. This is a significant consideration for population structure and function. Large populations of standing individuals are likely necessary to provide adequate numbers of individuals for cross pollination and to ensure adequate seed set.

Based on current understanding of the species' life history, sufficient rain in conjunction with wetter-than-average fall weather appears to trigger germination events. Seedlings may be generally present in suitable habitat throughout the dunes, especially during above-normal precipitation years. In intervening drier years, plant numbers decrease as individuals die and are not replaced by new seedlings. The species likely depends on the production of seeds in the wetter years, and the persistence of the seed banks from all years, to persist until appropriate conditions for production and germination occur. Further research and modeling are necessary to better understand the dynamics of this system and how the species may be responding to natural and man-made disturbances within its range. As one of the peer reviewers noted, this species has a complex life history, and while it can act as a perennial, it is more apt to behave as an annual (McCue, 2003).

The relative contribution of first-year plants of Peirson's milk-vetch to the seed bank and survival of the taxon is not fully understood. The available data suggest that older age classes may produce substantially more seeds than first-year plants and that, therefore, the older persisting plants may be more important for reproductive success (Phillips and Kennedy 2002, Romspert and Burk 1979). Phillips and Kennedy (2002) reported that the older plants produced a mean of 171 fruits per plant, compared to an estimated 5 fruits per each younger plant in the earlier spring survey. Romspert and Burk (1979) state that Peirson's milk-vetch plants that become reproductive the first season do not contribute a great deal to the seed bank, but that mature plants produced copious amounts of seeds.

In desert plants, the majority of seedlings may die off at the onset of the dryer season as noted by previous reports. Pavlik and Barbour (1988) studied the establishment and survivorship pattern of *Astragalus lentiginosus* var. *micans,* another dune endemic plant, and recorded a complete crash of the 1984–1985 seedling cohort. These authors also reported that 54 percent of the 1985–1986 cohort of seedlings survived. However, none of these plants reached reproductive maturity within the year. Thus, a large or very large number of seedlings of Peirson's milk-vetch may succumb prior to producing and dispersing seeds. Peirson's milk-vetch populations must then rely on the cumulative seed bank, not the seed production of a single year even if germination was high. This demonstrates the need for long-term analysis of the population dynamics of this plant to adequately assess adaptive management concerns and recovery actions.

Seed Biology

The fruits of Peirson's milk-vetch are 0.8 to 1.4 in (2 to 3.5 cm) long, one chambered, hollow, and inflated.

Peirson's milk-vetch fruits contain 11 to 16 large, flattened black seeds. The seeds, among the largest seeds of any *Astragalus* in North America (Barneby 1964), average less than 0.1 ounces (oz) (15 milligrams (mg)) each in weight and are up to 0.2 in (4.7 millimeters (mm)) in length (Bowers 1996). Seeds are either dispersed locally by falling out of partly opened fruits on the parent plant, salt-shaker style, or by their release from fruits blown across the sand after falling from the parent plant. Seeds require no pre-germination treatment to induce germination, but show increased germination success when scarified (outer cover is broken). Porter (*in litt.* 2002a) reported about 98 percent of scarified seeds germinated while only 21 percent of unscarified seeds germinated. In germination trials conducted by Romspert and Burk (1979), 92 percent or more seeds germinated within 29 days at temperatures of 77 °F (25 °C) or less, and no seeds germinated at temperatures of 86 °F (30 °C) or higher. This indicates that seeds on the dunes may likely germinate in the cooler months of the year. Porter (*in litt.* 2002a) reported that, under greenhouse conditions, seed germinated within 5 days of sowing. In the same report, Porter identified the primary dormancy mechanism in Peirson's milk-vetch is the impermeability of the seed coat to water. He demonstrated little loss of viability in seeds stored for three years, consistent with species having a seed bank (Given 1994). Dispersed seeds that do not germinate during the subsequent growing season become part of the seed bank (Given 1994). Romspert and Burk (1979) noted that older plants were the primary seed producers, and plants that become reproductive in the first season do not make significant contributions to the seedbank. Considering statements by Phillips and Kennedy (2002) that plants in early 2001 were estimated to produce 5 fruits per plant compared to 171 counted in a small sample of older plants that year, it is likely that older plants are important contributors to the seed bank and survival of Peirson's milk-vetch.

In a given year, an annual or short-lived species can fluctuate between large numbers of plants to few or even no plants. Many species, and Peirson's milk-vetch may be one of them, have periodic ''rescue'' episodes from the seed bank where large flushes appear when germination conditions are suitable (Elzinga *et al.* 1998). To the extent that plants are precluded from adding seeds to the seed bank by being eliminated by summer drought, herbivory, and OHV impacts, these individuals cannot be expected to contribute to the reproductive success of Peirson's milk-vetch. Development of a seed bank and associated dormancy allows plant species to grow, flower, and set seed in years with most favorable conditions (Given 1994). When measuring seed bank dynamics, to determine the viability and productivity of a seed bank, it is considered necessary to estimate the rate of seed mortality and aging, the amount of seed removed by predators, and the variability in germination events are among the factors considered necessary (Elzinga *et al.* 1998).

Distribution and Habitat

Astragalus magdalenae var. *peirsonii* is reported from northeastern Baja California, Mexico (Barneby 1959, 1964; WESTEC 1977; Spellenberg 1993), and has been verified in the Gran Desierto of Sonora, Mexico (Felger 2000). In the United States, this plant is restricted to about 53,000 acres (21,500 hectares) in a narrow band of the central portion of the Algodones Dunes of eastern Imperial County, California, which are one of the largest dune fields in North America. The Algodones Dunes are often referred to as the Imperial Sand Dunes, a designation derived from their inclusion in the Imperial Sand Dunes Recreation Area (ISDRA) established by the Bureau of Land Management (BLM). Nearly all lands in the Algodones Dunes are managed by the BLM. However, the State of California and private parties own small inholdings in the dune area. Approximately 52,780 ac (21,359 ha) of the 185,000 acre ISDRA have been proposed as critical habitat for *A. m.* var. *peirsonii* (68 FR 46143).

The western boundary of the dunes is marked by a series of parallel, longitudinal southeast trending ridges. The northern third of the dunes is narrow, about 2 mi (3 km) wide, and increases in elevation from 200 to 300 feet (ft) (60–91 meters (m)) in the northern portion to 300 to 400 ft (91 to 121 m) in the southern portion north of Highway 78. Areas in the central portion of the dunes reach an elevation 500 ft (152 m) south of State Highway 78, but reach elevations of only 200 ft (60 m) for most areas just north of Interstate 8. The central portion of the dunes is wider, about 5 mi (8 km), and is characterized by deep bowls (hollows among the dunes) and slip faces (areas so steep that the loose sand naturally cascades downward) that run transverse to the primary ridge line (Norris and Norris 1961). The area south of Interstate 8 is generally characterized by a lower elevation, dunes less than 300 ft (91 m).

The Algodones Dunes are one of the driest and hottest regions in the United States. Romspert and Burk (1979) reported average precipitation between 1941 and 1970 was 2.6 in (67.8 mm) per year. Rainfall amounts differ from place to place and from year to year with areas to the northwest being generally dryer than those to the southeast (Willoughby 2001). Habitat for this plant is found in a band that runs parallel to the active, linear dunes on the western edge of the dune field in a northwest to southeast direction. The band is between these active linear dunes on the west and transverse ridge dunes to the east. This includes the area within the central dunes between State Highway 78 and Interstate 8. The dunes in this band are composed of a series of transitional crescentic ridges (Muhs *et al.* 1995). *A. m.* var. *peirsonii* occurs on the open, higher, more active dune areas with generally less than 20 degrees slope, in a vegetation community referred to as psammophytic (dune loving) scrub (Thorne 1982; Willoughby 2000).

Psammophytic scrub in the dunes proper occurs on the relatively stable substrates on the leeward side of the dune ridge tops in areas gradually sloping up from the bowls at the bases of the steep leeward slip faces (Phillips and Kennedy 2002). Because of the tiered nature of the dune system, a system of alternating slopes and swales, areas suitable for development of psammophytic scrub and thus Peirson's milk-vetch occur as scattered occurrences distributed among the dunes. These areas are protected from extreme deposition or removal of sand (Phillips and Kennedy 2002) and may shift in position over time. Therefore, the distribution and relative abundance of the plant varies from place to place and over time (WESTEC 1977, Willoughby 2000, 2001; Phillips and Kennedy 2003).

Abundance

Peirson's milk-vetch exhibits temporal variability in plant numbers apparently associated with annual precipitation patterns. Based on current understanding of the plant's life history, sufficient rain in conjunction with cooler fall weather appears to trigger germination events. Seedlings may be generally present in suitable habitat throughout the dunes, especially during above-normal precipitation years. In intervening drier years, plant numbers decrease as individuals die and are not replaced by new seedlings. The species likely depends on the production of

seeds in the wetter years and the persistence of the seed bank.

WESTEC (1977) was a study done under contract to BLM to determine, among other things, the distribution and abundance of seven sensitive plant taxa including the Peirson's milk-vetch. BLM surveyed 34 selected west-east transects in 1998 that were a subset of those used by WESTEC (Willoughby 2000). The document compares its findings to those of the earlier WESTEC study and concludes that all six of the plants taxa monitored in 1998 are at least as abundant and widespread in the entire dune system as they were in the 1977 WESTEC study. However, the BLM document cautions that the data are not directly comparable because the rainfall amounts were different for the two years and different methodologies were used in the two studies.

The number and location of standing plants may vary considerably from year to year due to a number of factors including the amount, timing, and location of rainfall; temperature; soil conditions; and the extent and nature of the seed bank. BLM continued to monitor the Peirson's milk-vetch population along the 34 transects and reported that 942 plants were found in 1999 and only 86 plants in 2000, both low rainfall years compared to the wetter year 1998, when 5,064 plants were found (Willoughby 2001).

In spring 2001, Thomas Olsen and Associates (TOA) conducted a survey of a portion of the Peirson's milk-vetch populations on approximately 35,000 acres of the dunes that were open to vehicle access. In the 13 days of ground surveys, approximately, 71,926 plants were reported (TOA 2001), but this single census does not provide any information on population trend. In addition, TOA (2001) states that ''extrapolation of the census data to the entire dunes or to other specific areas was not warranted.'' Plant mortality over the short term may also be considerable (Phillips and Kennedy 2002).

The count was reportedly the result of an explosive germination event in response to wet conditions during the winter of 2000 through 2001 (TOA 2001). The record of steep decline of the cohort counted by TOA in 2001 was tracked by Phillips and Kennedy (2002) who reported that 26 percent of the plants seen in Spring of 2001 were present in late 2001 and Phillips and Kennedy (2003) who reported that only 0.26 percent of the plants counted in Spring 2001 survived to Spring 2003. In 2003, Phillips and Kennedy (2003) reported that many of the germinants were already dead and that large numbers of those remaining would likely die. This severe decline in the population in 2003 was further documented by Porter (*in litt.* 2003a), reporting a similar mean seedling survival of 0.19 percent in monitored plots for the 2003 cohort of Peirson's milk-vetch.

Only 5 of these 71,926 plants encountered were considered to be more than one season old (TOA 2001). The observation that only 5 plants of the 71,926 individuals were censussed more than 1 season old suggests that the seedlings for this species suffered a high degree of mortality, or that the age classes were misidentified during the survey. In contrast, a study prepared for the ASA (Phillips and Kennedy 2002) estimated that 26 percent of the plants counted in the spring 2001 survey survived to the winter of 2001 through 2002. Phillips and Kennedy (2002) also found that these persisting plants produced a mean of 171 fruits per plant, compared to an estimated 5 fruits per each younger plant in the earlier spring survey. Phillips and Kennedy (2002) data suggested that older age classes may produce substantially more seeds, and that longevity may be an important factor for reproductive success.

Public and Peer Review Comments

On September 5, 2003, we published a Notice in the **Federal Register** (68 FR 52782) that the petition received on October 25, 2001 to delist the Peirson's milk-vetch presented substantial information to indicate the petitioned action may be warranted. As part of this Notice, we requested information on the status of *Astragalus magdalenae* var. *peirsonii.* In response, we received comments and information from several organizations. In addition, to ensure that our status review and 12-month finding are based on the best available scientific and commercial information available, we solicited peer review of the key documents supporting the petition from three scientists with demonstrated and significant expertise and backgrounds in studies of genetic diversity, seed banks, plant systematics, population genetics, *Astragalus* field studies, and/or dune plant research. Documents referenced by the petitioner, sent to the peer reviewers, included Willoughby (cited as BLM) (2000, 2001); Thomas Olsen Associates, Inc. (TOA) (2001); and Phillips and Kennedy (2002, 2003). These documents represent considerable effort to address complex ecological issues. They provide some useful data relative to the life history and ecology of *A. m.* var. *peirsonii.* However, survey methodology and measures used in these studies often differed.

All of the peer reviewers provided comments on some or all of the documents provided to them. These included two documents considered supportive to the delisting petition although not provided with the petition (Phillips and Kennedy 2002, 2003). The peer reviewers identified weaknesses in the supporting documents or limitations of the data that was used to support the delisting petition. In particular, the peer reviewers discussed the limitations of each survey methodology used in the various documents and cautioned the use of data extrapolation. For example, a few of the peer reviewers cautioned against comparing the WESTEC (1977) and Willoughby (2000) studies due to the widely different survey methodologies. Several reviewers noted that a few statements in TOA (2001) and Phillips and Kennedy (2002, 2003) were not completely supported by the data presented. The Service has incorporated the data from these studies in this finding, however, we have taken into account the specific data limitations discussed by the peer reviewers. All of the comments and information provided by the public and the peer reviewers were considered in the development of the 12-month finding and are cited in the finding, where appropriate.

Discussion of Listing Factors

When considering an action for listing, delisting, or reclassifying a species, we are required to determine whether a species is endangered or threatened based on one or more of the five listing factors identified in section 4(a)(1) of the Act. These factors are: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) over-utilization 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 the continued existence of the species. Delisting a species must be supported by the best scientific and commercial data available and only if such data substantiates that the species is neither endangered nor threatened for one or more of the following reasons: (1) The species is considered extinct; (2) the species is considered to be recovered; and/or (3) the original data available when the species was listed, or the interpretation of such data, were in error (50 CFR 424.11).

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The final listing rule (63 FR 53596, October 6, 1998) identifies OHVs as a serious threat to *Astragalus magdalenae* var. *peirsonii*, citing the fragile nature of the plants. Numbers and distribution of OHVs have increased since the species was listed (BLM 2003 and references cited therein).

Impacts of OHV use on *Astragalus magdalenae* var. *peirsonii* plants and habitat have been noted by most dune plant studies. For example, ''The occurrence of dune plants and heavy use areas for vehicles is, to a large extent, mutually exclusive'' (TOA 2001). This supports similar findings by Willoughby (2000, 2001), WESTEC (1977), Luckenbach and Bury (1983), and ECOS, Inc. (1990). Because of the generally transient nature of surface structure of the dunes, most quantitative measures of OHV impacts are given in terms of numbers of plants impacted. The TOA (2001) survey reported finding 667 OHV-impacted plants during 13 survey days. Phillips and Kennedy (2003) reported finding 430 impacted plants during 6 survey days. But in neither study were plants marked to determine survival or reproductive success at a later date. Impacts to *A. m.* var. *peirsonii* from OHVs continue to be noted (Phillips and Kennedy 2003; Willoughby 2004) although no follow-up to measure long-term impact or relative severity of impact has been done.

The impacts of OHV use on other types of desert vegetation have been documented. Bury *et al.* (1977) compared eight paired sites in the Mojave Desert in 1974 and 1975, examining the impact of OHV use on creosote bush scrub and associated wildlife. There were fewer creosote shrubs per hectare in plots with higher OHV use, and the proportion of shrubs per plot damaged by OHVs increased with increased OHV use.

The North Algodones Dunes Wilderness (Wilderness) will continue to be closed to OHV use. However, the Wilderness alone is not sufficient to ensure the long-term survival of *Astragalus magdalenae* var. *peirsonii* because this area provides only a small percentage of the entire habitat for this species within the Algodones Dunes and the area provides less available habitat for this plant relative to the areas south of State Highway 78 that are open to OHV use.

The Bureau of Land Management estimates that only approximately 14–16 percent of the habitat for *Astragalus magdalenae* var. *peirsonii* occurs within the Wilderness. Between 75–80 percent of all known colonies of *Astragalus magdalenae* var. *peirsonii* in 1977 were found in the areas open to OHV activity; only approximately 20% of the larger occurrences were found in the Wilderness (WESTEC 1977). Further, the habitat within the Wilderness is not all suitable for this species. Creosote bush scrub habitat, which does not support *Astragalus magdalenae* var. *peirsonii* is more abundant in the Wilderness than in the areas south of State Highway 78. The distribution of *Astragalus magdalenae* var. *peirsonii* from 1998–2000 indicates a higher relative abundance of plants in the central dunes south of State Highway 78 (BLM 2003). Thus, the Wilderness is not sufficient to sustain this species because it does not provide sufficient habitat and habitat quality to ensure the long-term survival of this species.

The recently released Recreation Area Management Plan (RAMP) (BLM 2003) proposes to reopen, to OHV use, all temporarily closed areas of the dunes. Re-opening these areas will likely affect the Peirson's milk-vetch found in these locations. While many of these areas were likely inaccessible prior to the closure, the technological advances, such as affordable global positioning system (GPS) units, cell phones, and OHVs with greater range have enabled OHV use to penetrate further into the dunes. This will likely affect more of the population than was previously impacted.

Visitorship continues to increase in the ISDRA (BLM 2003) and has outpaced previous estimations (BLM 1987). Since this plant was listed, visitorship to the recreation area has continued to increase. Based on the BLM (*in litt.* 2002), visitorship increased an additional 79 percent between 1996 and 1999, and 111 percent over the base year of 1994. The visitorship levels recorded in 1999–2000 (BLM *in litt.* 2002) were 149 percent higher than those projected for the year 2000 by BLM (1987). The BLM (2002) estimated visitorship for 2002 to be 1,005,000. In fact, according to BLM figures (Integrated Marketing Systems 2003), there were over 1.4 million visitors. This is 400,000 visitors higher than were projected. The BLM (2002) estimated range of visitorship projected for 2012 is 1,418,000 to 2,071,000. User groups are advocating for building as many camping pads as possible until ''Over a span of time, 100 percent of both sides of the road would be camping pads'' (ASA 2002). Shifts in visitation have also been reported by the BLM (Schoeck, BLM *in litt.* 2001) indicating that, by the late 1990s and early 2000s, day use of the central dunes between State Highway 78 and Interstate 8 had become heavy and continues to increase. In the late 1970s visitation was concentrated primarily to major winter holiday weekends, with Thanksgiving week receiving the highest numbers of visitors. However, day use has been reported to be increasing on non-holiday weekends as well (Schoeck, BLM *in litt.* 2001).

Significant impacts from OHV use on *Astragalus magdalenae* var. *peirsonii* habitat have been observed at or near the OHV staging areas (Willoughby 2000). The TOA (2001) report supports the BLM findings (Willoughby 2000, 2001) regarding limited occurrence of dune plants associated with heavy OHV activity: ''The occurrence of dune plants and heavy use areas for vehicles is to a large extent mutually exclusive.'' This corroborates earlier findings by WESTEC (1977), Luckenbach and Bury (1983), and ECOS, Inc. (1990), and was reported in the final listing rule (63 FR 53596). The coincidence of timing of seedling establishment and the cooler months (OHV season) are among the reasons for the plants' susceptibility to impacts from OHVs (Romspert and Burk 1979). Luckenbach and Bury (1983), in non-replicated studies of paired plots along Highway 78 in the Algodones Dunes, report reduced numbers of herbaceous and perennial plants, arthropods, lizards, and mammals between areas closed to entry (control plots) and those exposed to heavy OHV use. Control plots had 2.4 times the number of species, 10 times the numbers of individuals within these species, 9.4 times the vegetative cover, and 40 times the volume of shrubby perennials as compared to the OHV-impacted areas (Luckenbach and Bury 1983). These data are from localized plots and were not intended to be extrapolated to the dune system as a whole but rather are presented here to illustrate the effects of OHV use on biota. Willoughby (2001) presented data, albeit limited, indicating a higher percentage of *A. m.* var. *peirsonii* seedlings in the areas closed to OHV use compared to areas open to OHV use.

A map of vehicle tracks (Willoughby 2000) along selected transects of the Algodones Dunes on a single day in 1998 showed that considerable areas of potential habitat have been impacted. We have no evidence that the extent of vehicle tracks, as depicted on this map, will diminish in the future. Nor do we know how the distribution and intensity of these tracks changes over a growing season or recreation season. *Astragalus magdalenae* var. *peirsonii* plants, if

present in those areas, may have been impacted; however, on-the-ground counts coincident with the vehicle track mapped areas were not performed. Because of the transient nature of sand dunes, impacts from OHVs are usually reported in terms of plant numbers impacted or the condition of the impacted plants. In their report, TOA (2001) found 667 plants impacted by OHVs over the course of 13 survey days. A seedling's roots are especially sensitive to drying out if the plants or sand surface are disturbed. There are potential direct impacts if OHVs run over the delicate seedlings and indirect impacts, such as higher soil and root desiccation, if sand disturbance occurs in close proximity to the seedlings. Seedling death may result from both types of impacts. Seedlings that sustain broken branches and live will produce fewer flowers, fruits, and seeds that they otherwise would have produced. Most recently, during their short survey period, Phillips and Kennedy (2003) report that they found several hundred *A. m.* var. *peirsonii* plants that had been impacted by OHVs. Neither TOA (2001) nor Phillips and Kennedy (2003) described the degree, pattern, or frequency of impacts to the habitat occupied by the plants, or to adjacent suitable habitat used as access avenues to the impacted site. Follow-up surveys to determine the effects of the impacts on the plant's survival and reproductive output were also lacking. Willoughby (2004) did not record the area associated with the OHV-impacted plants he recorded. The early, and most sensitive, life history phases of Peirson's milk-vetch plants occur between late October and late February. This period directly overlaps five of the peaks of visitorship to the Algodones Dunes that occur in the same time frame. These peaks in visitor use include Thanksgiving (250,000), New Years (150,000), and Presidents Day (100,000) as well as Halloween and Martin Luther King Day. Only two other visitor peaks over 50,000 visitors occur during a typical recreation year. The early elimination of a portion of a seedling cohort means that there will be fewer plants to potentially survive to become older plants. Older plants have been shown to produce many more seed pods per plant than younger first year plants.

In a very limited study, Pavlik (1979) quantified the immediate physical effects of direct contact with an OHV to four specimens of each of three psammophytic plant taxa found on the Eureka Dunes in Inyo County, California. One was *Astragalus lentiginosus* var. *micans* (shining milk-vetch), a short-lived perennial to annual desert plant similar to *Astragalus magdalenae* var. *peirsonii*. Damage to each of the plants impacted was assessed in terms of percentage of shoots severed, apices removed, flowers removed, foliage loss or damage, and damage to underground parts of the plants. In this study, *A. l.* var. *micans* lost 50 to 90 percent of the shoots and stem apices with light to moderate OHV activity.

Willoughby (2000) notes a similar abundance trend in both the closed and open areas for OHV activity for five of the six monitored plant taxa, including Peirson's milk-vetch. Willoughby (2000) states that this is likely due to the fact that intensive OHV use did not encroach on much of the plant's habitat over relatively large portions of the open area (all of the dunes except the wilderness area at that time). Willoughby (2000) further notes that this trend may be expected to continue unless OHV use patterns change. Patterns of visitorship have reportedly changed according to BLM with the advent of GPS units and cell phones, which apparently embolden riders to use more remote areas (Schoeck *in litt.* 2001). Also, the projected 82 percent increase in visitorship by 2012–2013 over 1999–2000 levels (BLM 2002) will likely result in intensification and dispersal of OHV impacts. Willoughby (2000) also states that the BLM surveys are monitoring programs and not research, and there are limitations to using the information to assess the impacts of OHV use on the plants monitored. This indicates the observational nature of the monitoring rather than research that tests hypotheses related to measures of OHV impacts on plants.

The early, and most sensitive, life history phases of Peirson's milk-vetch plants occur between late October and late February. This period directly overlaps five of the peaks of visitorship to the Algodones Dunes that occur in the same time frame. These peaks in visitor use include Thanksgiving (250,000), New Years (150,000), and Presidents Day (100,000) as well as Halloween and Martin Luther King Day. Only two other visitor peaks over 50,000 visitors occur during a typical recreation year.

The period of plant sensitivity, approximately late October to late February, includes seed germination as well as seedling emergence. A seedling's roots are especially sensitive to drying out if the plants or sand surface are disturbed. There are potential direct impacts if OHVs run over the delicate seedlings and indirect impacts, such as higher soil and root desiccation, if sand disturbance occurs in close proximity to the seedlings. Seedling death may result from both types of impacts. Broken seedlings will produce fewer branches which results in fewer flowers and seeds than undamaged seedlings leading to a gradual diminishment of the seed bank.

The early elimination of a portion of a seedling cohort means that there will be fewer plants to potentially survive to become older plants. Older plants have been shown to produce many more seed pods per plant than younger first year plants. Surveys that found hundreds of plants impacted in 2001 (TOA 2001) and 2003 (Phillips and Kennedy 2003) were conducted between early March and mid May. The magnitude of impact described in these reports is likely conservative, in that the surveys occurred after the highest vehicular use.

One of the mechanisms of survival for this species is a seed-setting strategy for producing large numbers of seeds per plant, particularly by older plants. Additionally, as is the nature of seed banks, not all of the seeds in the soil germinate the following year, as a safety measure against population failure. Natural ecological processes diminish the Peirson's milk-vetch seed bank. Natural factors affecting the seed bank include seed viability, seed parasitism, seed deposition in suitable habitat and at appropriate depth, age of the seeds, and failure of an entire seedling generation due to range-wide environmental conditions. Each of these factors can limit the number of seeds available for germination. The timing of the germination of seedlings, the most sensitive life-stage of PMV, also overlaps with the onset and peak levels of OHV activity within the Algodones Dunes. Several studies document plants that were run over by OHVs at the Algodones Dunes and this activity likely results in the direct loss and damage to seedlings. The likely mortality of seedlings and older plants by OHV activity precludes their future contribution to the seed bank further threatening the long-term recovery potential and viability of this plant.

The available documentation attests to historical and ongoing, heavy OHV impacts to *Astragalus magdalenae* var. *peirsonii* (WESTEC 1977; ECOS, Inc. 1990; Willoughby 2000, 2001, 2004; TOA 2001, Phillips and Kennedy 2003). Based on information noted above, visitorship is expected to continue to increase (BLM 1987, 2002, 2003). and OHV use will continue to pose a threat to the survival of *A. m.* var. *peirsonii.* In summary, OHV use generally reduces the number of species and density of

those species in a given area. The Pierson's milk-vetch seedling establishment timing coincides with the heaviest use of OHV use, which impacts seedlings reducing the number of older plants. The older plants produce more seed, ultimately contributing the most seed to the seed bank. Without establishment of the older plants the seed bank will likely decrease. Given that this plant survives in a dry dune habitat that is highly disturbed by its nature and experiences periods of long periods of drought, increasing the size of the seed bank is key to the long term survival and eventual recovery of the species.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Current data do not indicate that these factors constitute a threat to *Astragalus magdalenae* var. *peirsonii* at this time.

C. Disease or Predation

Herbivory was reported for some of the taxa of *Astragalus* in the final listing rule (63 FR 53596). As part of a series of reports on the natural history of *Astragalus magdalenae* var. *peirsonii,* Porter (*in litt,* 2003a) noted the general poor health of adult plants and attributed it to evidenced rodent and insect herbivory. Porter (*in litt.* 2002a) reported ''nearly ubiquitous'' harvesting of leaflets and young inflorescences by rodents in *A .m.* var. *peirsonii* populations. Most of the plants had leaves, leaflets, and/or terminal portions of the stems removed, likely by unidentified rodents that had left abundant tracks around the milk-vetch plants. Porter (*in litt.* 2003a) also found similar results in 2003. To the extent that rodents remove photosynthetic tissue and young inflorescences, plants are likely to exhibit a loss of vigor and reduction in reproductive output (*i.e.*, seeds). Indeed, Phillips and Kennedy (2002) noted that seed bank counts were lower in areas where they noted kangaroo rat (*Dipodomys* spp.) tracks and dens and suggested that this should be investigated. Pavlik (*in litt.* 2003) noted that rodents may be a constant, long-term source of high seed mortality that could dramatically reduce the seed bank. As yet unidentified weevils were observed to strip the epidermis from the stems, which would affect the movement of food and water in the plants (Porter *in litt.* 2003a).

Beetles, in the family Bruchidae, were reported to contribute to the high mortality of seeds and reduced seed crop for *Astragalus magdalenae* var. *peirsonii* by Romspert and Burk (1979). Larvae of these beetles eat the contents of the seeds before emerging as adults. Fruits collected in April continued to release beetles, into October (Romspert and Burk 1979). Porter (*in litt.* 2003a) found between 45 and 86 percent of the fruits on the few *Astragalus magdalenae* var. *peirsonii* plants, where he could find fruits, were infested with bruchid beetles. The range was 0 to 29 percent for dispersed fruits on the ground. Similarly, for the obligate dune plant *Astragalus lentiginosus* var. *micans,* Pavlik and Barbour (1985) found that dispersed fruits had about 66 percent of the seeds eaten or damaged by insect larvae compared to 86 percent of the seeds in fruits still on the plant. Also the number of undamaged seeds decreased by more than 60 percent between April and May, indicating that predation is highest at dispersal time. The reduction of productivity of any given cohort of *A. m.* var. *peirsonii* from seed predation is unknown but may locally be considerable in a given year. Seed predation has been reported to cause significant loss of ovules or seeds in *Astragalus canadensis* (Boe *et al.* 1989), and in two other species of *Astragalus* (Green and Palmbald 1974).

Available information shows that rodent herbivory and seed predation, as noted above, are not detrimental to the species by themselves but, may be additive threats to Peirson's milk-vetch in the presence of the other stressors that the population is currently undergoing.

D. The Inadequacy of Existing Regulatory Mechanisms

The lack of regulatory protections for *Astragalus magdalenae* var. *peirsonii* by the State of California cited in the final listing rule (63 FR 53596) still hold true. Pursuant to the Native Plant Protection Act (California Department of Fish and Game (CDFG) Code) and the California Endangered Species Act (CESA), *A. m.* var. *peirsonii* was listed as endangered in 1979. This plant is known to occur primarily on BLM managed lands. BLM is not subject to the provisions of the CESA. The BLM and the CDFG developed a habitat management plan in 1987 that included provisions for monitoring transects every other year until trends were established. However, little monitoring specific to sensitive species was carried out by the BLM prior to the listing of *A. m.* var. *peirsonii.* Since the listing, the BLM and the CDFG have been conducting periodic monitoring for the rare plants on the Algodones Dunes.

The BLM temporarily closed areas of the Algodones Dunes to OHV and other traffic on November 3, 2000. However, the recent RAMP for the ISDRA (BLM 2003) proposes to reopen those areas temporarily closed to OHV activity. The opening of the temporarily closed areas will increase the threat to *Astragalus magdalenae* var. *peirsonii* to some degree from current levels. This would open all areas of the dunes to OHV use, except for the Wilderness Area, which was the case when this species was listed in 1998 (63 FR 53596). To help protect the plant, BLM has an adaptive management and monitoring strategy in place. This will provide corrective measures should existing management be found to cause excessive, unacceptable impact to the plant. The majority of OHV users are responsible recreationists on the dunes and avoid vegetated sites (TOA 2001). However, there may be significant damage to populations of *A. m.* var. *peirsonii* and its habitat, especially closer to the staging areas. This would be the result of the focus of increased OHV activity in a smaller area.

The designation of the North Algodones Dunes Wilderness was fully considered and was one of the reasons for changing the listing status from endangered, published in the proposed rule (57 FR 19844), to threatened in the final rule (63 FR 53596). As stated in the final listing rule (USFWS 1998), ''While this taxon remains vulnerable to the OHV use occurring over most of its dune habitat, the Service believes that the dispersed nature of its colonies and the wilderness designation reduce the potential for immediate extinction.''

Available information does not indicate that adequate regulatory mechanisms are in place to protect Peirson's milk vetch.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

The vast majority of OHV users likely avoid *Astragalus magdalenae* var. *peirsonii* and other biota on the dunes for safety and aesthetic reasons. The impacts from OHVs can be incidental or purposeful. Although the range-wide impact is difficult to assess, there has been an increase in reports of vandalism to the habitat and individuals of *A. m.* var. *peirsonii.* This was a specific concern expressed in the critical habitat discussion of the final listing rule (63 FR 53596). There has been no monitoring specifically for the distribution, extent, and impact of vandalism to the plant across its range. Porter (*in litt.* 2002) describes both tracks and incursions of OHVs into areas outside of the Wilderness Area that were closed to OHV traffic. Three of the 20 plants in one of Porter's monitored plots (Porter *in litt.* 2002) were destroyed by vandals. There have

been other reported incidents of vandalism, some by our staff, and others, but because of the time, lack of knowledge of intent, precision of the description of the location, frequency of occurrence, and percentage of the plant's range involved, it is difficult to assess the cumulative impact to the species.

This species is also threatened by low numbers of reproducing individuals, a circumstance that occurs from time to time. Movements and fluctuations of populations have not been recorded long enough to assess the full impact of significance to the survival of the taxon. The BLM (Willoughby 2001) reported a total of only 86 plants throughout its transect areas in the 2000 survey. TOA (2001) found only five plants more than a year old in their survey of all of the areas open to OHV use. This would be an extremely important fact requiring explanation and assessment if only five plants of an herbaceous perennial taxon had persisted from the previous season, especially in light of seed production as mentioned before. The older, larger plants contribute more to the seed bank than younger flowering juveniles (Romspert and Burk 1979; Phillips and Kennedy 2002). Random events may have a significant detrimental effect on the species when so few individuals are present or when the habitat requirements are so narrow that random environmental conditions can result in the demise of an entire cohort. This was apparently the case with the loss of the entire 2003 cohort of seedlings (Phillips and Kennedy 2003; Porter *in litt* 2003). The ecological impact of any cyclic depletion and restoration of the seed bank is unknown.

Astragalus magdalenae var. *peirsonii,* like some other narrow endemic dune taxa, is subject to debilitating or lethal environmental conditions, such as drought or excessive unseasonal winds, across its entire range that can affect an entire cohort of plants. Pavlik and Barbour (1988), noting the establishment/survivorship pattern of *Astragalus lentiginosus* var. *micans,* another dune endemic plant, reported a complete crash of the 1984 through 1985 seedling cohort. Even though 54 percent of the 1985 through 1986 cohort of seedlings survived, none of these plants reached reproductive maturity within the year. This was apparently the case for the 2003 cohort of *A. m.* var. *peirsonii.* Phillips and Kennedy (2003) noted that many of the germinants were already dead and that large numbers of those remaining would likely die. Porter (*in litt.* 2003a) reports a similar mean seedling survival of 0.19 percent in monitored plots for the 2003 cohort of *A. m.* var. *peirsonii.* Environmental conditions unsuitable for this plant can occur at irregular intervals or can persist for several years. Low numbers combined with periodic, range-wide, debilitating environmental conditions pose an ongoing potential threat to this plant.

Finding

We have carefully assessed the best scientific and commercial information regarding the biology of this species and its threats. We reviewed the petition and associated documents, information available in our files, other published and unpublished information submitted to us during the public comment period following our 90-day petition finding. We reviewed new data and information on the life history and ecology of Peirson's milk-vetch; however, we did not find convincing information that Peirson's milk-vetch was listed in error.

The North Algodones Dunes Wilderness (Wilderness) will continue to be closed to OHV use. However, the Wilderness alone is not sufficient to ensure the long-term survival of *Astragalus magdalenae* var. *peirsonii* because this area provides only a small percentage of the entire habitat for this species within the Algodones Dunes and the area provides less available habitat for this plant relative to the areas south of State Highway 78 that are open to OHV use.

The Bureau of Land Management estimates that only approximately 14–16 percent of the habitat for *Astragalus magdalenae* var. *peirsonii* occurs within the Wilderness. Between 75–80 percent of all known colonies of *Astragalus magdalenae* var. *peirsonii* in 1977 were found in the areas open to OHV activity; only approximately 20% of the larger occurrences were found in the Wilderness (WESTEC 1977). Further, the habitat within the Wilderness is not all suitable for this species. Creosote bush scrub habitat, which does not support *Astragalus magdalenae* var. *peirsonii* is more abundant in the Wilderness than in the areas south of State Highway 78. The distribution of *Astragalus magdalenae* var. *peirsonii* from 1998–2000 indicates a higher relative abundance of plants in the central dunes south of State Highway 78 (BLM 2003). Thus, the Wilderness is not sufficient to sustain this species because it does not provide sufficient habitat and habitat quality to ensure the long-term survival of this species.

This species likely depends on the production of seeds in the wetter years and the persistence of the seed bank from previous years to survive until appropriate conditions for germination occur again. However, assertions that the reproductive success of Peirson's milk-vetch is not dependent on the longevity of individual plants but on each plant's ability to produce and drop seeds in their first year is not supported by the available documentation. First year plants produce substantially less seeds than older plants (5 fruits per plant as opposed to 171 fruits per plant) (Phillips and Kennedy 2002). TOA (2001) reported plants produce seeds their first year, however those age classes may have been misidentified. In addition, an entire cohort of seedlings may die off in a given year without producing seeds (Phillips and Kennedy 2003, Porter *in litt.* 2003). Therefore, the key to survival and recovery is having a large seed bank. The available information on the rate of seed deposition to the seed bank and the longevity of seeds in the seed bank does not support claims of a healthy seed bank. Given, the low numbers of Pierson's milk-vetch, other natural predators (seed predatory beetles and kangaroo rats) further threaten the species by depleting an already low seed bank reserve. Peirson's milk-vetch also exhibits a wide variation in numbers of standing individuals found in any given year. Plant count data between years is often not directly comparable due to differences in rainfall amounts and methodologies. Long-term studies need to be undertaken to show the population trends for the species.

Documentation available attests to historical and ongoing OHV impacts to Peirson's milk-vetch (WESTEC 1977, ECOS 1990, Willoughby 2000, 2001, 2004, TOA 2001, Phillips and Kennedy 2003). Areas within the dunes subject to intensive OHV use have a lower abundance of Peirson's milk-vetch (*e.g.*, staging areas). Plants within the interior portions of the dunes have remained less affected by OHV use, however, the advent of GPS and increased vehicle fuel efficiency now enable OHV users to travel further into the interior of the dunes without getting disoriented and lost. Available information suggests OHV use will continue to pose a threat to the survival of Peirson's milk-vetch. Given the low numbers, other threats such as rodent and insect herbivory, seed predation, and vandalism are contributing to the cumulative threats to the Peirson's milk-vetch.

After a thorough review and consideration of all information available, we find that delisting Peirson's milk-vetch is not warranted at this time and that this species should remain classified as a threatened species. In making this determination we have followed the procedures set

forth in section 4(a)(1) of the Act and regulations implementing the listing provisions of the Act (50 CFR part 424).

We will continue to monitor the status of the species, and 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 all references cited in this finding is available on request from the Carlsbad Fish and Wildlife Office (see **ADDRESSES** above).

Author

The primary author of this finding is the staff of the Carlsbad Fish and Wildlife Office.

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: May 28, 2004.

Marshall Jones,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 04–12659 Filed 6–3–04; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 300 and 600

[Docket No. 040423129–4165–02; I.D. 041404D]

RIN 0648–AQ22

International Fisheries Regulations; Pacific Tuna Fisheries

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations to implement the 1981 Treaty Between the Government of the United States of America and the Government of Canada on Pacific Coast Albacore Tuna Vessels and Port Privileges (Treaty) as authorized by recently passed legislation. This final rule establishes vessel marking, record keeping, and reporting requirements for U.S. albacore tuna fishing vessel operators and vessel marking and reporting requirements for Canadian albacore tuna fishing vessel operators fishing under the Treaty. The intended effect of this final rule is to allow the United States to carry out its obligations under the Treaty by limiting fishing by both U.S. and Canadian vessels as provided for in the Treaty.

DATES: Effective June 1, 2004.

ADDRESSES: Copies of the environmental assessment/regulatory impact review/final regulatory flexibility analysis (EA/RIR/FRFA) are available from Svein Fougner at the NMFS address. Comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted in writing to Svein Fougner, Assistant Administrator for Sustainable Fisheries, NMFS, Southwest Region and to David Rostker, OMB, by e-mail at *David_Rostker@omb.eop.gov*, or by facsimile (Fax) to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Svein Fougner, Sustainable Fisheries Division, Southwest Region, NMFS, 562–980–4030; fax: 562–980–4047; and email: *svein.fougner@noaa.gov*.

SUPPLEMENTARY INFORMATION: The Treaty, as amended in 2002, establishes a number of obligations of the Parties (the United States and Canada) to control reciprocal fishing in the waters of one Party by vessels of the other Party as well as reciprocal port privileges. The proposed rule (69 FR 23715, April 30, 2004) provided substantial information on the history of the Treaty and that information will not be repeated here. The Treaty permits fishing vessels of one Party to fish for albacore tuna in waters under the fisheries jurisdiction of the other Party seaward of 12 nautical miles from the baseline from which the territorial sea is measured (hereafter generally referred to as ''waters''). The Treaty originally allowed for unlimited fishing for albacore tuna by vessels of each Party in waters of the other Party. In response to U.S. industry concerns about the increase in fishing effort by Canadian vessels in U.S. waters beginning in 1998, the Departments of State (DOS), supported by the National Marine Fisheries Service, initiated technical discussions which led to negotiations with Canada and ultimately agreement to amend the Treaty to establish controls over reciprocal fishing. Agreement to amend the Treaty was reached on April 24, 2002. The U.S. Senate has given its advice and consent to the Treaty amendments, and Congress enacted H.R. 2584 (Public Law 108–219) on March 29, 2004, to authorize the Secretary of Commerce to issue regulations to implement the amended Treaty. The President signed H.R. 2584 into law on April 13, 2004.

The amendment to Article 1 (b) of the Treaty allows for the United States and Canada to establish a mutually agreed upon fisheries limitation regime applicable to each Party's vessels fishing for albacore in the other Party's waters. Pursuant to that provision, the United States and Canada agreed to an initial 3–year regime that reduces reciprocal fishing effort each year until a level is reached in year three that is slightly above the pre–1998 average. Annex C of the Treaty also provides for a further reduced level of fishing after the 3–year period if the Parties are not able to reach agreement on a subsequent regime.

The specific actions that are called for under the Treaty and being implemented through this final rule are:

Vessel Lists

As under the original Treaty, the United States and Canada will annually exchange lists of fishing vessels which may fish for albacore tuna in each other's waters under the Treaty.

Vessel Marking

U.S. and Canadian vessels must have their name and vessel identification marking prominently displayed where they will be clearly visible both from the air and from a surface vessel.

Hail-in and Hail-out

The operators of U.S. and Canadian albacore fishing vessels must report to designated reporting offices at least 24 hours prior to entering the waters of the other nation to fish under the Treaty.

Recordkeeping

Operators of U.S. and Canadian vessels must keep accurate logbook records of catch and effort while fishing under the Treaty and must submit those logbooks to their respective fishery agencies.

Information Exchange

The United States and Canada will annually monitor the amount of fishing and the weight of albacore tuna caught by their respective vessels in waters under the fisheries jurisdiction of the other Party, and will annually exchange this information.

Annual Treaty Consultations

The United States and Canada will consult annually to review the information exchanged on the albacore tuna fisheries; on their respective conservation and management measures for albacore tuna; and on implementation of internationally agreed conservation and management measures applicable to the Parties related to fisheries covered under the Treaty.

Notification of Management Laws and Regulations

The United States and Canada will notify one another of the conservation and management laws and regulations applicable to vessels fishing in each other's waters.

Limitation of Fishing Effort

Annex C of the Treaty established a 3–year regime which limits the level of fishing that vessels of one Party can conduct in fishing for albacore tuna in the other Party's waters, beginning on June 1 of the first year of implementation of the limitation program. The limit can be exercised in terms of either the maximum number of vessels that can fish under the Treaty for up to 4 months each in a year; or the maximum number of fishing months that vessels can conduct in a year without a limit on the number of vessels that can participate in the year (i.e., vessel fishing months). The United States will administer the effort limit in terms of vessel fishing months. This is administratively the simplest approach and provides maximum flexibility to U.S. vessels to engage in fishing in Canadian waters if the fish are there. During the first year, the limit on fishing by U.S. vessels in Canadian waters will be 680 vessel fishing months; during the second year, the limit will be 560 vessel fishing months; and during the third year, the limit will be 500 vessel fishing months. There is provision for a ''carry over'' of unused fishing in a subsequent year.

The Treaty does not affect rights of U.S. vessels, including fishing vessels, to transit Canadian waters. However, Canadian hail-in requirements will continue to apply to transiting vessels, and with respect to albacore fishing vessels, fishing gear must be stowed in an unfishable condition to prevent the vessel from being considered to be ''fishing'' under the Treaty.

Extension or Adjustment of Fishing Limits

Prior to the expiration of this 3–year effort limitation program, the United States and Canada will consult to consider a new limitation program or extension of this program for 1 or more years.

The intent of this program is to ensure that neither Party receives disproportionate benefits from the fishing opportunities provided by the Treaty and that neither Party's fishermen will be disadvantaged relative to the other Party's fishermen under the Treaty.

To carry out this agreement, NMFS establishes the following requirements for U.S. albacore fishing vessel owners and operators:

1. *Vessel List*. The owner of any albacore fishing vessel who wants that vessel to be on the list of U.S. vessels eligible to fish for albacore tuna in Canadian waters under the Treaty must provide to NMFS the vessel name, the vessel registration number (U.S. Coast Guard documentation number or, if not documented, the state registration number), the home port, and the captain or operator's name. A vessel is not eligible to fish for albacore tuna in Canadian waters if it is not on the U.S. vessel list for at least 7 days prior to engaging in fishing for albacore tuna in Canadian waters. Each list is only valid for a single calendar year.

2. *Vessel Marking*. A U.S. vessel eligible to fish for albacore tuna in Canadian waters must be marked with the name and vessel identification marking prominently displayed where they will be clearly visible both from the air and from a surface vessel. The letter ''U'' must be painted or otherwise securely affixed to the vessel and be positioned at the end of each appearance on the vessel of its U.S. Coast Guard Documentation number (or if not documented, the state registration number) in the same height and size as the numerals. Regulations at 50 CFR 660.704 implementing the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP) establish vessel marking size requirements relative to the size of the vessel involved; the U would be the same size as the numerals for each vessel under those regulations.

3. *Logbook Reports*. The owner of a U.S. albacore fishing vessel is responsible for ensuring that a logbook of catch and effort covering fishing under the Treaty is maintained and submitted to the Southwest Region, NMFS, within 15 days of the end of the trip if the vessel re-enters U.S. waters or enters the Canadian territorial sea or other Canadian waters in which fishing is not permitted or a Canadian port having notified NMFS of its intent to stop fishing; or within 7 days of landing fish if the vessel entered the high seas after exiting the Canadian exclusive economic zone (EEZ). NMFS will provide the logbook form upon being advised of the owner's request to be placed on the list of eligible vessels as described above.

4. *Hail-in/Hail-out Reports*. The operator of a U.S. vessel eligible to fish for albacore tuna in Canadian waters must report to an office designated by NMFS at least 24 hours prior to entering Canadian waters to fish under the Treaty and at least 24 hours prior to returning to U.S. waters or exiting Canadian waters and entering the high seas. NMFS has contracted for a call-in system to support U.S. reporting requirements. Reports will be acceptable through single sideband radio, landline and cell telephone, fax, and email. NMFS will provide detailed information to U.S. vessel operators of the appropriate times for reporting and the contractor contact points (phone numbers, radio frequencies, and email addresses) to all owners or operators identified on the list of eligible vessels.

NMFS and the U.S. Coast Guard will use all available means to inform fishers of closures of the fishery in Canadian waters in a timely manner. This will include use of Notice to Mariners, a hotline on current information relative to fishing limits, fax notices, and internet and web page notices. A closure notice also will be published in the **Federal Register**. Other means may be developed with the industry in the future.

This final rule also adds a new § 600.530 to the foreign fishing regulations at 50 CFR part 600 subpart F. This will reinforce Canadian regulations to govern the activity of Canadian vessels and ensure adequate ability to enforce the regulations and prosecute violations. In this context, it should be noted that Public Law 108–219 authorizes fishing by vessels from Canada in waters under the fisheries jurisdiction of the United Statesmore than 12 nautical miles from the baseline from which the territorial sea is measured, notwithstanding the prohibitions at 50 CFR part 600, subpart F.

The DOS has concurred with issuance of this final rule, as required by Public Law 108–219.

Changes From the Proposed Rule

Three changes were made from the proposed rule. In § 300.175, the language is clarified to require that U.S. vessels planning to fish in waters under Canadian jurisdiction must file a hail-in report to the Reporting Office at least 24 hours prior to engaging in fishing in such waters. Similarly, in § 600.530(e) and (f) Canadian vessels must file reports 24 hours prior to their entry and exit from the U.S. EEZ. These changes make this final rule consistent with the Canadian regulations. A time frame was not specified in the proposed rule.

This final rule adds a new § 600.525 to part 600, subpart F, to clarify that fishing by vessels of Canada is regulated only under §§ 600.525 and 600.530 and not by the other sections of subpart F. This makes clear that the reporting and recordkeeping requirements and other

provisions of subpart F do not apply to Canadian vessels fishing under the Treaty. The proposed rule had been unclear on this point.

Comments and Responses

Comment: NMFS received one set of comments on the proposed rule. Those comments criticized NMFS for allowing profiteering and rapacious fishermen to destroy U.S. fishery resources; and proposed that no Canadian fishing be allowed in U.S. waters nor U.S. fishing in Canadian waters; that the fisheries be reduced by 50 percent this year and 10 percent each year thereafter; that the allowed levels of fishing are far too high; that marine protected areas be established; and that the logbook requirement is a joke because there is no enforcement. No other comments were received.

Response: None of the comments specifically addressed the actions addressed by this rule, and no changes have been made in this final rule as a result of the comments. The United States is obliged to allow fishing by Canadian vessels consistent with the Treaty.

Classification

NMFS prepared a FRFA that describes the economic impact this final rule will have on small entities. The FRFA is available from NMFS (see **ADDRESSES**). A summary of the FRFA follows.

This final rule is not expected to have significant effects on U.S. vessels that are active in the troll albacore fishery off the West Coast and on the high seas, all of which are considered small entities. About 800 vessels made landings of albacore into U.S. ports or transshipped albacore to foreign ports in 2003, with a total estimated catch of just under 15,000 metric tons (mt). Average annual U.S. albacore catches have been about 12,000 mt for the past 10 years. The amount of fishing in Canadian waters has been quite low; NMFS estimates that between 1 and 2 percent of total U.S. fishing effort (estimated at about 25,000 days per year) has been conducted in Canadian waters thepast 10 years. The Treaty limitations are not expected to affect either the amount of fishing by U.S. vessels or their albacore catches in future years off the West Coast, in Canadian waters, or on the high seas. There are no catch limits under the Treaty or these implementing regulations. If Canadian fishing in U.S. waters declines through the effort limitation regime, there maybe less competition on fishing grounds in U.S. waters, but it does not appear (though it is not certain) that there would be any effects on U.S. vessels' effort or catches or on subsequent revenues and profits in the fishery.

The principal impacts of this final rule are reporting burdens (see following discussion of Paperwork Reduction Act burdens). Those owners who choose to have their vessels participate in fishing in Canadian waters under the Treaty would incur the costs associated with having the vessel name placed on the U.S. vessel list provided to Canada; reporting to NOAA Fisheries designated offices prior to entering Canadian waters to fish and prior to exiting Canadian waters; maintaining and submitting a logbook report on fishing in Canadian waters; and marking the vessels in accordance with the requirements. The total annual cost of these actions is estimated to be less than $100 per vessel owner. In any year, it is likely that U.S. vessels' fishing in Canadian waters will be far below the U.S. limit (average of 580 vessel months per year for the first 3 years) as albacore migrate into Canadian waters in relatively few years and for only a short time (less than two months) in those years.

The effect of this final rule is distinguished from the likely impacts of the fishing limits under the Treaty. That is, under these limits, there will be lower risk of levels of Canadian fishing in U.S. waters at levels that would create problems for U.S. vessels, such as crowding on the grounds or preemption of catch. Thus, the Treaty limits may have beneficial impacts on U.S. vessels' catch per unit effort, total catch and total revenue in the future, all other things being equal. In turn, it is conceivable that failure to implement this final rule would result in further delay in implementing the Treaty fishing limits such that U.S. vessel owners would be disadvantaged by unlimited Canadian fishing in U.S. waters. Under those circumstances, however, there would likely be pressure to terminate the Treaty and foreclose the future option of U.S. fishing in Canadian waters to ensure that there would not beunlimited Canadian fishing in U.S. waters. This final rule is not expected to result in any increase or decrease in average fishing time, catch per unit effort, total catch and revenue, or costs other than the administrative costs identified above. Thus, there will be very little impact (if any) on profits of the vessel owners involved from this final rule.

NMFS considered a number of alternatives to the specific actions related to vessel lists, vessel identification and marking, hail-in and hail-out reports, and logbooks. The differences between those options were relatively slight and the economic impacts were small. The requirements selected were felt to best balance between the need for good information to carry out U.S. obligations and the need to minimize the burden on U.S. and Canadian vessel operators and owners. With respect to the reciprocal fishing limit, however, there were substantially different choices and NMFS considered the following alternatives to the proposed approach: (a) to establish a U.S. limited entry program by which to carry out the U.S. effort limitation regime using ''vessel years'' as the operating limit; and (b) to establish monthly effort limits (i.e., one-fifth of the annual limit each month in the months of June through October each year) to implement the effort limitation regime on a vessel month basis.

The former would be administratively more complex than the proposed approach. It would require establishing either a lottery by which eligible vessels might be selected or criteria (e.g., prior participation) by which the requisite number of vessels would be identified as being eligible to fish in the year; issuing specific licenses or permits for fishing under the Treaty to those vessels; and then evaluating the effects and effectiveness of the program and possibly refining it the next year.

The latter would also be more complex and less flexible than the proposed approach. It could support enforcement of the program by ensuring that there would not be an excessive flood of vessels into Canadian waters in any one month. However, it also would increase the potential that the U.S. would not be able to carry out as much fishing as legally permitted under the Treaty, since unused vessel months in one month would not carry over to the following month (which is the practical effect of the proposed approach).

Thus the proposed action was chosen for administrative ease, maximum flexibility to the fleet, and ability to enforce and administer at relatively low cost.

Neither of the alternatives (nor this final rule) would be likely to substantially affect the fishing effort and catch and revenue of the U.S. albacore fishery. As noted above, U.S. vessels have not fished extensively in Canadian waters for many years, and the U.S. fleet is not expected to fish at levels permitted under the Treaty. Thus, the form of the limitation used should not result in changes in fishing effort, catches or revenue.

This final rule establishes reporting burdens subject to the Paperwork Reduction Act (PRA). The vessel

marking requirement consists of adding the letter ''U'' after the vessel marking number required under regulations at 50 CFR 660.704 if the vessel enters Canadian waters. This is estimated to take 5 minutes per vessel.

It is expected that all of the U.S. vessels that would fish under the Treaty are subject to the HMS FMP and/or the High Seas Fishing Compliance Act, both of which require vessel marking, and the added cost (adding the letter U) under this final rule is minimal. Given the limits of the amended Treaty, the maximum number of times the added burden would occur in the 3–year period is 1,740 vessel crossings, or 580 per year, with a burden of 48.33 hours annualized.

This final rule requires that vessel owners or operators take action each year to be sure that their vessels are on the list of vessels eligible to fish in Canadian waters under the Treaty. This can be done with a 5 minute phone call. Although it is highly unlikely, it is assumed for estimating the reporting burden that 700 vessels will get on the list (this is about 90 percent of the number of vessels that actually landed albacore into a West Coast port in 2003); under this assumption, the total fleet burden is 58.33 hours. It should be noted that there is no cost to get on the list; therefore, it is expected that many will choose to get on the list just in case an opportunity to fish in Canadian waters arises during the year. This final rule also requires U.S. vessels to report border crossings to and from Canadian waters. Assuming a round trip for the maximum of 580 vessels (assuming that every vessel fishes only 1 month toward the U.S. limit), and with each call taking an average of 5 minutes, this imposes a burden of 96.67 hours. Finally, this final rule imposes a logbook reporting requirement for U.S. vessels fishing under the Treaty in Canadian waters. Under the limits of the Treaty, U.S. vessels will be limited to an average of no more than 580 vessel months per year (over 3 years).

Assuming full fishing each month (i.e., up to 30 days per month) and 1 logbook page per day (at 5 minutes per page), the reporting burden will be 2.5 hours per vessel per month or a fleet total of 1,450 hours per year. It is estimated that 50 percent of these vessels already participate in a voluntary albacore fishery logbook program, so the net new burden for which PRA approval has been requested is 725 hours.

Most years there will be much less fishing under the Treaty than the level on which this estimate is based. However, assuming full participation, the total new reporting burden for the fleet is 928.33 hours per year for the first 3 year period of fishing limits. There are no significant capital or equipment costs associated with this reporting burden. NMFS is working with the albacore fishery to evaluate the potential of electronic recordkeeping and reporting for this fishery. This could reduce the collection burden in the future. An emergency PRA clearance request was approved by the Office of Management and Budget (OMB) so this final rule could be published by the target effective date.

Public comment is sought regarding whether these proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility, the accuracy of the burden estimate, 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, including through the use of automated information technology. 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, Svein Fougner, Assistant Administrator for Sustainable Fisheries, NMFS, Southwest Region (SEE **ADDRESSES**) and by e-mail to *David__Rostker@omb.eop.gov*, or facsimile (fax) to202–395–7285.

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 requirement of the PRA, unless that collection of information displays a currently valid OMB control number.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

Administrative Procedure Act

The Assistant Administrator for Fisheries finds good cause under 5 U.S.C. 553(d)(3) to waive the 30–day delay in effectiveness of this final rule. This final rule must be made effective by June 1, 2004 (the start of the Pacific albacore tuna fishing year), as the Parties to the Treaty agreed to implement the Amended Treaty by that date. The legislation (H.R. 2584)ratifying the Amended Treaty was signed into law on April 13, 2004. NMFS published a proposed rule to implement the Amended Treaty in the **Federal Register** on April 30, 2004. As the comment period for the rule ended on May 17, 2004, NMFS has insufficient time to provide 30 days to delay the effectiveness of this rule prior to June 1, 2004. Failure to have the rule in effect that date would mean that the U.S. and Canada could not exchange diplomatic notes confirming that all administrative steps for Treaty implementation had been taken. Failure to do so would delay for another full fishing year (i.e., until 2005) the implementation of the reciprocal fishing limit regime that is very important to the U.S. albacore fishing fleet. The Parties agreed that the Treaty would not go into effect during the fishing year (i.e., after June 1). Without this limitation program, Canadian vessels could once again fish without limits in U.S. waters to the likely disadvantage of U.S. vessels. The limitation regime is intended to allow a fair opportunity for each nation's vessels to participate in fishing on the common stock, but Canadian fishing vessels have enjoyed much greater benefit under the Treaty than U.S. vessels in recent years. NOAA has prepared an information package for almost 1,100 U.S. vessel owners and operators about the new restrictions imposed by this final rule and the proposed rule was posted on the internet and sent to industry advisors for distribution to fishers. No U.S. vessel is expected to fish under the Treaty in the first several weeks after June 1, 2004, providing additional time to distribute this information to the industry. NOAA has been advised that Canadian vessel owners and operators have also been informed that the requirement to report prior to border crossings will be a condition of their licenses to fish in U.S. waters.

List of Subjects

50 CFR Part 300

Fisheries, High seas fishing, International agreements, Permits, Reporting and recordkeeping requirements.

50 CFR Part 600

Administrative practice and procedure, Confidential business information, Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Statistics.

Dated: May 27, 2004.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 300 is amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

■ 1. A new Subpart L is added to read as follows:

Subpart L—Pacific Albacore Tuna Fisheries

Sec.
300.170 Purpose and scope.
300.171 Definitions.
300.172 Vessel list.
300.173 Vessel identification.
300.174 Logbook reports.
300.175 Hail-in and hail-out reports.
300.176 Prohibitions.

Authority: Sec. 401, Pub. L. 108-219, 118 Stat. 616 (16 U.S.C. 1821 note).

Subpart L—Pacific Albacore Tuna Fisheries

§ 300.170 Purpose and scope.

The regulations in this subpart govern fishing by U.S. vessels in waters under the fisheries jurisdiction of Canada pursuant to the 1981 Treaty Between the Government of the United States of America and the Government of Canada on Pacific Coast Albacore Tuna Vessels and Port Privileges as amended in 2002. Regulations governing fishing by Canadian vessels in waters under the fisheries jurisdiction of the United States pursuant to this Treaty as amended in 2002 are found at § 600.530 of chapter VI of this title.

§ 300.171 Definitions.

In addition to the definitions in the Magnuson-Stevens Fishery Conservation and Management Act and § 600.10 of Chapter VI of this title, the terms used in this subpart have the following meanings:

Fishing under the Treaty as amended in 2002 means to engage in fishing for albacore tuna in waters under the fisheries jurisdiction of Canada seaward of 12 nautical miles from the baseline from which the territorial sea is measured.

Regional Administrator means the Regional Administrator, Southwest Region, NMFS, 501 W. Ocean Boulevard, Suite 4200, Long Beach, CA 90802–4213, or a designee.

Reporting Office means the office designated by the Regional Administrator to take hail-in and hail-out reports from U.S. and Canadian vessel operators.

Treaty means the 1981 Treaty Between the Government of the United States of America and the Government of Canada on Pacific Coast Albacore Tuna Vessels and Port Privileges as amended in 2002.

§ 300.172 Vessel list.

The ''vessel list'' is the list of U.S. vessels that are authorized to fish under the Treaty as amended in 2002. Only a vessel on the list for at least 7 days may engage in fishing in Canadian waters under the Treaty as amended in 2002. At least 7 (seven) days prior to the first day on which any fishing in Canadian waters may begin, the owner of any U.S. vessel that wishes to be eligible to fish for albacore tuna under the Treaty as amended in 2002 must provide the Regional Administrator or his designee with the vessel name, the owner's name and address, phone number where the owner can be reached, the U.S. Coast Guard documentation number (or state registration number if not documented), and vessel operator (if different from the owner) and his or her address and phone number. NMFS will then place the vessel on the vessel list.

§ 300.173 Vessel identification.

A U.S. vessel fishing under the Treaty as amended in 2002 must be marked with its name and vessel identification prominently displayed where they will be clearly visible both from the air and from a surface vessel. Vessel identification means the U.S. Coast Guard Documentation number (or if not documented, the state registration number) followed by the letter U in the same height and size as the numerals. Numerals and the letter U must meet thesize requirements of § 660.704 of chapter VI of this title.

§ 300.174 Logbook reports.

The owner of any U.S. vessel that fishes for albacore tuna in Canadian waters under the Treaty as amended in 2002 must maintain and submit to the Regional Administrator a logbook of catch and effort of such fishing. The logbook form will be provided to the vessel owner as soon as practicable after the request to be placed on the list of vessels. The logbook must be submitted to the Regional Administrator within 15 days of the end of a trip, regardless of whether the trip ends by reentry to U.S. waters or entry to Canada's territorial sea, other Canadian waters in which fishing is not permitted, or a Canadian port. If the departure is due to exit to the high seas, the vessel operator must submit the logbook within 7 days of its next landing.

§ 300.175 Hail-in and hail-out reports.

(a) The operator of any U.S. vessel that wishes to engage in fishing in waters under the fisheries jurisdiction of Canada must file a hail-in report to the Reporting Office at least 24 hours prior to engaging in fishing in such waters.

(b) The operator of a U.S. vessel that has been fishing under the Treaty as amended in 2002 must file a hail-out report to the Reporting Office within 24 hours of departing waters under the fisheries jurisdiction of Canada.

§ 300.176 Prohibitions.

It is prohibited for the owner or operator of a U.S. fishing vessel to:

(a) Engage in fishing in waters under the fisheries jurisdiction of Canada if:

(1) The vessel has not been on the list of fisheries pursuant to § 300.172 for at least 7 days;

(2) The vessel is not clearly marked as required under § 300.173;

(3) The vessel operator has not filed a hail-in report with the Reporting Office as required under § 300.175(a); or

(4) The Regional Administrator has announced that the U.S. limit on fishing under the Treaty as amended in 2002 has been reached.

(b) Fail to maintain and submit logbook records of catch and effort statistics as required under § 300.174;

(c) Fail to report an exit from waters under the fisheries jurisdiction of Canada as required by § 300.175(b).

■ For the reasons set out in the preamble, 50 CFR part 600 subpart F is amended as follows:

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

■ 2. The authority citation for part 600 continues to read as follows:

Authority: 5 U.S.C 561 and 16 U.S.C. 1801 *et seq.*

■ 3. A new § 600.525 is added to subpart F to read as follows:

§ 600.525 Applicability of Subpart F to Canadian Albacore Fishing Vessels off the West Coast.

Fishing by vessels of Canada under the 1981 Treaty Between the Government of the United States of America and the Government of Canada on Pacific Coast Albacore Tuna Vessels and Port Privileges is regulated only under this section and § 600.530 of this subpart F, and is exempt from any other requirements of this subpart F. Regulations governing fishing by U.S. vessels in waters under the fisheries jurisdiction of the Canada more than 12 nautical miles from the baseline from which the territorial sea is measured are found at §§ 300.170–300.176 of chapter II of this title.

■ 4. A new § 600.530 is added to subpart F to read as follows:

§ 600.530 Pacific albacore fishery.

(a) *Purpose and scope.* This section regulates fishing by Canadian vessels

under the 1981 Treaty Between the Government of the United States of America and the Government of Canada on Pacific Coast Albacore Tuna Vessels and Port Privileges as amended in 2002. Notwithstanding any other provision of this subpart F, fishing vessels of Canada may be authorized to fish in waters under the fisheries jurisdiction of the United States more than 12 nautical miles from the baseline from which the territorial sea is measured in accordance with the Treaty and this section, pursuant to Public Law 108–219 (118 Stat. 616; 16 U.S.C. 1821 note).

(b) *Definitions*. In addition to the definitions in the Magnuson-Stevens Fishery Conservation and Management Act and § 600.10, the terms used in this subpart have the following meanings:

Fishing under the Treaty as amended in 2002 means to engage in fishing for albacore tuna in waters under the fisheries jurisdiction of the United States seaward of 12 nautical miles from the baseline from which the territorial sea is measured.

Regional Administrator means the Regional Administrator, Southwest Region, NMFS, 501 W. Ocean Boulevard, Suite 4200, Long Beach, CA 90802–4213, or a designee.

Reporting Office means the office designated by the Regional Administrator to take hail-in and hail-out reports from U.S. and Canadian vessel operators.

Treaty means the 1981 Treaty Between the Government of the United States of America and the Government of Canada on Pacific Coast Albacore Tuna Vessels and Port Privileges as amended in 2002.

(c) *Vessel list*. A Canadian vessel is not eligible to fish for albacore in U.S. waters under the Treaty as amended in 2002 unless the vessel is on the list provided to NMFS by the Government of Canada of vessels authorized by Canada to fish under the Treaty as amended in 2002.

(d) *Vessel identification*. A Canadian vessel fishing under the Treaty as amended in 2002 must clearly display its Canadian vessel registration number followed by the letter C in the same height and size as the numerals, consistent with Canadian vessel marking requirements.

(e)*Hail-in reports*. The operator of a Canadian Vessel eligible to fish for albacore in U.S. waters under the Treaty as amended in 2002 must file a hail-in report with the Reporting Office at least 24 hours prior to beginning any such fishing.

(f) *Hail-out Reports*. The operator of a Canadian vessel that has been fishing in U.S. waters under the Treaty as amended in 2002 must file a hail-out report with the Reporting Office at least 24 hours prior to exiting from U.S. waters.

(g) *Prohibitions*. It is prohibited for the operator of a Canadian vessel to engage in fishing in U.S. waters if the vessel:

(1) Is not on the vessel list in paragraph (c) of this section;

(2) Has not filed a hail-in report to advise of an intent to fish under the Treaty as amended in 2002 prior to engaging in such fishing; or

(3) Is not clearly marked in accordance with paragraph (d) of this section.

[FR Doc. 04–12517 Filed 5–28–04; 4:20 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 69, No. 108
Friday, June 4, 2004

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 929

[Docket Nos. AO–341–A6; FV02–929–1]

Cranberries Grown in the States of Massachusetts, et.al.; Exceptions to Recommended Decision to Proposed Amendment of Marketing Agreement and Order No. 929

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; reopening comment period.

SUMMARY: The Agricultural Marketing Service is reopening and extending the comment period for filing written exceptions to the recommended decision on proposed amendments to the marketing agreement and order for cranberries grown in the States of Massachusetts, *et.al.*

DATES: Comments must be received by June 30, 2004.

ADDRESSES: Interested persons are invited to submit written exceptions concerning the recommended decision. Comments should be filed with the Hearing Clerk, U.S. Department of Agriculture, room 1081–S, Washington, DC 20250–9200, FAX number (202) 720–9776. Four copies of all written exceptions should be submitted and they should reference the docket numbers and the date and page number of this issue of the **Federal Register**, or you may send your comments by the electronic process available at Federal eRulemaking portal at *http://www.regulations.gov.* Comments can be viewed at: *http://www.ams.usda.gov/fv/moab.html.*

FOR FURTHER INFORMATION CONTACT: Kathleen M. Finn, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW. STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, or Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on April 23, 2002, and published in the May 1, 2002, issue of the **Federal Register** (67 FR 21854); Secretary's Decision on partial amendments issued on December 4, 2003, and published in the December 12 issue of the **Federal Register** (68 FR 69343); and Recommended Decision and Opportunity to File Written Exceptions issued on April 21, 2004, and published in the April 28, 2004 issue of the **Federal Register** (69 FR 23330).

The recommended decision published on April 28, 2004, was issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to the as the ''Act.'' The deadline for the submission of written exceptions to the recommended decision was May 28, 2004.

The Department of Agriculture (USDA) has received a request to provide more time for interested persons to analyze the recommended decision and file exceptions.

Extending the period in which written exceptions may be filed will provide interested persons more time to review the recommended decision and submit written exceptions thereto. Accordingly, the period in which to file written exceptions is extended until June 30, 2004.

This notice is issued pursuant to the Act and the applicable rules of practice governing the formulation of marketing agreements and orders (7 CFR part 900).

List of Subjects in 7 CFR Part 929

Cranberries, Marketing agreements, Reporting and recordkeeping requirements.

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

Dated: June 2, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04–12785 Filed 6–3–04; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 2 and 3

[Docket No. 98–106–4]

RIN 0579–AB69

Animal Welfare; Regulations and Standards for Birds, Rats, and Mice

AGENCY: Animal and Plant Health Inspection Service, USDA.

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

SUMMARY: The Farm Security and Rural Investment Act of 2002 amended the definition of *animal* in the Animal Welfare Act (AWA) by specifically excluding birds, rats of the genus *Rattus,* and mice of the genus *Mus,* bred for use in research. In a separate document published in the Rules and Regulations section of today's **Federal Register**, we are amending the definition of *animal* in our regulations to be consistent with the definition of *animal* in the AWA. At this time, we are also considering several changes to the regulations to help promote the humane handling, care, treatment, and transportation of birds, rats, and mice not specifically excluded from coverage under the AWA. Specifically, we intend to extend enforcement of the AWA to birds other than birds bred for use in research. However, before we can do so, we believe it is necessary to consider what regulations and standards are appropriate for them. Therefore, we are soliciting comments from the public to help determine how we should regulate the care and use of those animals. In addition, we are considering if we should continue to regulate the handling, care, treatment, and transportation of rats and mice covered by the Act under the general standards in the regulations or if we should establish specific standards for them. To aid in that determination, we are soliciting comments from the public

concerning the regulation of those animals. Finally, we are requesting data and information from the public regarding the potential economic effects on entities that may be affected if we were to establish specific standards for birds, rats, and mice not specifically excluded from coverage under the AWA.

DATES: We will consider all comments that we receive on or before August 3, 2004.

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

- *Webform:* The preferred method is to use the webform located at *http://comments.aphis.usda.gov.* This webform is designed to allow commenters to associate each of their comments with the issues identified in the advance notice, and to allow APHIS to more easily analyze the comments received regarding each issue.
- *Postal Mail/Commercial Delivery:* Please send four copies of your comment (an original and three copies) to Docket No. 98–106–4, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 98–106–4.
- *E-mail:* Address your comment to *regulations@aphis.usda.gov.* Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and ''Docket No. 98–106–4'' on the subject line.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for locating this docket and submitting comments.

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

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

FOR FURTHER INFORMATION CONTACT: Dr. Jerry DePoyster, Senior Veterinary Medical Officer, Animal Care, APHIS, 4700 River Road Unit 84, Riverdale, MD 20737–1234; (301) 734–7586.

SUPPLEMENTARY INFORMATION:

Background

Under the Animal Welfare Act (AWA) (7 U.S.C. 2131 *et seq.*), the Secretary of Agriculture is authorized to promulgate standards and other requirements governing the humane handling, care, treatment, and transportation of certain animals by dealers, research facilities, exhibitors, operators of auction sales, and carriers and intermediate handlers. Within the U.S. Department of Agriculture (USDA), responsibility for administering the AWA has been delegated to the Administrator of the Animal and Plant Health Inspection Service (APHIS). Within APHIS, the responsibility for administering the AWA has been delegated to the Deputy Administrator for Animal Care. Regulations established under the AWA are contained in the Code of Federal Regulations (CFR) in 9 CFR parts 1, 2, and 3. Part 1 contains definitions for terms used in parts 2 and 3; part 2 provides administrative requirements and sets forth institutional responsibilities for regulated parties; and part 3 contains specifications for the humane handling, care, treatment, and transportation of animals covered by the AWA. Currently, part 3 consists of subparts A through E, which contain specific standards for dogs and cats, guinea pigs and hamsters, rabbits, nonhuman primates, and marine mammals, respectively, and subpart F, which sets forth general standards for warmblooded animals not otherwise specified in that part.

Definition of Animal

The Federal Laboratory Animal Welfare Act (Pub. L. 89–544), commonly referred to as the Animal Welfare Act, was enacted in 1966 to protect owners from pet theft, prevent use of stolen pets, and ensure the humane treatment of research animals. Under that Act, an *animal* was defined as live dogs, cats, monkeys (nonhuman primate mammals), guinea pigs, hamsters, or rabbits. The Animal Welfare Act of 1970 (Pub. L. 91–597) expanded the list of covered animals to include all warm-blooded animals determined by the Secretary of Agriculture as being used, or intended for use, in research, testing, experimentation, or exhibition, or as a pet, and specifically excluded horses not used for research purposes and other farm animals when used for agricultural purposes.

In 1971, USDA amended the definition of *animal* in § 1.1 of the regulations to incorporate the 1970 amendments to the Act and to specifically exclude birds, rats, and mice for enforcement purposes. In 1989, USDA further amended that definition by, among other things, narrowing the exclusion for rats and mice to only those rats of the genus *Rattus* and mice of the genus *Mus* bred for use in research. The AWA's definition of *animal* has excluded the types of rats and mice commonly bred and used in research and all birds from coverage for over 30 years. Other types of rats and mice, such as wild rats and mice, are covered by the regulations and standards in part 2 and subpart F of part 3. (The regulations can be viewed on Animal Care's Internet site at *http://www.aphis.usda.gov/ac/* by selecting ''Publications''; the regulations are listed under the heading *Animal Welfare Act, Regulations, and Standards,* subheading *Animal Care Regulations.*)

The Farm Security and Rural Investment Act of 2002 (Pub. L. 107–171, signed into law on May 13, 2002), included provisions that amended the definition of *animal* in the AWA (7 U.S.C. 2132(g)) by specifically excluding birds, rats of the genus *Rattus,* and mice of the genus *Mus,* bred for use in research. While the definition of animal in the regulations has excluded rats of the genus *Rattus* and mice of the genus *Mus* bred for use in research, that definition has also excluded all birds (*i.e.*, not just those birds bred for use in research). Therefore, in a separate document published in the Rules and Regulations section of today's **Federal Register**, we are amending the definition of *animal* in the regulations to be consistent with the definition of *animal* in the AWA by narrowing the scope of the exclusion for birds to only those birds bred for use in research. Our final rule is intended only to make the definition of *animal* in the regulations consistent with the definition of *animal* in AWA.

Advance Notice of Proposed Rulemaking

At this time, we are considering several changes to the regulations to help promote the humane handling, care, treatment, and transportation of birds, rats, and mice not specifically excluded from coverage under the AWA. Specifically, we are notifying the public that we intend to extend enforcement of the AWA to birds not bred for use in research that are sold as pets at the wholesale level, or transported in commerce, or used for exhibition, research, teaching, testing, or experimentation purposes. However, before we can begin enforcing the AWA with respect to such birds, we believe it is necessary to consider what regulations and standards are

appropriate for them. Therefore, in this document, we are soliciting comments from the public to help determine how we should regulate the care and use of those animals. In addition, we are considering if we should continue to regulate the handling, care, treatment, and transportation of rats and mice covered by the AWA under the general standards in subpart F of part 3 or if we should establish specific standards for those animals. To aid in that determination, we are soliciting comments from the public concerning the regulation of rats and mice, except for rats of the genus *Rattus* and mice of the genus *Mus* bred for use in research, that are sold as pets at the wholesale level, or transported in commerce, or used for exhibition, research, teaching, testing, or experimentation purposes. Finally, we are requesting data and information from the public regarding the potential economic effects on entities that may be affected if we were to establish specific standards for all covered rats and mice and for birds other than birds specifically bred for use in research.

This advance notice of proposed rulemaking is intended to help promote the humane handling, care, treatment, and transportation of birds, rats, and mice covered by the AWA. This action follows a notice published in the **Federal Register** on January 28, 1999 (64 FR 4356–4367, Docket No. 98–106–1) that informed the public of our receipt of a petition for rulemaking concerning the regulation of birds, rats, and mice, and that solicited comments from the public on that petition.

Request for Comments: Birds

Birds belong to a diverse class (Aves) of warmblooded vertebrates characterized by having a body covered with feathers and forelimbs modified as wings. There are approximately 9,000 species of birds belonging to about 30 orders. Although all birds share a common origin, birds today live in all the major biogeographic regions of the world and are highly diverse morphologically and behaviorally, exhibiting variation in, among other things, body and wing size and structure, modes of locomotion, and dietary requirements. As a result of this diversity, birds maintained in captivity often require unique husbandry and care. For this reason, we do not believe that the general standards in subpart F of part 3 would be appropriate or adequate to provide for the humane handling, care, treatment, and transportation of birds. Therefore, we are soliciting comments from the public to aid in the development of appropriate standards for birds not specifically excluded from coverage under the AWA. In addition, we are also reviewing the regulations in parts 1 and 2 to determine if any changes are necessary before we can regulate the care and use of birds not specifically bred for use in research. Therefore, we are also soliciting comment on certain provisions in part 2 as they pertain to birds.

When we determine how to regulate the handling, care, treatment, and transportation of birds other than birds bred for use in research, we will publish a proposed rule for public comment in the **Federal Register**. Any changes to our Animal Care program and regulations that may result from such a proposal will be addressed in that document.

In particular, we invite responses to the questions listed below. Although the following questions solicit comments concerning the regulation of all birds not specifically excluded from coverage under the AWA, we welcome responses that pertain to a specific type of bird. Please make it explicit in your response if your comment addresses a specific type of bird or if your response pertains to birds in general.

1. As mentioned above, part 3 of the regulations contains specifications for the humane handling, care, treatment, and transportation of animals covered by the AWA. Among other things, the standards in part 3 address the following considerations:

- *Facilities and operations* (including space, structure and construction, waste disposal, heating, ventilation, lighting, and interior surface requirements for indoor and outdoor primary enclosures and housing facilities);
- *Animal health and husbandry* (including requirements for sanitation and feeding, watering, and separation and classification of animals); and
- *Transportation* (including specifications for primary enclosures, primary conveyances, terminal facilities and the feeding, watering, care, and handling of animals in transit).

Please describe minimum standards that would be appropriate for birds other than birds bred for use in research, including requirements for facilities and operations, animal health and husbandry, and transportation. Please submit specific data to support any suggested standards.

2. We are aware of several published programs of humane care and use for birds. Should the standards we develop for birds, except for birds bred for use in research, be consistent with any published program(s) for the care and use of birds? If so, please submit a copy of any suggested programs and specific data to support those standards.

3. Sections 2.1 and 2.25 of the regulations provide licensing and registration requirements for dealers, exhibitors, operators of auction sales, and carriers and intermediate handlers. In § 2.1, paragraph (a)(3) provides exemptions from licensing requirements for certain entities, such as retail pet stores that sell non-dangerous, pet-type animals, including birds, at retail only. Should we revise or add exemptions for certain dealers, exhibitors, operators of auction sales, and carriers and intermediate handlers of birds not bred for use in research? If so, what should those exemptions be? Please provide supporting data. (For example, we are aware that there are many entities who breed small numbers of birds; if we should exempt those entities, what criteria should we use to determine which entities should be exempt?)

4. Currently, § 2.130 provides minimum age requirements for the commercial transportation of dogs and cats. Should we establish minimum age requirements for the transportation of birds other than birds bred for use in research? If so, what factors should we consider when determining those requirements? (For example, if the animals are weaned, the species of bird under consideration, etc.) Please provide specific supporting data.

5. When conducting an inspection, USDA inspectors follow a given facility's biosafety procedures or use recommended protective clothing and equipment, such as coveralls, disposable gloves, and disposable or sanitizable boots. We invite comments on what procedures, equipment, and supplies should inspectors use in order to protect birds from transmitted diseases. Should additional procedures, equipment, or supplies be employed to inspect nesting birds? Please explain.

6. Comments are also invited concerning the number and size of entities that may be affected if we were to regulate birds other than birds bred for use in research. (Such entities may include dealers, research facilities, exhibitors, operators of auction sales, and carriers and intermediate handlers of birds not specifically bred for use in research that are sold as pets at the wholesale level, transported in commerce, or used for exhibition, research, teaching, testing, or experimentation purposes.)

7. What is the number of each species of birds, except for birds bred for use in research, that are currently sold as pets at the wholesale level, transported in commerce, or used for exhibition,

research, teaching, testing, or experimentation purposes?

8. Comments are invited regarding the current physical structures, equipment, staffing, licensing, and paperwork used in the handling, care, treatment, and transportation of birds other than birds bred for use in research and how those operations may be affected if we were to extend enforcement of the AWA to those animals. In addition, if you are submitting suggested standards for birds in response to questions 1 or 2, please address how those standards would affect facility operations.

9. What are the potential economic effects, in terms of time and/or money, on entities that may be affected if we were to regulate birds other than birds bred for use in research?

10. Do you have any other specific concerns or recommendations pertaining to the regulation of birds other than birds bred for use in research?

Request for Comments: Rats and Mice

In addition to the protections afforded by the standards and regulations in parts 2 and 3 of the regulations, the vast majority of animals used in biomedical research, including birds, rats, and mice, are provided oversight by Public Health Service (PHS) of the U.S. Department of Health and Human Services, through voluntary accreditation by the Association for Assessment and Accreditation of Laboratory Animal Care International (AAALAC), or both. Most biomedical research in the United States is performed in laboratories funded at least in part by PHS. The PHS *Policy on Humane Care and Use of Laboratory Animals* covers live vertebrate animals that are involved in activities supported by PHS. The PHS policy requires an Animal Welfare Assurance, which is a document that commits the research institution to a program of animal care and use that is consistent with the *Guide for the Care and Use of Laboratory Animals* (referred to below as the *Guide*), a publication produced by the National Research Council to assist institutions in caring for and using animals in ways judged to be scientifically, technically, and humanely appropriate.[1]

In addition to PHS oversight, many U.S. research facilities are accredited by AAALAC. This private organization, through inspections and reviews, accredits laboratories that meet or exceed the animal care standards in the *Guide*. Research facilities seek AAALAC accreditation for assistance with public relations and in receiving grants.

While the AWA and the regulations address a broader range of activities than does the *Guide*, we believe that many of the minimum standards for the care and use of animals contained in the *Guide* are applicable in research and non-research environments alike. As a result, we have made, whenever possible, the standards in part 3 consistent with the *Guide* in order to eliminate confusion and to simplify compliance for entities that must comply with both the regulations and the *Guide*. In those cases where the regulations are consistent with the *Guide*, it is because we have reviewed the *Guide* and determined that its program for animal care and use is appropriate and adequate to provide for the humane handling, care, treatment, and transportation of the animals in question.

We are soliciting comments to help us determine whether we should continue to regulate rats and mice other than rats of the genus *Rattus* and mice of the genus *Mus* bred for use in research under the general standards in subpart F of part 3, or if we should adopt specific standards for those animals. While the *Guide* does not provide husbandry specifications for the care and use of birds, as they are not commonly used in biomedical research, it does provide specifications for the care and use of rats and mice. Therefore, we also request comment on the adequacy of the specifications in the *Guide* as they pertain to the humane handling, care, treatment, and transportation of rats and mice. If we determine that specific standards should be established for rats and mice covered by the AWA, we will publish a proposed rule for public comment in the **Federal Register**. Any changes to our Animal Care program and regulations that may result from such a proposal will be addressed in that document.

In particular, we invite responses to the questions listed below. Although the following questions solicit comments concerning the regulation of all rats and mice covered by the AWA, we welcome responses that pertain to only rats or to mice, or to a specific type of rat or mouse. Please make it explicit in your response if your comment addresses a specific type of animal or if your response pertains to rats and mice in general.

11. Should rats and/or mice other than rats of the genus *Rattus* and mice of the genus *Mus* bred for use in research continue to be regulated under the general standards in subpart F of part 3? If so, please submit any data available to support the continued regulation of those animals under that subpart.

12. As mentioned above, part 3 contains specifications for the humane handling, care, treatment, and transportation of animals covered by the AWA. Among other things, the standards in part 3 address the following considerations:

- *Facilities and operations* (including space, structure and construction, waste disposal, heating, ventilation, lighting, and interior surface requirements for indoor and outdoor primary enclosures and housing facilities);
- *Animal health and husbandry* (including requirements for sanitation and feeding, watering, and separation and classification of animals); and
- *Transportation* (including specifications for primary enclosures, primary conveyances, terminal facilities and the feeding, watering, care, and handling of animals in transit).

Should specific standards be developed for rats and/or mice other than rats of the genus Rattus and mice of the genus Mus bred for use in research? If so, what minimum standards would be appropriate for those animals, including requirements for facilities and operations, animal health and husbandry, and transportation? Please submit specific data to support any suggested standards.

13. As noted above, research institutions funded at least in part by the Public Health Service of the U.S. Department of Health and Human Services are required to follow a program of animal care and use that is consistent with the National Research Council's *Guide for the Care and Use of Laboratory Animals*. To eliminate confusion and simplify compliance for entities that must comply with the regulations and the *Guide*, we have, whenever possible, made the standards in part 3 of the regulations consistent with the program of animal care and use in the *Guide*. If specific standards should be developed for rats and mice other than rats of the genus *Rattus* and mice of the genus *Mus* bred for use in research, are the specifications for the care and use of rats and mice contained in the *Guide* appropriate and adequate to provide for the humane care, handling, treatment, and transportation of those animals? If so, please submit specific data to support the adoption of the *Guide*'s specifications for rats and mice.

14. Comments are invited concerning the number and size of entities that use rats and mice, except for rats of the genus *Rattus* and mice of the genus *Mus*

[1] The *Guide* can be viewed on the National Academies Press' Internet site at *http://www.nap.edu/readingroom/books/labrats/*.

bred for use in research, for purposes covered by the AWA. (Such entities may include dealers, research facilities, exhibitors, operators of auction sales, and carriers and intermediate handlers of rats and mice covered by the AWA that are sold as pets at the wholesale level, transported in commerce, used in exhibits, or used for research, teaching, testing, or experimentation purposes.)

15. What is the number of each species of rats and mice, except for rats of the genus *Rattus* and mice of the genus *Mus* bred for use in research, that are currently sold as pets at the wholesale level, transported in commerce, used in exhibits, or used for research, teaching, testing, or experimentation purposes?

16. Comments are invited concerning the current physical structures, equipment, staffing, licensing, and paperwork used in the handling, care, treatment, and transportation of rats and mice, except for rats of the genus *Rattus* and mice of the genus *Mus* bred for use in research, for purposes covered by the AWA. If you are submitting suggested standards for rats and mice in response to question 12 or believe that we should establish specific standards for covered rats and mice that are consistent with the *Guide* (see question 13, above), please address how those standards would affect facility operations.

17. What are the potential economic effects, in terms of time and/or money, on entities that may be affected if we were to establish specific standards for rats and mice covered by the AWA? (Such entities may include dealers, research facilities, exhibitors, operators of auction sales, and carriers and intermediate handlers of rats and mice covered by the AWA that are sold as pets at the wholesale level, transported in commerce, used in exhibits, or used for research, teaching, testing, experimentation, or exhibition purposes.)

18. Do you have any other specific concerns or recommendations pertaining to the regulation of rats and mice other than rats of the genus *Rattus* and mice of the genus *Mus* bred for use in research?

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

Done in Washington, DC, this 1st day of June 2004.

Bill Hawks,

Under Secretary for Marketing and Regulatory Programs.

[FR Doc. 04–12692 Filed 6–3–04; 8:45 am]

BILLING CODE 3410–34–P

FARM CREDIT ADMINISTRATION

12 CFR Parts 611, 612, 614, 615, and 620

RIN 3052–AC21

Organization; Standards of Conduct and Referral of Known or Suspected Criminal Violations; Loan Policies and Operations; Funding and Fiscal Affairs, Loan Policies and Operations, and Funding Operations; Disclosure to Shareholders; Preferred Stock

AGENCY: Farm Credit Administration.

ACTION: Proposed rule.

SUMMARY: The Farm Credit Administration (FCA or agency) proposes to change its regulatory capital treatment for preferred stock issued by Farm Credit System (FCS or System) banks, associations, and service corporations and place certain restrictions on the retirement of preferred stock. Additionally, this proposal would require greater board involvement and oversight in the retirement of preferred stock, enhance the current standards of conduct regulations to specifically address insider preferred stock transactions, and require disclosure of senior officer and director preferred stock transactions. We also propose to modify and streamline our process for reviewing and clearing disclosure for certain issuances of FCS equities. Lastly, we propose to add a new provision to control investments by FCS banks, associations, and service corporations in preferred stock of other FCS institutions, including the Federal Agricultural Mortgage Corporation (Farmer Mac).

DATES: Please send your comments to us by August 3, 2004.

ADDRESSES: You may send comments by electronic mail to *reg-comm@fca.gov,* through the Pending Regulations section of FCA's Web site, *www.fca.gov,* or through the Governmentwide *www.regulations.gov* portal. You may also send comments to S. Robert Coleman, Director, Regulation and Policy Division, Office of Policy and Analysis, Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090 or by fax to (703) 734–5784. You may review copies of all comments we receive at our office in McLean, Virginia.

FOR FURTHER INFORMATION CONTACT:

Laurie A. Rea, Senior Policy Analyst, Office of Policy and Analysis, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4479; TTY (703) 883–4434;

or

Howard Rubin, Senior Attorney, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–2020.

SUPPLEMENTARY INFORMATION:

I. Objectives

Through this rulemaking we strive to:

- Ensure the stability and quality of capital at FCS institutions by establishing safety and soundness parameters on the issuance of preferred stock;
- Place restrictions on preferred stock issued by FCS institutions that can be continually redeemed and has limited attributes of equity;
- Ensure fair and equitable treatment of all shareholders of FCS preferred stock and minimize the potential for insider abuse;
- Modify and streamline our review and clearance process for issuances of nonborrower equities; and
- Require disclosure of senior officer and director preferred stock purchases and retirements.

The agency believes additional regulatory guidance and requirements will help ensure consistent treatment for all FCS institutions seeking to issue preferred stock.

II. Background

A. Informational Memorandum

FCA recently experienced an increase in requests from FCS institutions to review new preferred stock issuances. In reviewing submissions where associations sought to offer preferred stock to borrowers, we identified a number of policy and safety and soundness issues that led to a review of our capital adequacy regulations. In the fall of 2003, we outlined our concerns in an informational memorandum to all FCS institutions, which indicated that the FCA Board planned to consider modifications to FCA regulations to address these policy and safety and soundness issues.[1]

We noted that questions exist about the stability (''permanency'') and quality of preferred stock that an institution plans to redeem routinely with few limitations or without direct involvement or consideration by the institution's board of directors. In particular, we highlighted our concerns about the risk associated with the capital and earnings volatility that may result from fluctuations in purchases and retirements that may occur daily. Preferred stock programs may be an especially volatile source of capital under adverse credit or interest rate

[1] *See* Informational Memorandum, Roland E. Smith, Issuance of Preferred Stock, September 9, 2003.

conditions when the likelihood of requests for redemption is increased.

Stock that lacks permanence and other attributes of equity may not be available to absorb unforeseen losses, support growth, meet liquidity demands, or build financial strength. Overreliance on such programs as a source of capital may result in unsafe and unsound conditions and lessen incentives to procure more stable forms of capital. Therefore, it is necessary to take appropriate action to ensure that each FCS institution's capital continues to be primarily composed of equities that are likely to be a long-term feature of the institution's capital base. For this reason, we believe additional regulatory parameters and limits on certain types of preferred stock programs are warranted.

In 1997, FCA adopted new surplus and collateral requirements in order to better measure and ensure the adequacy of FCS institution capital.[2] However, many FCS stockholders and others still regard ''permanent capital'' to be a meaningful measure of an FCS institution's financial stability. Therefore, including certain types of preferred stock that lack qualities of ''permanence'' in an institution's permanent capital ratio may give stockholders an inaccurate or misleading impression about the institution's true financial condition. FCS institutions need to ensure that stockholders receive complete information regarding the components of their institution's capital base and the long-term stability of those components. Fair, accurate, and complete disclosure about preferred stock programs in all written materials (including marketing materials, Web page advertisements, and other written information) is another critical issue of concern for FCA. Therefore, we are soliciting public input on what additional disclosures or additional regulatory guidance would be helpful to FCS institutions and benefit potential investors. We are also proposing regulatory changes to help streamline our clearance and review process for certain nonborrower equities. We believe changes can be made to expedite the processing of requests for applications that do not, for example, raise any novel or significant legal, policy or safety and soundness issues.

Lastly, we noted in the informational memorandum that certain preferred stock programs may raise the concern that an institution's board and management may not treat all preferred stockholders equitably regarding stock retirement, or that insiders could become aware of financial difficulties of the FCS institution and retire their stock before other shareholders. Thus, the agency is also proposing additional conflict of interest provisions specifically directed to preferred stock issuances.

B. Mission and Policy

In addition to the safety and soundness concerns outlined above, we are proposing new restrictions to address mission and policy concerns regarding preferred stock issued by FCS institutions that is continually redeemed by the institution or otherwise has limited attributes of equity.

FCS institutions have statutory authority to issue debt and equity securities (subject to FCA regulation) to fulfill their mission of serving the needs of farmers, ranchers, and rural residents. Preferred stock can be a valuable tool for FCS institutions to increase their capital and generate additional loanable funds to meet the credit needs of their borrowers. Additionally, preferred stock issued to borrowers provides FCS associations a mechanism for members to invest and participate in their cooperative beyond minimum borrower stock purchases.

However, we question whether Congress intended FCS institutions to issue equities that have many characteristics of deposit or money market instruments. FCS institutions do not have authority to accept deposits except for limited circumstances specifically authorized by statute. Preferred stock securities that are structured so that a holder can reasonably expect redemption upon request have many features in common with comparably structured demand debt instruments (such as commercial bank deposits) under normal circumstances. Because the holder of such preferred stock can expect to receive principal and interest to the date of redemption, the preferred stock is functionally similar to a deposit or money market instrument under normal circumstances.

On balance, unlike a commercial bank deposit, FCS preferred stock is an ''at-risk'' equity investment and a preferred stockholder ordinarily does not have an enforceable right to demand redemption. The holder of a deposit instrument, such as a demand deposit, time deposit, certificate of deposit, or a ''money market'' deposit has an enforceable legal right to demand payment. By contrast, the holder of preferred stock (a form of equity security) does not have an enforceable right to demand payment. Further, the deposit holder (a creditor) has priority in liquidation over the preferred stockholder (an equity holder). This important distinction makes preferred stock at risk (meaning the shareholder can lose some or all of its principal investment) and is, therefore, includable as permanent capital.

Given these competing and dual characteristics that certain types of preferred stock may possess, we have endeavored to carefully craft regulations that appropriately balance mission and policy issues relating to these instruments in addition to addressing safety and soundness concerns.

C. Authority

Congress broadly authorized each FCS bank and association to adopt bylaws providing for the classes and terms of stock issued by the institution.[3] Congress specifically included preferred stock within the meaning of ''stock.''[4] Congress did not define ''preferred stock'' in the Farm Credit Act of 1971, as amended (Act). Congress defined ''permanent capital'' in the Act to mean:

(A) Current year retained earnings;

(B) Allocated and unallocated earnings (which, in the case of earnings allocated in any form by a System bank to any association or other recipient and retained by the bank, shall be considered, in whole or in part, permanent capital of the bank or of any such association or other recipient as provided under an agreement between the bank and each such association or other recipient);

(C) All surplus (less allowances for losses);

(D) Stock issued by a System institution, except:

(i) Stock that may be retired by the holder of the stock on repayment of the holder's loan, or otherwise at the option or request of the holder; and

(ii) Stock that is protected under section 4.9A of the Act or is otherwise not at risk; and

(E) Any other debt or equity instruments or other accounts that the FCA determines appropriate to be considered permanent capital.

When first implementing the new capitalization statutes added by the 1987 amendments to the Act, FCA stated: ''No stock may be issued by Farm Credit institutions after October 5, 1988, that is not both at risk and retireable at the discretion of the board of directors provided minimum capital adequacy standards are met. These are the

[2] *See* 62 FR 4429 (January 30, 1997).

[3] *See* 12 U.S.C. 2013(9), 2073(16), 2093(8), 2122(9), and 2154a(b).

[4] *See* 12 U.S.C. 2154a(a)(2).

essential characteristics of permanent capital.'' [5] Therefore, FCA may authorize System institutions to issue preferred stock so long as the stock is at risk and the institution's board retains discretion over stock retirements.

Section 4.3 of the Act [6] requires FCA to ensure that System institutions ''achieve and maintain adequate capital.'' Title V of the Act [7] authorizes FCA to adopt regulations to implement the Act and to take enforcement action in response to, or to prevent, an unsafe or unsound practice. Congress specifically provided that capitalization of System institutions, including the manner in which stock is issued, held, transferred, and retired, is subject to FCA regulation.[8]

III. Section-by-Section Discussion of Proposed Changes

A. Standards of Conduct—§ 612.2165

There is the potential that an insider with access to material confidential information may be able to use that information to make advantageous purchases of preferred stock or request retirement before negative information becomes publicly available. In particular, directors, who are insiders, as well as borrowers and investors, will inevitably possess earlier and more detailed knowledge about the affairs of the institution than other investors. Insiders will know in advance whether a floating or administered dividend rate on preferred stock will change and, if so, by how much and when. They will also know whether the association will have to stop paying dividends due to capital or earnings problems. For these reasons, we believe strong regulatory controls are appropriate.

Currently, System institution (defined to include banks, associations, and service organizations) directors are prohibited by § 612.2140 from making use of non-public information or using their position or inside information to obtain a personal benefit. Section 612.2165 requires the board of directors establish requirements and procedures ''to promote public confidence in the institution and the System * * * and prevent the improper use of official * * * information.'' Employees are prohibited by § 612.2150(b) and (e) from divulging or making use of ''any fact, information, or document not generally available to the public that is acquired by virtue of employment with a System institution'' and from using such information to obtain any personal benefit.

In addition, § 612.2160 requires each institution to ensure that its directors and employees comply with the Standards of Conduct regulations and to ''act promptly to preserve the integrity of and public confidence in the institution in any matter involving a conflict of interest;'' to ''[t]ake appropriate measures to ensure that all directors and employees are informed of the requirements of this regulation'' and the institution's related policies and procedures; and to ''[a]dopt and implement policies and procedures that will preserve the integrity of and public confidence in the institution and the System * * * .'' Under § 612.2170, the institution must designate a Standards of Conduct Official to advise directors, director candidates, and employees on standards of conduct regulations and policies. The Standards of Conduct Official must also report to the board and the FCA any violation that ''may have an adverse impact on continued public confidence in the System or any of its institutions.''

Although the current standards of conduct regulations discussed above are comprehensive, we believe that enhancements to these regulations would strengthen our requirements, reduce the potential for conflicts of interest, and heighten the awareness of this important issue. Thus, we are proposing to add two new provisions. The purposes of these provisions are to help ensure fair and equitable treatment of all stockholders and to address the potential issue that employees and directors could use information regarding changes in dividend rates, regulatory capital ratios, the financial condition of the institution, or other material information that is not available to all investors to their advantage.

Specifically, proposed § 612.2165(b)(14) requires FCS institutions to establish policies and procedures that prohibit directors and employees from purchasing or retiring any stock in advance of the release of material non-public information concerning the institution to other stockholders. Proposed § 612.2165(b)(15) requires FCS institutions to establish policies and procedures specifying when directors and employees may purchase and retire preferred stock in the institution.

We are also proposing other corresponding controls relating to insider transactions and retirement of equities that are discussed later in this preamble.

B. Lending Limits—§ 614.4351

The agency has routinely required FCS institutions that issue preferred stock that does not qualify as total surplus [9] (such as preferred stock with a planned continual redemption feature) to exclude it from their lending limit base calculation (the maximum amount an institution can extend to an individual borrower). This control has been instituted to limit significant fluctuations in an institution's lending base that may occur due to stock purchases and redemptions and to limit the ability of an institution to appreciably increase its lending base with volatile securities. This condition has also been imposed to reduce the possibility that an FCS institution would be in noncompliance with FCA regulations due to routine preferred stock redemptions that caused the institution's capital levels to decline to a level where large loans would exceed the institution's legal lending limit. Lastly, this condition is also an effective safety and soundness control to limit the level of credit risk to a single counterparty or obligor.

For these same reasons, we are now proposing to institute a similar requirement in our regulations by adding a new paragraph (a)(3) to § 614.4351 to the computation of the lending and leasing limit base. This provision will require FCS institutions to deduct from their lending limit base any amounts of preferred stock not eligible to be included in total surplus as defined in § 615.5301(i).

C. Investments in FCS Institution Preferred Stock—§ 615.5175

We believe there is a need to increase our oversight of the flow of capital between FCS institutions through investments in preferred stock. Proposed § 615.5175 provides that FCS banks, associations, and service corporations may purchase preferred stock issued by another FCS institution, including Farmer Mac, only with the written prior approval of the FCA, except pursuant to § 615.5171 (which relates to transfer of capital from banks to associations).[10] The proposal also requires that an institution's request to purchase preferred stock in another FCS institution, including Farmer Mac, explain the terms and risk characteristics of the investment and the purpose and objectives for making the investment.

[5] 53 FR 40033 (October 13, 1988).

[6] 12 U.S.C. 2154.

[7] 12 U.S.C. 2241 *et seq.*

[8] *See* 12 U.S.C. 2014, 2074(a), 2094, 2146.

[9] *See* 12 CFR 615.5301(i).

[10] The FCA is concurrently considering amendments that will address investments by Farmer Mac in other FCS institutions.

As the safety and soundness regulator, we believe that it is important for FCS institutions to build their capital primarily through earnings. Diversified capital sources, however, can be a valuable source of additional financial strength. For example, preferred stock issuances can be a useful method for FCS institutions to build capital to fulfill their ongoing mission to serve agriculture and rural areas. However, for the reasons explained below, we believe that investment by one FCS institution in another FCS institution needs to be closely monitored.

FCS banks and associations have statutory authority to purchase nonvoting equities in other FCS institutions.[11] Historically, investments in preferred stock of other FCS institutions have been made to provide financial assistance. For instance, in the 1980s, several FCS banks purchased preferred stock issued by financially troubled associations. Today, there are a number of FCS institutions that are issuing preferred stock for a variety of other reasons, including meeting long-term capital objectives and supporting growth.

There have not been any recent investments by FCS banks, associations, or service corporations in the preferred stock of other FCS institutions, including Farmer Mac. Nevertheless, certain preferred stock investments of this nature could potentially reduce the perceived quality of FCS and Farmer Mac capital. These investments could be used to improve the regulatory capital ratios of individual FCS institutions without providing additional risk-bearing resources to the System as a whole. For example, if two FCS associations invested in each other's preferred stock, FCA regulations would require each FCS institution to deduct from its assets and total capital an amount equal to the reciprocal investment before computing its regulatory capital.[12] However, if the investment came from a third FCS institution and there were no reciprocal investments, the regulatory capital of the issuing institutions could also increase. Furthermore, an FCS institution's ability to invest unlimited amounts in preferred stock issued by other FCS institutions creates concentration and systemic risks.

D. Capital Adequacy—Definitions—§ 615.5201

We are proposing to modify our definitions in subpart H that apply to our capital adequacy regulations by defining preferred stock by class and maturity. Current § 615.5201 does not specifically define preferred stock, but includes preferred stock within the definition of permanent capital. We are proposing changes to better define and capture the various classes of preferred stock currently offered in the marketplace. We are proposing to use these new definitions to differentiate how each class is treated for permanent capital ratio computation purposes, which we discuss later in this preamble. Also, to the extent appropriate to the activities of the FCS institutions, we are proposing definitions similar to those used by other financial regulatory agencies.[13]

Under the proposal, the reference to term preferred stock is removed from the definition of permanent capital in § 615.5201(1)(5). Instead, preferred stock is more broadly defined under proposed § 615.5201(m) as stock that is ''permanent capital and has dividend and/or liquidation preference over common stock.'' The definition of preferred stock is further described as including, but not limited to, the following instruments:

(1) *Convertible preferred stock*, which means preferred stock that is mandatorily convertible into any other class of equities.

(2) *Intermediate-term preferred stock*, which means term preferred stock with an original maturity of at least 5 years but less than 20 years.

(3) *Limited life preferred stock*, which means preferred stock that has an original maturity of less than 5 years or preferred stock that has an effective maturity of less than 5 years and no stated maturity date.

(4) *Long-term preferred stock*, which means term preferred stock with an original maturity of 20 years or more.

(5) *Perpetual preferred stock*, which means preferred stock that does not have a maturity date and has no other provisions that will require future retirement of the issue.

For consistency with the other financial regulatory agencies and to provide for future use, we reference convertible preferred stock in the proposed rule even though we do not refer to such stock anywhere else in our regulations and no System institution has issued such stock.

E. Treatment of Preferred Stock for Permanent Capital Computations—§ 615.5203

We are proposing to add new § 615.5203 to address the treatment of preferred stock for permanent capital computational purposes. This provision is similar to current § 615.5201(l)(5), which phases out the amount of term preferred stock that is eligible to be counted as permanent capital as it matures. Also, similar to the rules established by the other financial regulatory agencies, this proposal gives institutions less credit for preferred stock that lacks permanence and other positive characteristics of equity for meeting regulatory capital standards.

We believe revisions to our current regulations are needed to more accurately address the relative levels of ''permanency'' of all classes of preferred stock. FCS institutions can issue classes of preferred stock that possess notably different terms/characteristics and have varying levels of ''permanency.'' As previously discussed, some FCS institutions have offered preferred stock that they intend to redeem at any time with the approval of the institution's board, as long as the institution meets its regulatory capital requirements (*e.g.*, continually redeemed preferred stock). Such stock often lacks characteristics of stable equity because its effective maturity can be very short. Yet, under our current permanent capital regulations, this stock is treated the same as perpetual preferred stock that is not routinely retired, allowing an FCS institution to count the full amount outstanding as permanent capital.

Term preferred stock, however, is treated less favorably during the last 5 years of its term under our current regulations for permanent capital computational purposes. At the beginning of each of the last 5 years of the term of the stock, the amount that is eligible to be counted as permanent capital is reduced by 20 percent of the original amount of the stock (net of redemptions). Thus, stock that has a remaining maturity of less than 1 year is no longer eligible to be counted as permanent capital. As a result, certain equity instruments that are outstanding for only a short time period may be counted 100 percent in permanent capital, whereas other equity instruments with an original maturity of more than 5 years, but a similar short remaining maturity, are given less equity credit.

Therefore, we are proposing changes to better align our capital requirements with the true characteristics of an equity instrument and remove inconsistencies.

[11] *See* 12 U.S.C. 2013(11), (16), 2073(7),(8).

[12] *See* 12 CFR 615.5210(e)(1).

[13] We refer collectively to the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision as the ''other financial regulatory agencies.''

These changes also reduce safety and soundness concerns that may result from overreliance on equity that lacks stability and is not expected to remain as a permanent feature of the institution's capital base. Additionally, these amendments would help reduce the volatility in an institution's permanent capital ratio that may result from ongoing purchases and redemptions of the institution's preferred stock.

We believe it is essential that an instrument be available to participate in losses while the institution is operating as a going concern. As an instrument approaches maturity, it begins to take on characteristics of a short-term obligation. For this reason, we are proposing to reduce, or discount, the outstanding amount of preferred stock that is eligible for inclusion in the permanent capital ratio as the instrument nears maturity. More specifically, for the purposes of computing the minimum permanent capital ratio, proposed § 615.5203 would permit a System institution to include preferred stock that it issues based on its ''effective maturity'' as follows:

Effective maturity	Amount includable in the permanent capital ratio (in percent)
5 years or more	100
4 years or more and less than 5 years	80
3 years or more and less than 4 years	60
2 years or more and less than 3 years	40
1 year or more and less than 2 years	20
Less than 1 year	0

For the purpose of this section ''effective maturity'' is the earlier of:

(1) The remaining term to the stated maturity date; or

(2) Either the remaining term to the earliest possible date on which an FCS institution may grant a stockholder's request for stock redemption, or the estimated duration of the weighted average term to maturity of the instrument's expected cash flows as determined under § 615.5202(c) as described below.

To use the estimated duration method, a System institution must adequately document and support its methodology and assumptions using historical redemption rates, appropriate discount rates, and, if applicable, timing of call or other features (*e.g.*, interest rate step-ups or caps). The information must be sufficient for FCA or an independent third party to validate the data and analysis to determine its appropriateness. Additionally, at least quarterly, the System institution must validate and adjust, as needed, its duration estimation and conduct appropriate interest rate stress testing on its estimation. However, in calculating effective maturity, a System institution is not required to include isolated retirements made in unusual or extraordinary circumstances (such as the death of a holder or a merger).

We recognize that at the time a class of stock is first issued, an FCS institution may not have sufficient information regarding potential redemption rates to estimate the duration of the instrument. Therefore, FCS institutions may use data gathered on the duration of preferred stock with similar characteristics issued by other financial institutions (including other FCS institutions) or previously issued by the institution to support their estimation.

The regulation also makes explicit that FCA reserves the right to make the final determination of the appropriate capital treatment for any instrument. The FCA will continue to evaluate the terms and characteristics of each issuance of preferred stock as well as the institution's policy and practice of retirement in making its determination.

We are also proposing to limit the total amount of preferred stock with an effective maturity of less than 5 years that an FCS bank, association, or service corporation may include as permanent capital for computation of the permanent capital ratio. Specifically, proposed § 615.5203(e) limits such stock to 25 percent of the institution's permanent capital (after deductions required in the permanent capital ratio computation). This provision is similar to our regulatory limit on the amount of term preferred stock that may be included as total surplus.[14] We are proposing this limit because we believe it is appropriate and necessary to ensure that each FCS institution's permanent capital continues to be primarily composed of equities that are likely to be a long-term feature of the FCS institution's capital base. Further, it is essential for each FCS institution to maintain a stable capital base to meet the future needs of the institution.

[14] *See* 12 CFR 615.5301(1)(4).

F. Implementation of Cooperative Principles—§ 615.5230

We propose to make a one-word addition to § 615.5230(b)(1) to read: ''each issuance of preferred stock * * * shall be approved by a majority of the shares of each class of equities *adversely* affected by the preference * * *'' (Added word emphasized). This change clarifies our intent. We do not consider this to be a substantive change since the revised language conforms to our current interpretation of this rule.

G. Permanent Capital Requirements—§ 615.5240

We have not made any substantive changes to this section. Current § 615.5240(b) separately enumerates different, yet overlapping, permanent capital requirements for: (1) Common stock and participation certificates; (2) perpetual preferred stock; and (3) term preferred stock. We have made paragraph (b) easier to read and apply by consolidating it into one list for all equities. Additionally, we moved the content of existing paragraph (c), covering retirement of borrower stock, to § 615.5270, Retirement of Other Equities.

H. Limitations on FCS Association Preferred Stock—§ 615.5245

The proposal would limit the amount of preferred stock that a single investor may hold in any one FCS association offering. This limitation is intended to reduce the potential that any one holder of association preferred stock could have undue influence on any one class of stock. Thus, a single investor would be less likely to affect dividend rates or redemptions, or influence a decision

that could affect the institution. Additionally, this is another condition that we have imposed on FCS associations that have issued preferred stock. Specifically, proposed § 615.5245(a) requires an association board of directors to adopt a policy to ensure that no holder at the date of purchase or transfer acquires more than the greater of $2 million or 5 percent of any class of outstanding preferred stock in the association.

Additionally, § 615.5245(b) requires boards of directors of FCS associations offering preferred stock to borrowers to adopt a policy that prohibits the association from extending credit to borrowers to purchase preferred stock in the association. The possibility exists that an FCS association's short-term administered loan rate could be less than the dividend rate on the association's preferred stock, providing an arbitrage opportunity. Generally, we would consider this type of lending a practice that is inconsistent with the mission objectives of the System.

I. Disclosure and Review Requirements for FCS Equities—§§ 615.5250 to 615.5255

Under current rules, FCA has two affirmative responsibilities when an institution seeks to sell preferred stock: (1) We review the proposed disclosure statement for adequacy of disclosure; and (2) we determine whether the stock qualifies as permanent capital. In connection with new stock issuances we also routinely:

- Determine whether the stock issuance qualifies as total surplus or core surplus; and,
- Assess whether the stock issuance may present any legal, policy, operational, or safety and soundness issues.

The proposed rule retains the same basic regulatory framework, requiring banks, associations, and service corporations to submit a proposed disclosure statement to FCA before any sale may take place, but clarifies and streamlines the current review and clearance process. We have also created separate regulatory sections for borrower stock and nonborrower equities. The disclosure requirements in proposed § 615.5250 for borrower stock remain fundamentally the same. We have, however, made some organizational and plain language changes. The changes we are proposing to our clearance and review process for equities not purchased as a condition of obtaining a loan are contained in proposed § 615.5255.

We anticipate that the new provisions will expedite processing of offerings that do not present significant supervisory or compliance concerns or raise significant legal or policy issues. For issuances where each purchaser and subsequent transferee must acquire at least $250,000 of the stock and meets the Securities and Exchange Commission definition of ''accredited investor'' or ''qualified institutional buyer,'' a disclosure statement is deemed reviewed and cleared by FCA unless FCA notifies the institution to the contrary within 30 days of receipt of a complete disclosure statement submission (which consists of the proposed disclosure statement and any additional materials requested by FCA).[15]

Under this process, an institution may also conclude that FCA will consider the stock permanent capital unless FCA notifies the institution to the contrary within 30 days. Upon request, FCA will provide written confirmation of its determination on how it will treat the proposed issuance for all other regulatory capital measures. We believe the shorter time period is appropriate for market-driven issuances purchased by sophisticated investors that do not raise novel or safety and soundness issues.

In contrast, FCA has heightened interest about smaller, nonstandard issuances offered to unsophisticated borrowers and other investors who may be unaware of the risks involved with the purchase. Therefore, we are proposing to apply a 60-day time period for these issuances. For issuances offered to unsophisticated borrowers and investors, a disclosure statement is deemed reviewed and cleared and an institution may conclude that FCA will consider the stock permanent capital unless FCA notifies the institution to the contrary within 60 days of receipt of a complete disclosure statement submission.

We believe these proposed changes will clarify our process and expedite FCS institutions' ability to issue preferred stock that does not have unique features or raise significant supervisory, legal, or policy issues. These amendments will also help address the concern that the current process could impede an FCS institution's ability to issue stock to sophisticated investors within a specific time period.

Under our current regulations, a FCS institution must disclose to investors purchasing non-borrower equities: (1) All of the information required by part 620 in the annual report to shareholders as of a date within 135 days of the proposed sale; (2) the institution's capitalization bylaws; and, (3) a written description of the terms and conditions under which the equity is issued. In addition to specific terms and conditions, the description must disclose:

- The equity is an at-risk investment and not a compensating balance and the equity is retirable only at the discretion of the board of directors and only if minimum permanent capital standards established under subpart H of this part are met;
- Whether the institution presently meets its minimum permanent capital standards;
- Whether the institution knows of any reason the institution may not meet its permanent capital standard on the next earnings distribution date; and,
- The rights, if any, to share in patronage distributions.

In addition to the above disclosures, we are proposing to add a new requirement that FCS institutions establish a method to disclose and make information on insider preferred stock purchases and retirements readily available to the public. Under proposed § 615.5255(h), at a minimum, each FCS institution offering preferred stock must make this information available upon request. A FCS institution can also use other means, such as their Web sites, to make information on insider preferred stock transactions available to the public or provide this information along with the other required disclosures at purchase. We believe making this information available will help increase transparency of insider transactions, reduce the potential for insider abuses, and may provide eligible purchasers useful information regarding their decision on preferred stock purchases and retirements.

At this time, we are not proposing any additional changes to our list of required disclosures. However, we invite comments from the public on whether any additional disclosures would be beneficial for investors to receive regarding the sale of non-borrower FCS equities.

Current § 615.5250(c)(4) provides that ''no officer, director, employee, or agent'' shall make any disclosure in connection with the sale of equities, through the disclosure statement or otherwise, that is inaccurate or misleading, or omit to make any statement needed to prevent other disclosures from being misleading. We are proposing to change this provision

[15] Current rules allow FCA waiver of disclosure requirements for minimum purchases of $100,000 by sophisticated investors. We have updated this threshold to $250,000 (the $100,000 limit has remained the same for more than 15 years) to better reflect the activities of market participants.

in proposed § 615.5255(g) by applying the rule to each ''institution'' in addition to specific individuals. Since this section applies to equities offered by institutions, this amendment places responsibility for accurate and truthful disclosures on the institution itself in addition to individual officers, directors, employees, and agents. We also note that FCA considers this provision applicable to all forms of communication regarding a proposed offering—including marketing materials and Web page advertisements—and not just to the formal disclosure statement submitted to FCA.

We are also proposing to add § 615.5255(j), which provides that in addition to FCA requirements, each institution is responsible for ensuring its compliance with all applicable Federal and State securities laws. This provision reiterates that FCA review and clearance of a disclosure statement does not excuse or replace compliance with any other applicable law and does not replace or supersede oversight by any other governmental entity with authority over a securities issuance.

J. Retirement of Other Equities—§ 615.5270

We are proposing amendments that would restrict the ability of an FCS institution board to retire and delegate to management the retirement of preferred stock under certain conditions. Additionally, these new provisions would increase FCS institution board involvement in the retirement of equities that are at risk. We are proposing these new provisions to address the safety and soundness, mission, and policy concerns discussed earlier in this preamble. These new controls will help ensure that FCS equities are fundamentally composed of equities that are likely to remain a long-term feature of the institution's capital and are available to absorb losses of the institution. Additionally, we believe these measures will help ensure the appropriateness of FCS activities within the context of its Government-sponsored enterprise mission.

We are proposing several new restrictions relating to the retirement of preferred stock in § 615.5270. First, an FCS bank, association, or service corporation would not be able to retire limited life preferred stock, except pursuant to §§ 615.5280 and 615.5290 (which relates to retirement in the event of default or restructuring) and except for stock at the end of its stated maturity, unless the institution's permanent capital ratio would be in excess of 8 percent after any retirements. Second, an FCS bank, association, or service corporation would be prohibited from retiring any preferred stock prior to 12 months after the date of issuance, except pursuant to §§ 615.5280 and 615.5290. These provisions are intended to promote the stability (''permanence'') of capital while restricting the issuance of equities that could function like demand deposits or money market instruments.

The FCA is also considering other regulatory measures to ensure that equities issued by FCS institutions are a stable and permanent feature of an institution's capital base. Specifically, we invite comments on whether FCA should institute a longer prohibition on retirement of preferred stock, such as 5 years (rather than 1 year as currently proposed). We also invite specific comment on whether FCA should only allow FCS institutions to retire preferred stock on a pro rata basis by class and not on an individual basis (except in the case of hardship or death). These provisions are two of many possible measures that could help address both the policy and safety and soundness concerns with stock that is continually redeemable. Thus, we are interested in gathering a broad range of perspectives on this subject.

We are also proposing to move the provisions relating to the delegation of retirement of at-risk borrower stock in § 615.5240(c) to § 615.5270(e) and apply those same revisions to all at-risk stock issued by FCS institutions. Thus, an institution's board of directors would only be able to delegate authority to retire at-risk stock to institution management if:

(1) The board has determined that the institution's capital position is adequate;

(2) All retirements are in accordance with the institution's capital adequacy plan or capital restoration plan;

(3) The institution's permanent capital ratio will be in excess of 9 percent after any retirements;

(4) The institution satisfies all applicable minimum surplus and collateral standards after any retirements; and

(5) Management reports the aggregate amount and net effect of stock purchases and retirements to the board of directors each quarter.

We are further proposing to require FCS institutions to adopt a written policy covering the retirement of preferred stock. Specifically, proposed § 615.5270(f) would require each board of directors of a bank, association, or service corporation that issues preferred stock to adopt a written policy covering retirement of preferred stock. The policy must, at a minimum:

(1) Establish any delegations of authority to retire preferred stock and the conditions of delegation (which must meet all the proposed requirements discussed above).

(2) Contain specific limitations on the amount of stock that may be retired during a single quarter (or shorter) time period;

(3) Ensure that all stockholder requests for retirement are treated fairly and equitably;

(4) Prohibit any insider, including institution officers, directors, employees, or agents, from retiring any preferred stock in advance of the release of material non-public information concerning the institution to other stockholders; and

(5) Establish when insiders may retire their preferred stock.

The proposal would also require the institution's board to review its policy at least annually to ensure that it continues to be appropriate for the institution's current financial condition and consistent with its long-term goals established in its capital adequacy plan.

The FCA expects FCS institution boards to fully consider the effect preferred stock retirements have on the institution's capital adequacy, current year earnings, patronage to other shareholders, and future capital needs.

We believe these new regulations are necessary to ensure that FCS institutions fulfill their mission objectives in an appropriate and safe and sound manner, as intended under the Act. We also believe that these provisions will reduce the potential for insider abuse and the potential or appearance of unfair treatment or dealings relating to the retirement of preferred stock.

K. Payment of Dividends—§ 615.5295

This proposal adds a new section to address the payment of dividends. These changes further address our mission and policy concerns relating to the issuance of preferred stock that can be continually redeemed.

Under proposed § 615.5295(a), an FCS institution's board of directors would be required to declare a dividend on a class of stock before any dividends may be paid to stockholders. We are adding this provision to emphasize the distinction between debt and equity securities. We are concerned that payment of accrued dividends before an institution's board has declared them makes the dividend payments perform too much like interest payments on debt instruments.

Proposed § 615.5295(b) prohibits an FCS institution from declaring or paying any dividend unless after declaration or payment of the dividend the institution

would continue to meet its regulatory capital standards under this part. This provision implements section 4.3A(d) of the Act,[16] which prohibits payments of dividends if such action would cause the institution to fail to meet its permanent capital requirements and extends this safety and soundness measure to include all regulatory capital requirements.

Lastly, proposed § 615.5295(c) would require an FCS institution to exclude any accrued but unpaid dividends from regulatory capital computations. We are proposing this amendment to remove any potential that capital could be inflated through temporary accounts as an additional safety and soundness measure.

L. Disclosure of Insider Preferred Stock Transactions

We are proposing to amend § 620.5(j)(2) relating to the required disclosures of transactions with senior officers and directors in FCS institution annual reports to shareholders. We are proposing to add a new requirement that FCS institutions disclose insider preferred stock transactions and make other organizational changes to this section. We are proposing this new disclosure requirement along with other disclosure amendments previously discussed in an effort to increase the transparency of insider preferred stock transactions.

Specifically, § 620.5(j)(2)(a) would require FCS institutions to state the name of each senior officer or director that held preferred stock issued by the institution during the reporting period, the current amount of preferred stock held by the senior officer or director, the average dividend rate on the preferred stock currently held, and the amount of purchases and retirements by the individual during the reporting period. A FCS institution may disclose this information in tabular form as follows:

Name of senior officer or director	Amount of preferred stock held	Average dividend rate	Purchases	Retirements

M. Conforming Changes

We propose to make a conforming change to § 611.1135 to update a cross-reference that would be changed by this proposed rule.

IV. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the FCA hereby certifies that the proposed rule will not have a significant impact on a substantial number of small entities. Each of the banks in the System, considered together with its affiliated associations and service corporations, has assets and annual income in excess of the amounts that would qualify them as small entities. Therefore, System institutions are not ''small entities'' as defined in the RegulatoryFlexibility Act.

List of Subjects

12 CFR Part 611

Agriculture, Banks, Banking, Rural areas.

12 CFR Part 612

Agriculture, Banks, Banking, Conflicts of interest, Rural areas.

12 CFR Part 614

Agriculture, Banks, Banking, Flood insurance, Foreign trade, Reporting and recordkeeping requirements, Rural areas.

12 CFR Part 615

Accounting, Agriculture, Banks, Banking, Government securities, Investments, Rural areas.

12 CFR Part 620

Accounting, Agriculture, Banks, Banking, Reporting and recordkeeping requirements, Rural areas.

For the reasons stated in the preamble, we propose to amend parts 611, 612, 614, 615, and 620 of chapter VI, title 12 of the Code of Federal Regulations as follows:

PART 611—ORGANIZATION

1. The authority citation for part 611 continues to read as follows:

Authority: Secs. 1.3, 1.13, 2.0, 2.10, 3.0, 3.21, 4.12, 4.15, 4.20, 4.21, 5.9, 5.10, 5.17, 6.9, 6.26, 7.0–7.13, 8.5(e) of the Farm Credit Act (12 U.S.C. 2011, 2021, 2071, 2091, 2121, 2142, 2183, 2203, 2208, 2209, 2243, 2244, 2252, 2278a–9, 2278b–6, 2279a–2279f–1, 2279aa–5(e)); secs. 411 and 412 of Pub. L. 100–233, 101 Stat. 1568, 1638; secs. 409 and 414 of Pub. L. 100–399, 102 Stat. 989, 1003, and 1004.

Subpart I—Service Organizations

2. Amend § 611.1135 by revising paragraph (f) to read as follows:

§ 611.1135 Incorporation of service corporations.

* * * * *

(f) *When your service corporation issues equities, what are the disclosure requirements?* Your service corporation must provide the disclosures described in § 615.5255 of this chapter.

PART 612—STANDARDS OF CONDUCT AND REFERRAL OF KNOWN OR SUSPECTED CRIMINAL VIOLATIONS

3. The authority citation for part 612 continues to read as follows:

Authority: Secs. 5.9, 5.17, 5.19 of the Farm Credit Act (12 U.S.C. 2243, 2252, 2254).

Subpart A—Standards of Conduct

4. Amend § 612.2165 by revising paragraphs (b)(12) and (b)(13) and adding new paragraphs (b)(14) and (b)(15) to read as follows:

§ 612.2165 Policies and procedures.

* * * * *

(b) * * *

(12) Establish reporting requirements, consistent with this part, to enable the institution to comply with § 620.5 of this chapter, monitor conflicts of interest, and monitor recusal compliance;

(13) Establish appeal procedures available to any employee to whom any required approval has been denied;

(14) Prohibit directors and employees from purchasing or retiring any stock in advance of the release of material non-public information concerning the institution to other stockholders; and

(15) Establish when directors and employees may purchase and retire their preferred stock in the institution.

PART 614—LOAN POLICIES AND OPERATIONS

5. The authority citation for part 614 continues to read as follows:

Authority: 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128; secs. 1.3, 1.5, 1.6, 1.7, 1.9, 1.10, 1.11, 2.0, 2.2, 2.3, 2.4, 2.10, 2.12, 2.13, 2.15, 3.0, 3.1, 3.3, 3.7, 3.8, 3.10, 3.20, 3.28, 4.12, 4.12A, 4.13B, 4.14, 4.14A, 4.14C, 4.14D, 4.14E, 4.18, 4.18A, 4.19, 4.25, 4.26, 4.27, 4.28, 4.36, 4.37, 5.9, 5.10, 5.17, 7.0, 7.2, 7.6, 7.8, 7.12, 7.13, 8.0, 8.5, of the Farm Credit Act (12 U.S.C. 2011, 2013, 2014, 2015, 2017, 2018, 2019, 2071, 2073, 2074, 2075, 2091, 2093, 2094, 2097, 2121, 2122, 2124, 2128, 2129, 2131, 2141, 2149, 2183, 2184, 2201, 2202, 2202a, 2202c, 2202d, 2202e, 2206, 2206a, 2207, 2211, 2212, 2213, 2214, 2219a, 2219b, 2243, 2244, 2252, 2279a, 2279a–2,

[16] 12 U.S.C. 2154a(d).

2279b, 2279c–1, 2279f, 2279f–1, 2279aa, 2279aa–5); sec. 413 of Pub. L. 100–233, 101 Stat. 1568, 1639.

Subpart J—Lending and Leasing Limits

6. Amend § 614.4351 by adding a new paragraph (a)(3) to read as follows:

§ 614.4351 Computation of lending and leasing limit base.

(a) * * *

(3) Any amounts of preferred stock not eligible to be included in total surplus as defined in § 615.5301(i) of this chapter must be deducted from the lending limit base.

* * * * *

PART 615—FUNDING AND FISCAL AFFAIRS, LOAN POLICIES AND OPERATIONS, AND FUNDING OPERATIONS

7. The authority citation for part 615 continues to read as follows:

Authority: Secs. 1.5, 1.7, 1.10, 1.11, 1.12, 2.2, 2.3, 2.4, 2.5, 2.12, 3.1, 3.7, 3.11, 3.25, 4.3, 4.3A, 4.9, 4.14B, 4.25, 5.9, 5.17, 6.20, 6.26, 8.0, 8.3, 8.4, 8.6, 8.7, 8.8, 8.10, 8.12 of the Farm Credit Act (12 U.S.C. 2013, 2015, 2018, 2019, 2020, 2073, 2074, 2075, 2076, 2093, 2122, 2128, 2132, 2146, 2154, 2154a, 2160, 2202b, 2211, 2243, 2252, 2278b, 2278b–6, 2279aa, 2279aa–3, 2279aa–4, 2279aa–6, 2279aa–7, 2279aa–8, 2279aa–10, 2279aa–12); sec. 301(a) of Pub. L. 100–233, 101 Stat. 1568, 1608.

Subpart F—Property, Transfers of Capital, and Other Investments

8. Add new § 615.5175 to read as follows:

§ 615.5175 Investments in Farm Credit System institution preferred stock.

Except as provided for in § 615.5171, Farm Credit banks, associations and service corporations may only purchase preferred stock issued by another Farm Credit System institution, including the Federal Agricultural Mortgage Corporation, with the written prior approval of the Farm Credit Administration. The request for approval should explain the terms and risk characteristics of the investment and the purpose and objectives for making the investment.

Subpart H—Capital Adequacy

9. Amend § 615.5201 by:

a. Removing paragraph (l)(5) and redesignating existing paragraphs (l)(6), (1)(7), and (1)(8) as (l)(5), (1)(6), and (1)(7), respectively.

b. Redesignating existing paragraphs (m), (n), (o), (p), and (q) as paragraphs (n), (o), (p), (q) and (r), respectively and adding a new paragraph (m) to read as follows:

§ 615.5201 Definitions.

* * * * *

(m) *Preferred stock* means stock that is permanent capital and has dividend and/or liquidation preference over common stock. Preferred stock includes, but is not limited to, the following instruments:

(1) *Convertible preferred stock,* which means preferred stock that is mandatorily convertible into any other class of equities.

(2) *Intermediate-term preferred stock,* which means term preferred stock with an original maturity of at least 5 years but less than 20 years;

(3) *Limited life preferred stock,* which means preferred stock that has an original maturity of less than 5 years or preferred stock that has an effective maturity of less than 5 years and no stated maturity date.

(4) *Long-term preferred stock,* which means term preferred stock with an original maturity of 20 years or more; and,

(5) *Perpetual preferred stock,* which means preferred stock that does not have a maturity date and has no other provisions that will require future retirement of the issue.

* * * * *

10. Add new § 615.5203 to read as follows:

§ 615.5203 Treatment of preferred stock in the permanent capital ratio.

(a) For the purposes of computing the minimum permanent capital ratio, a Farm Credit bank, association, or service corporation may include its preferred stock as permanent capital based on its effective maturity as follows:

Effective maturity	Amount includable in the permanent capital ratio (in percent)
5 years or more	100
4 years or more and less than 5 years	80
3 years or more and less than 4 years	60
2 years or more and less than 3 years	40
1 year or more and less than 2 years	20
Less than 1 year	0

(b) For the purpose of this section effective maturity is the earlier of:

(1) The remaining term to the stated maturity date; or

(2) Either the remaining term to the earliest possible date on which an institution may grant a stockholder's request for stock redemption, or the estimated duration of the weighted average term to maturity of the instrument's expected cash flows as determined under paragraph (c) of this section.

(c) To use the estimated duration method, an institution must adequately document and support its methodology and assumptions using historical redemption rates, appropriate discount rates, and, if applicable, timing of call or other features (*e.g.*, interest rate step-ups or caps). Additionally, at least quarterly, the institution must validate and adjust, as needed, its duration estimation and conduct appropriate interest rate stress testing on its estimation.

(d) In calculating effective maturity, an institution is not required to include isolated retirements made in unusual or extraordinary circumstances (such as the death of a holder or merger).

(e) The total amount of preferred stock with an effective maturity of less than 5 years that an institution may include as permanent capital for computation of the permanent capital ratio is limited to 25 percent of the institution's permanent capital (after deductions required in the permanent capital ratio computation).

(f) The Farm Credit Administration reserves the right to make the final determination of the appropriate capital treatment for any instrument.

Subpart I—Issuance of Equities

11. Revise § 615.5230(b)(1) to read as follows:

§ 615.5230 Implementation of cooperative principles.

(b) * * *

(1) Each issuance of preferred stock (other than preferred stock outstanding on October 5, 1988, and stock into which such outstanding stock is converted that has substantially similar preferences) shall be approved by a majority of the shares of each class of equities adversely affected by the preference, voting as a class, whether or not such classes are otherwise authorized to vote;

* * * * *

12. Revise § 615.5240 to read as follows:

§ 615.5240 Permanent capital requirements.

(a) The capitalization bylaws shall enable the institution to meet the capital adequacy standards established under subparts H and K of this part and the total capital requirements established by the board of directors of the institution.

(b) In order to qualify as permanent capital, equities issued under the bylaws must meet the following requirements:

(1) Retirement must be solely at the discretion of the board of directors and not upon a date certain (other than the original maturity date of preferred stock) or upon the happening of any event, such as repayment of the loan, and not pursuant to any automatic retirement or revolvement plan;

(2) Retirement must be at not more than book value;

(3) The institution must have made the disclosures required by this subpart;

(4) For common stock and participation certificate dividends, dividends must be noncumulative and payable only at the discretion of the board; and

(5) For cumulative preferred stock, the board of directors must have discretion to defer payment of dividends.

13. Add a new § 615.5245 to read as follows:

§ 615.5245 Limitations on FCS association preferred stock.

The board of directors of each association offering preferred stock to eligible borrowers must adopt a policy that:

(a) Includes measures to ensure that no holder acquires more than the greater of $2 million or 5 percent of any class of outstanding preferred stock in the association at the date of purchase or transfer.

(b) Prohibits the association from extending credit for preferred stock purchases in the association.

14. Revise § 615.5250 to read as follows:

§ 615.5250 Disclosure requirements for borrower stock.

(a) For sales of borrower stock, which for this subpart means equities purchased as a condition for obtaining a loan, an institution must provide a prospective borrower with the following documents prior to loan closing:

(1) The institution's most recent annual report filed under part 620 of this chapter;

(2) The institution's most recent quarterly report filed under part 620 of this chapter, if more recent than the annual report;

(3) A copy of the institution's capitalization bylaws; and

(4) A written description of the terms and conditions under which the equity is issued. In addition to specific terms and conditions, the description must disclose:

(i) That the equity is an at-risk investment and not a compensating balance;

(ii) That the equity is retirable only at the discretion of the board of directors and only if minimum permanent capital standards established under subpart H of this part are met;

(iii) Whether the institution presently meets its minimum permanent capital standards;

(iv) Whether the institution knows of any reason the institution may not meet its permanent capital standard on the next earnings distribution date; and

(v) The rights, if any, to share in patronage distributions.

(b) Notwithstanding the provisions of paragraph (a) of this section, no materials previously provided to a purchaser (except the disclosures required by paragraph (a)(4) of this section) need be provided again unless the purchaser requests such materials.

15. Add new § 615.5255 to read as follows:

§ 615.5255 Disclosure and review requirements for other equities.

(a) A bank, association, or service corporation must submit a proposed disclosure statement to the Farm Credit Administration (FCA) for review and clearance prior to the proposed sale of any other equities, which for this subpart means equities not purchased as a condition for obtaining a loan.

(b) An institution may not offer to sell other equities until a disclosure statement is reviewed and cleared by FCA.

(c) A disclosure statement must include:

(1) All of the information required by part 620 of this chapter in the annual report to shareholders as of a date within 135 days of the proposed sale. An institution may incorporate by reference its most recent annual report to shareholders and the most recent quarterly report filed with the FCA in satisfaction of this requirement;

(2) The information required by § 615.5250(a)(3) and (a)(4); and

(3) A discussion of the intended use of the sale proceeds.

(4) An institution is not required to provide the materials identified in paragraphs (c)(1) and (c)(2) of this section to a purchaser who previously received them unless the purchaser requests it.

(d) For any class of stock where each purchaser and all subsequent transferees acquire at least $250,000 of the stock and meets the definition of ''accredited investor'' or ''qualified institutional buyer'' contained in 17 CFR 230.501 and 230.144A, a disclosure statement submitted pursuant to this section is deemed reviewed and cleared by FCA and an institution may treat stock that meets all requirements of part 615 as permanent capital for the purpose of meeting the minimum permanent capital standards established under subpart H unless FCA notifies the institution to the contrary within 30 days of receipt of a complete disclosure statement submission. A complete disclosure statement submission includes the proposed disclosure statement plus any additional materials requested by FCA.

(e) For all other issuances, a disclosure statement submitted pursuant to this section is deemed reviewed and cleared by FCA, and an institution may treat stock that meets all requirements of part 615 as permanent capital for the purpose of meeting the minimum permanent capital standards established under subpart H unless FCA notifies the institution to the contrary within 60 days of receipt of a complete disclosure statement submission. A complete disclosure statement submission includes the proposed disclosure statement plus any additional materials requested by FCA.

(f) Upon request, FCA will inform the institution how it will treat the proposed issuance for other regulatory capital ratios or computations.

(g) No institution, officer, director, employee, or agent shall make any disclosure, through a disclosure statement or otherwise, in connection with the sale of equities that is inaccurate or misleading, or omit to

make any statement needed to prevent other disclosures from being misleading.

(h) Each bank and association must establish a method to disclose and make information on insider preferred stock purchases and retirements readily available to the public. At a minimum, each institution offering preferred stock must make this information available upon request.

(i) The requirements of this section do not apply to the sale of Farm Credit System institution equities to:

(1) Other Farm Credit System institutions,

(2) Other financing institutions in connection with a lending or discount relationship, or

(3) Non-Farm Credit System lenders that purchase equities in connection with a loan participation transaction.

(j) In addition to the requirements of this section, each institution is responsible for ensuring its compliance with all applicable Federal and state securities laws.

Subpart J—Retirement of Equities and Payment of Dividends

16. Amend subpart J of part 615 by revising the heading to read as stated above.

17. Amend § 615.5270 by adding new paragraphs (c), (d), (e), and (f) to read as follows:

§ 615.5270 Retirement of other equities.

* * * * *

(c) A bank, association, or service corporation may not retire limited life preferred stock at any time, except pursuant to §§ 615.5280 and 615.5290 and except for stock at the end of its stated maturity, unless the institution's permanent capital ratio will be in excess of 8 percent after any retirements.

(d) No preferred stock may be retired prior to 12 months after the date of issuance, except pursuant to §§ 615.5280 and 615.5290.

(e) A bank, association, or service corporation board of directors may delegate authority to retire at-risk stock to institution management if:

(1) The board has determined that the institution's capital position is adequate;

(2) All retirements are in accordance with the institution's capital adequacy plan or capital restoration plan;

(3) The institution's permanent capital ratio will be in excess of 9 percent after any retirements;

(4) The institution will continue to satisfy all applicable minimum surplus and collateral standards after any retirements; and

(5) Management reports the aggregate amount and net effect of stock purchases and retirements to the board of directors each quarter.

(f) Each board of directors of a bank, association, or service corporation that issues preferred stock must adopt a written policy covering the retirement of preferred stock. The policy must, at a minimum:

(1) Establish any delegations of authority to retire preferred stock and the conditions of delegation, which must meet the requirements of paragraph (d) of this section.

(2) Contain specific limitations on the amount of stock that may be retired during a single quarter (or shorter) time period;

(3) Ensure that all stockholder requests for retirement are treated fairly and equitably;

(4) Prohibit any insider, including institution officers, directors, employees, or agents, from retiring any preferred stock in advance of the release of material non-public information concerning the institution to other stockholders; and

(5) Establish when insiders may retire their preferred stock. The institution's board must review its policy at least annually to ensure that it continues to be appropriate for the institution's current financial condition and consistent with its long-term goals established in its capital adequacy plan.

18. Add new § 615.5295 to read as follows:

§ 615.5295 Payment of dividends.

(a) The board of directors of a bank, association, or service corporation must declare a dividend on a class of stock before any dividends may be paid to stockholders.

(b) No bank, association, or service corporation may declare or pay any dividend unless after declaration or payment of the dividend the institution would continue to meet its regulatory capital standards under this part.

(c) Each bank, association, and service corporation must exclude any accrued but unpaid dividends from regulatory capital computations under this part.

PART 620—DISCLOSURE TO SHAREHOLDERS

20. The authority citation for part 620 continues to read as follows:

Authority: Secs. 5.17, 5.19, 8.11 of the Farm Credit Act (12 U.S.C. 2252, 2254, 2279aa–11); sec. 424 of Pub. L. 100–233, 101 Stat. 1568, 1656.

Subpart B—Annual Report to Shareholders

21. Revise § 620.5(j)(2) to read as follows:

§ 620.5 Contents of the annual report to shareholders.

* * * * *

(j) * * *

(2) *Transactions other than loans.* For each person who served as a senior officer or director on January 1 of the year following the fiscal year of which the report is filed, or at any time during the fiscal year just ended, describe briefly any transaction or series of transactions other than loans that occurred at any time since the last annual meeting between the institution and such person, any member of the immediate family of such person, or any organization with which such person is affiliated.

(i) For transactions relating to the purchase or retirement of preferred stock issued by the institution, state the name of each senior officer or director that held preferred stock issued by the institution during the reporting period, the current amount of preferred stock held by the senior officer or director, the average dividend rate on the preferred stock currently held, and the amount of purchases and retirements by the individual during the reporting period.

(ii) For all other transactions, state the name of the senior officer or director who entered into the transaction or whose immediate family member or affiliated organization entered into the transaction, the nature of the person's interest in the transaction, and the terms of the transaction. No information need be given where the purchase price, fees, or charges involved were determined by competitive bidding or where the amount involved in the transaction (including the total of all periodic payments) does not exceed $5,000, or the interest of the person arises solely as a result of his or her status as a stockholder of the institution and the benefit received is not a special or extra benefit not available to all stockholders.

* * * * *

Dated: May 27, 2004.

Jeanette C. Brinkley,

Secretary, Farm Credit Administration Board.

[FR Doc. 04–12514 Filed 6–3–04; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AJ09

Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for Astragalus lentiginosus var. piscinensis (Fish Slough Milk-vetch)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat pursuant to the Endangered Species Act of 1973, as amended (Act), for the federally threatened *Astragalus lentiginosus* var. *piscinensis* (Fish Slough milk-vetch). We propose to designate approximately 8,490 acres (ac) (3,435 hectares (ha)) of land in Mono and Inyo Counties, California.

We hereby solicit data and comments from the public on all aspects of this proposal, including data on economic and other effects of the designation. We may revise this proposal prior to final designation to incorporate or address new information received during public comment periods.

DATES: We will accept comments until August 3, 2004. Public hearing requests must be received by July 19, 2004.

ADDRESSES: If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods:

1. You may send written comments and information to the Field Supervisor, Ventura Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2493 Portola Road, Suite B, Ventura, CA 93003.

2. You may send your comments by electronic mail (e-mail) to *fw1fsmv_pch@r1.fws.gov*. For directions on how to submit electronic filing of comments, *see* the ''Public Comments Solicited'' section below for file format and other information about electronic filing.

3. You may hand-deliver written comments and information to our Ventura Fish and Wildlife Office, at the above address, or fax your comments to (805) 644–3958.

All comments and materials received, as well as supporting documentation used in the preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Diane Noda, Field Supervisor, Ventura Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2493 Portola Road, Suite B, Ventura, CA 93003 (telephone 805/644–1766; facsimile 805/644–3958).

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

It is our intent that any final action resulting from this proposal will be as accurate as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. On the basis of public comment, during the development of the final rule we may find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2), or not appropriate for exclusion, and in all of these cases, this information would be incorporated into the final designation. We particularly seek comments concerning:

(1) The reasons why any areas should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefits of designation will outweigh any threats to the taxon resulting from the designation;

(2) Specific information on the amount and distribution of *Astragalus lentiginosus* var. *piscinensis* and its habitat, and which habitat or habitat components are essential to its conservation and why;

(3) Land use designations and current or planned activities in or adjacent to the area proposed and their relationship to the proposed critical habitat;

(4) Current or planned water withdrawals or diversions in or adjacent to the area proposed and their relationship to the proposed critical habitat;

(5) Any foreseeable economic or other potential impacts resulting from the proposed designation of critical habitat, in particular, any impacts on small entities and to the water user community;

(6) Methodologies that we might use, pursuant to section 4(b)(2) of the Act, to determine if the benefits of excluding an area from critical habitat outweigh the benefits of designating the area as critical habitat;

(7) Whether our approach to critical habitat designation could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments;

(8) Additional information that can be used to characterize or more completely understand the regional aquifer that supports aquatic or riparian habitat in Fish Slough, or how local ground water pumping activities affect the hydrology of Fish Slough; and

(9) Information or comment on the merits of the proposed 1,000 meter wide upland area surrounding the alkaline soils, including the need or value of including all or part of this area to ensure an adequate supply of pollinators, manage for control of invasive species, and include sites that could be restored to alkaline soils and reoccupied by *Astragalus lentiginosus* var. *piscinensis*.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (*see* **ADDRESSES** section). Please submit electronic comments in ASCII file format and avoid the use of special characters and any form of encryption. Please also include Attn: ''RIN 1018–AJ09'' and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your internet message, contact us directly by calling our Ventura Fish and Wildlife Office at phone number (805) 644–1766. Please note that the e-mail address ''*fw1fsmv__pch@r1.fws.gov*'' will be closed out at the termination of the public comment period.

Our practice is to make comments, including names and home addresses of respondents, available for public review during normal business hours. Individual respondents may request that we withhold their home address from the rulemaking record and we will honor such requests to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will not, however, consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

Preamble

Designation of Critical Habitat Provides Little Additional Protection to Species

In 30 years of implementing the Act, we have found that the designation of statutory critical habitat provides little additional protection to most listed species while consuming significant amounts of available conservation resources. Our present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. We believe that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

Role of Critical Habitat in Actual Practice of Administering and Implementing the Act

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species yet consumes large amounts of conservation resources. Sidle (1987) stated ''Because the ESA can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7.'' Currently, only 445 species or 36 percent of the 1,244 listed species in the United States under the jurisdiction of the Service have designated critical habitat. We address the habitat needs of all 1,244 listed species through conservation mechanisms such as listing, section 7 consultations, the Section 4 recovery planning process, the Section 9 protective prohibitions of unauthorized take, the Section 6 funding to the states, and the Section 10 incidental take permit process. We believe that it is these measures that may make the difference between extinction and survival for many species.

Procedural and Resource Difficulties in Designating Critical Habitat

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected us to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves us with little ability to prioritize our activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, our own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court-ordered designations have left us with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially-imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA); all are part of the cost of critical habitat designation. None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

Background

Astragalus lentiginosus Douglas ex Hook. var. *piscinensis* Barneby (Fish Slough milk-vetch), was described by Barneby (1977). The type specimen was collected from BLM Spring in the central portion of Fish Slough 8 miles (mi) (13 kilometers (km)) north of the town of Bishop, California. Spellenberg (1993) retained this variety in his treatment of *Astragalus*, which was published in the most recent edition of *The Jepson Manual of Higher Plants of California*. The genus *Astragalus* is in the pea family (Fabaceae).

Astragalus lentiginosus var. *piscinensis* is a prostrate perennial, with few-branching stems that are up to 39 inches (in) (1 meter (m)) in length and covered with stiff, appressed hairs. Leaflets, flowers, and fruits are described in the final listing rule (63 FR 53596).

The Service listed *Astragalus lentiginosus* var. *piscinensis* as threatened under the Act on October 6, 1998 (63 FR 53596). Please refer to our final listing rule for a more detailed discussion of the species' taxonomic history and description. *A. l. var. piscinensis* is not listed by the State of California as a rare, threatened, or endangered taxon, and is not a state candidate for listing as threatened or endangered.

Status and Distribution

The entire known range of *Astragalus lentiginosus* var. *piscinensis* is restricted to a 6 mi (9.7 km) long area of alkaline habitat that parallels Fish Slough, a wetland oasis in Inyo and Mono Counties, California. Fish Slough is located in the northern end of the Owens Valley area, along the eastern edge of the Sierra Nevada Mountains in central California. The Fish Slough area is approximately 4,200 feet (ft) (1,280 m) in elevation. Alkaline habitat at Fish Slough is characterized by soil that has a sandy or silty texture and a white appearance. This alkaline habitat forms a ring around the seasonally and permanently flooded wetland habitat in the slough itself. The alkali flat and alkali scrub habitats in the Fish Slough ecosystem were mapped in 1991 (Ferren 1991a). Approximately 540 ac (219 ha) of alkaline habitat were present in Fish Slough when this mapping effort was completed. For reasons that are not precisely known, *A. l.* var. *piscinensis* does not inhabit the entire alkaline habitat present in Fish Slough (Ferren 1991a; Odion *et al.* 1991).

A comparison of the distribution of alkaline habitat that exists in Fish Slough today with aerial photographs taken in 1950 suggests the geographic extent of alkaline habitat in Fish Slough has decreased over time (Anne Halford, Bureau of Land Management, pers. comm. 2004). There has not been an effort to precisely map the boundary of the alkaline areas in the photographs, but some of the areas that previously possessed alkaline soil would now be mapped as xeric uplands that would not be likely to support *Astragalus lentiginosus* var. *piscinensis*.

In 1992, staff from the Los Angeles Department of Water and Power

(LADWP) and Bureau of Land Management (BLM) performed the first comprehensive survey to locate all of the *Astragalus lentiginosus* var. *piscinensis* in Fish Slough (Novak 1992). The survey documented approximately 3,200 widely-scattered individuals within a 530–ac (214–ha) area. This survey also demonstrated that multiple sites that had been occupied by *A. l.* var. *piscinensis* in the 1980s and 1991 were larger in geographic extent than previously suspected. One site where six plants were documented in the 1980s and 1991 had no plants in 1992. Another site experienced a decline in the number of observed plants from 44 in 1983 to 8 in 1992. The areas where *A. l.* var. *piscinensis* occurred in 1992 were resurveyed in 2000, and it was determined that the overall number of mature plants declined from the 3,200 individuals in 1992 to 1,543 plants in 2000 (A. Halford, pers. comm. 2004). The 2000 survey did not result in the discovery of any new, additional patches of *A. l.* var. *piscinensis*, and the overall distribution of the taxon in 2000 was similar to what was observed in 1992.

Fish Slough can be divided into northern, central, and southern areas. Sixty percent of the known *Astragalus lentiginosus* var. *piscinensis* plants occur in the northern portion of the slough on land owned by the LADWP. In 1991, LADWP staff constructed an 80–ac (32–ha) cattle exclosure in the northern portion of Fish Slough; in 1992, over 95 percent of the *A. l.* var. *piscinensis* plants documented in the northern portion of Fish Slough were within this exclosure. Approximately 35 percent of the known *A. l.* var. *piscinensis* plants occur in the central portion of the slough on lands owned and managed by the BLM or the LADWP. The remaining 5 percent of the known plants occur as scattered patches in the southern portion of the slough located north of the McNally Canal. This land is owned by the BLM or the LADWP. The area south of McNally Canal contains little habitat suitable for *A. l.* var. *piscinensis* (Novak 1992).

Staff from the LADWP and the BLM collect population trend data for *Astragalus lentiginosus* var. *piscinensis* in five monitoring plots on land owned by the LADWP. Two monitoring plots are located in the 80-ac (32-ha) cattle exclosure, where grazing has not occurred since 1991. The other three monitoring plots are subject to grazing. One grazed plot is north of the cattle exclosure, and the other two are in the central portion of Fish Slough near BLM Spring. Monitoring of the five plots occurred annually between 1991 and 2002 (Paula Hubbard, LADWP, pers. comm. 2003; A. Halford, pers. comm. 2003), except for one plot near BLM Spring in 1995, and for the plot north of the cattle exclosure in 1996. When trend data were collected, there was an effort to quantify the number of seedlings, immature plants, and mature plants in each plot.

Data collected from LADWP plots provide insight into how the abundance of *Astragalus lentiginosus* var. *piscinensis* has varied over time at specific sites. An average of 33 plants was present in ungrazed plot 1 between 1991 and 1996, but this declined by 61 percent to an average of 13 plants between 1997 and 2002. Similarly, in ungrazed plot 2, an average of 104 plants was present between 1991 and 1996; this declined by 52 percent to an average of 50 plants between 1997 and 2002. In the grazed plot north of the cattle exclosure (plot 3), an average of 41 plants was present between 1991 and 1996, while the average present between 1997 and 2002 was 48 (an increase of 17 percent). In grazed plot 4, north of BLM Spring, an average of 15 plants was present between 1991 and 1996; this number declined by 53 percent to an average of 7 plants between 1997 and 2002. In grazed plot 5, north of BLM Spring, an average of 7 plants were present in the plot between 1991 and 1996; this number declined by 86 percent to an average of 1 plant between 1997 and 2002. If data from all plots (*i.e.*, grazed and ungrazed) are considered together, the average number of plants in the plots declined by approximately 41 percent between the two periods. The number of immature plants observed within a plot has exceeded the number of mature plants in that plot for only one plot (grazed plot 3) during the monitoring period, and this only occurred twice. The number of seedlings present in different plots has varied over time, with the greatest number of seedlings occurring in the northern portion of the slough in ungrazed plot 2 and grazed plot 3. The plant census data collected within and outside the cattle exclosure suggest that the decline in *A. l.* var. *piscinensis* within the monitoring plots may be caused by one or more factors that may not relate directly to grazing activities, and suggest that low numbers of cattle in an area may not necessarily have an adverse effect on *A. l.* var. *piscinensis*.

Staff from the BLM also monitor changes in the abundance of *Astragalus lentiginosus* var. *piscinensis* at five plots established in 1997 or 1998 on lands under their jurisdiction. Three of the plots are near the middle of Fish Slough. The number of *A. l.* var. *piscinensis* in two of these plots declined from 14 plants in 1997 to 3 plants in 2003, and from 47 plants in 1998 to 5 plants in 2003. At the third plot near the middle of Fish Slough, the number of plants has varied between 19 and 22 individuals during a 7-year period. At the two plots near BLM Spring, the number of *A. l.* var. *piscinensis* has remained relatively constant between 1997 and 2003, with one plot having between 39 and 46 individuals, and the other plot having between 6 and 8 plants. The only plot where a substantial number of young individuals were seen between 1997 and 2003 was located near BLM spring.

Threats

Previously identified threats to *Astragalus lentiginosus* var. *piscinensis* include the presence of roads, effects related to the use of motorized off-road vehicles, effects related to cattle grazing, and herbivory by native vertebrates and insects (USFWS 1998). A potential threat to *A. l.* var. *piscinensis* not previously identified in other documents includes competition with, or displacement by, non-native plant species (P. Hubbard, pers. comm. 2003). The modification of wetland habitats which results from ground water pumping or water diversion activities that alter the surface and underground hydrology of Fish Slough are also a threat to the taxon (USFWS 1998).

The use of motorized off-road vehicles and the presence of roads have affected habitat occupied by *Astragalus lentiginosus* var. *piscinensis*. Approximately 19 mi (30.6 km) of roads exist within 3,280 ft (1,000 m) of the alkaline habitats within Fish Slough. South of BLM Spring, on the east side of the slough, a road bisects one cluster of the listed plants, and off-road vehicle use in the central portion of the slough has been documented (Novak 1992). Soil compaction and topographic changes resulting from road presence and off-road vehicle activity can affect soil moisture regimes in Fish Slough, and potentially result in changes in seasonal inundation patterns that may adversely affect *A. l.* var. *piscinensis*.

Roads through upland areas in Fish Slough also create increased levels of human visitation that would otherwise be unlikely if roads were absent. Roads have been associated with negative impacts that alter the biotic integrity of both terrestrial and aquatic habitats (Trombulak and Frissell 2000). A growing body of published literature indicates that vehicular traffic along road networks in terrestrial habitats increases the likelihood that non-native plant seeds will be introduced into areas

where they were previously absent (Wace 1977; Schmidt 1989; Lonsdale and Lane 1994). Some of the non-native plant species in Fish Slough (*e.g.*, five hook bassia (*Bassia hyssopifolia*)) are identified as pest plants of ecological concern (CalEPPC 1999) and have the potential to invade and degrade the quality of alkaline habitats and compete with *Astragalus lentiginosus* var. *piscinensis*.

The BLM does not permit grazing on lands they administer in Fish Slough. With the exception of the 80-ac (32-ha) cattle exclosure in the northern portion of Fish Slough, lands under LADWP management that support Fish Slough milk-vetch are grazed (P. Hubbard, pers. comm. 2003). The LADWP has not completed a management plan that provides specific prescriptions to guide grazing activities in Fish Slough. Currently, there are approximately 40 head of cattle and up to 8 horses in Fish Slough between late summer and March annually (P. Hubbard, pers. comm. 2003). The LADWP schedules grazing activities so cows are absent from the slough during the milk-vetch growing season.

We believe that moderate to intense levels of cattle grazing in Fish Slough could result in a number of adverse effects. For example, the composition of the local plant community could be altered by reducing or eliminating species that cannot tolerate trampling and increasing the abundance of plant species that are tolerant to trampling. Other taxa that were not previously part of the native plant community may be introduced as a result of grazing activities (*e.g.*, introduction of seeds of non-native species from supplemental feed that is not weed seed free). The regular presence of cattle in an area could result in the creation of cattle trails that are devoid of vegetation, and therefore reduce the amount of habitat that could be occupied by *Astragalus lentiginosus* var. *piscinensis*. Trampling by livestock can also reduce the number of burrows or other nesting sites available for bee pollinators (Sugden 1985), and actions that concentrate the presence of cattle in a particular location (*e.g.*, placement of salt licks) may lead to an increased likelihood that individual *A. l.* var. *piscinensis* plants could be trampled.

Native herbivores may exert a substantial effect on the reproductive output of individual *Astragalus lentiginosus* var. *piscinensis* plants. Infestations of root systems by phloem-sucking insects and high rates of rabbit herbivory have been reported for *A. l.* var. *piscinensis* individuals that were present in the central portion of Fish Slough (Mazer and Travers 1992). Ferren (1991a) observed rabbit feces adjacent to individuals that had been stripped of leaves, flowers, and seeds, and assumed these plants had been browsed or otherwise adversely affected by rabbits. Mazer and Travers (1992) found that plants in the central portion of Fish Slough experienced high herbivory levels when compared to plants in the northern portion of the slough. Some plants in the center of the slough had 80 percent of their branches grazed by rabbits or rodents, while in the northern portion of the slough fewer than 20 percent of the branches of some plants had been grazed. Herbivory of *A. l.* var. *piscinensis* by rodents and insects has also been noted during the aforementioned surveys of long-term monitoring plots (P. Hubbard, pers. comm. 2003). A large percentage of *A. l.* var. *piscinensis* seeds in Fish Slough may be perforated by holes that are created by weevils or wasps. In addition, gopher activity and ant colonies under previously live plants have been noted during monitoring activities. It is not known if herbivory of *A. l.* var. *piscinensis* plants is responsible for low recruitment levels of the listed plant taxon.

Investigations into the condition and viability of *Astragalus lentiginosus* var. *piscinensis* seeds suggest that a large fraction of its viable seeds will germinate under laboratory conditions, but that a large proportion of seeds may be parasitized. Of the 2,901 seeds collected from 35 plants in Fish Slough on September 10, 2000, 1,039 seeds (36 percent) were found to have been parasitized by one or more insect species (Wall 2001). The identity of the insects has not been determined, but may include a weevil (Joy Fatooh, BLM, in litt. 2003), or a wasp (Wall 2001). Parasitism of a seed is believed to always result in damage to the seed embryo (Joy Fatooh, BLM, in litt. 2002).

The proliferation of non-native plant species in Fish Slough has the potential to adversely affect *Astragalus lentiginosus* var. *piscinensis*. Non-native salt cedar (*Tamarix ramosissima*), five hook bassia, Russian thistle (*Salsola iberica*), and pepperweed (*Lepidium latifolium*) would compete with *A. l.* var. *piscinensis* for available space, nutrients, and water if the different species had overlapping distributions. The presence of pepperweed in Fish Slough is especially problematic since that species is able to colonize and rapidly spread into a variety of habitat types, including alkaline areas where *A. l.* var. *piscinensis* is present (P. Hubbard, pers. comm. 2003). Currently, dense concentrations of non-native plant species are not found with *A. l.* var. *piscinensis*. Recognizing that non-native competition could be a problem, LADWP, BLM, and California Department of Fish and Game (CDFG) staff systematically work to control the spread of non-native plant species in Fish Slough.

Natural changes in, or human-induced modifications of, aquatic habitat in Fish Slough may reduce the number of *Astragalus lentiginosus* var. *piscinensis*. A long-term threat to the milk-vetch may include the expansion of Fish Slough Lake. The increased size of the lake may be due to natural geologic processes (*e.g.*, earthquakes), or human-caused actions (*e.g.*, the construction of Red Willow Dam, a small earthen berm). Expansion of Fish Slough Lake from natural processes or human-caused actions has resulted in increased soil inundation, expansion in the distribution of emergent wetland vegetation, and loss of suitable alkaline habitat for Fish Slough milk-vetch (Ferren 1991c). Beavers (*Castor canadensis*) have been observed in Fish Slough Lake and the Northwest Springs area, and their presence sometimes results in changes in local soil moisture conditions as they construct ponds. The construction of a beaver dam near one of the aforementioned long-term monitoring plots on land owned by the LADWP (ungrazed plot 1) appears to coincide with decreases in the number of *A. l.* var. *piscinensis* plants that were counted (P. Hubbard, pers. comm. 2004).

The creation of earthen dams, fish barriers, and weirs that facilitate water flow measurements has also likely affected *Astragalus lentiginosus* var. *piscinensis*. The dams and fish barriers have been built for a variety of purposes, including habitat enhancement for waterfowl, creation of sport fish habitat, and management activities that were designed to benefit native fish. These activities have also altered the slough hydrology by increasing the size of permanently flooded habitats, modifying surface water drainage patterns, and increasing the length of time that *A. l.* var. *piscinensis* habitat is inundated or subject to elevated soil moisture conditions. Each of these effects creates conditions that are less suitable or unsuitable for *A. l.* var. *piscinensis*. No new dams have been built in Fish Slough since 1980. Staff from the BLM and CDFG have removed two dams and are analyzing the potential to remove Red Willow Dam, now the single largest water control structure remaining in Fish Slough.

Water diversion activities associated with mining operations may also affect the hydrology near the southern end of Fish Slough. The Desert Aggregate Mine is situated near the southernmost portion of Fish Slough on lands owned by the LADWP and is 0.75 mi (1.2 km) south of the southernmost known occurrence of *Astragalus lentiginosus* var. *piscinensis*. The mine was specifically developed at a site with coarse, permeable gravels and the transmissivity (a measure of the ease at which ground water can move through the aquifer) of the area around the mine is relatively high (Danskin 1998). Ground water pumping activities at pits at the mine in 1986 or 1987 adversely affected riparian vegetation to the extent that large areas of vegetation south and down-gradient of the mine and Fish Slough died as water tables declined (P. Hubbard, pers. comm. 2003; Sally Manning, County of Inyo, pers. comm. 2003). The effect of ground water pumping on alkaline habitats around the mine was not documented and so it is unknown if alkaline habitats near the mine were also adversely affected. Mining activities nearest to Fish Slough have been completed.

Three major spring areas are present in Fish Slough. Northeast Spring and Northwest Springs are located in the northern portion of the slough, and BLM Spring is present in the east-central portion of the slough. Staff from the LADWP has quantified the amount of water passing through Fish Slough for several decades. The volume of water moving through Fish Slough at one monitoring site declined from 148–152 cubic feet per second (cfs) (4,191–4,304 liters per second (lps)) in the early 1920s to 84–96 cfs (2,379–2,718 lps) in the early 1960s. This reduction in water flow is larger than the annual variability in water volume that can be accounted for by seasonal variation in evaporative losses and transpiration by local phreatophytes (Pinter and Keller 1991). The cause for the decrease in water flow through the slough between the 1920s and the 1960s has not been conclusively identified, but may be related to increased ground water pumping in the Chalfant Valley 2 mi (3.2 km) northeast of Fish Slough (Pinter and Keller 1991; MHA 2001).

Analysis of water table levels in a number of wells in Chalfant and Hammil valleys east or northeast of Fish Slough confirms that there is an incremental decrease in the potentiometric surface (*i.e.*, height of the water table) between these valleys and Fish Slough. This decrease suggests that ground water is moving down gradient from Chalfant and Hammil valleys to the Fish Slough area (MHA 2001).

The Tri-Valley Groundwater Management District (District) in Mono County was established in 1989, in part, to review and approve proposals to export water from the District. The District includes Chalfant, Hammil, and Benton valleys. California landowners may extract as much ground water as they can put to beneficial use, and no permit is required to pump ground water (DWR 1996). Between 1999 and 2001, the District considered a proposal by United States Filter Water Resources, Inc. to pump and export 13,700 acre-feet (16.9 billion liters) of ground water per year (MHA 2001). If the project had been approved as initially proposed, captured water would have been conveyed in a closed pipe and diverted to a location south and down-gradient of Fish Slough. The project was ultimately abandoned, in part, because of environmental concerns for Fish Slough. The District will continue to consider applications to export water, however, as projects to do so are proposed.

Lack of recruitment is a potential threat to *Astragalus lentiginosus* var. *piscinensis.* Staff from the BLM and the LADWP has monitored this taxon from 1992 to 2002, observing that only a few young plants matured and persisted during that time (A. Halford, pers. comm. 2003; P. Hubbard, pers. comm. 2003). Two possible explanations for the lack of recruitment are high rabbit/rodent herbivory of seedlings and changes in soil hydrology or chemistry that make the habitat less suitable for seed germination and plant growth.

Previous Federal Action

On October 6, 1998, the Service published a final rule in the **Federal Register** (63 FR 53596), which determined endangered status for three plant taxa and threatened status for two plant taxa, including *Astragalus lentiginosus* var. *piscinensis.* Please refer to the final rule listing the taxon for information on previous Federal actions prior to October 6, 1998. In the final rule listing *A. l.* var. *piscinensis,* the Service determined that endangered status for this taxon was not warranted because a significant portion of the listed plant occurrences in northern Fish Slough were protected by a cattle exclosure, thereby reducing threats from grazing and trampling. In addition, the land where the taxon occurred was receiving specific management consideration at the time the final rule was published due to its inclusion in a special management unit administered by the BLM. The Service determined that, while this taxon may not have been in immediate danger of extinction, it was likely to become endangered in the foreseeable future throughout all or a significant portion of its range, and listing as threatened was warranted.

At the time *Astragalus lentiginosus* var. *pinscinensis* was listed, we determined that designation of critical habitat was not prudent because the potential benefits were outweighed by the potential negative effects of designating critical habitat. We believed that designation of critical habitat could result in increased threats of illegal collection and vandalism and the designation would not compel or require a private or other non-Federal landowner to undertake active management for the taxon or to modify proposed project activities in the absence of a Federal nexus.

On November 15, 2001, the Center for Biological Diversity and the California Native Plant Society filed a lawsuit in the U.S. District Court for the Southern District of California challenging our determination not to designate critical habitat for eight desert plants, including *Astragalus lentiginosus* var. *pinscinensis* (*Center for Biological Diversity* et al. v. *Norton,* No. 01 CV 2101). On July 1, 2002, the Court ordered the Service to reconsider its not prudent determination and propose critical habitat, if prudent, for *A. l.* var. *pinscinensis* on or before November 15, 2003. On September 9, 2003, the court issued a subsequent order that required the Service to publish a proposed critical habitat designation for *A. l.* var. *pinscinensis* by June 1, 2004.

We have reconsidered our evaluation of the threats posed by vandalism in the not prudent determination, and now determine that the threats to *Astragalus lentiginosus* var. *pinscinensis* from specific instances of vandalism are limited, if not speculative. Accordingly, we withdraw our previous determination that the designation of critical habitat is not prudent for *A. l.* var. *pinscinensis* and determine that the designation of critical habitat is prudent. At this time, we have sufficient information necessary to identify specific areas as essential to the conservation of this plant taxon and are therefore proposing critical habitat (*see* ''Methods'' section below for a discussion of information used in our reevaluation).

Critical Habitat

Section 3(5)(A) of the Act defines critical habitat as—(i) the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are

found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. It does not allow government or public access to private lands. Under section 7 of the Act, Federal agencies must consult with us on activities they undertake, fund, or permit that may affect critical habitat and lead to its destruction or adverse modification. However, the Act prohibits unauthorized take of listed species and requires consultation for activities that may affect them, including habitat alterations, regardless of whether critical habitat has been designated. We have found that the designation of critical habitat provides little additional protection to most listed species.

To be included in a critical habitat designation, habitat must be either a specific area within the geographic area occupied by the species on which are found those physical or biological features essential to the conservation of the species (primary constituent elements, as defined at 50 CFR 424.12(b)) and which may require special management considerations or protection, or be specific areas outside of the geographic area occupied by the species which are determined to be essential to the conservation of the species. Section 3(5)(C) of the Act states that not all areas that can be occupied by a species should be designated as critical habitat unless the Secretary determines that all such areas are essential to the conservation of the species. Our regulations (50 CFR 424.12(e)) also state that, ''The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.''

Regulations at 50 CFR 424.02(j) defines special management considerations or protection to mean any methods or procedures useful in protecting the physical and biological features of the environment for the conservation of listed species. When we designate critical habitat, we may not have the information necessary to identify all areas which are essential for the conservation of the species. Nevertheless, we are required to designate those areas we consider to be essential, using the best information available to us. Accordingly, we do not designate critical habitat in areas outside the geographic area occupied by the species unless the best available scientific and commercial data demonstrate that unoccupied areas are essential for the conservation needs of the species.

Section 4(b)(2) of the Act requires that we take into consideration the economic impacts, the effect on national security, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude areas from critical habitat designation when the benefits of exclusion outweigh the benefits of including the areas within critical habitat, provided the exclusion will not result in extinction of the species.

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), provides criteria, establishes procedures, and provides guidance to ensure that our decisions represent the best scientific and commercial data available. It requires our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should be the listing package for the species. Additional information may be obtained from a recovery plan, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Section 4 of the Act requires that we designate critical habitat on the basis of what we know at the time of designation. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. 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, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods

As required by the section 4(b)(2) of Act and regulations at 50 CFR 424.12, we used the best scientific information available to determine areas that contain the physical and biological features that are essential for the conservation of *Astragalus lentiginosus* var. *piscinensis,* and that may require special management considerations or protection. This includes information from our own documents, including the data from the final rule listing the taxon as threatened (66 FR 27901), recent biological surveys, reports and aerial photos, documentation provided by staff from the BLM and the LADWP, and discussions with botanical and hydrologic experts. We also conducted two site visits to Fish Slough, and met with staff from the BLM, the LADWP, and CDFG to solicit their views on various management aspects involving *A. l.* var. *piscinensis.*

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we consider those physical and biological features (primary constituent elements) that are essential to the conservation of the species and that may require special management considerations or protection. These include, but are not limited to: Space for individual and population growth, and for normal behavior; food, water, air, light, minerals or other nutritional or physiological requirements; cover or shelter; sites for reproduction, germination, or seed dispersal; and habitats that are protected from disturbance or are representative of the

known historic, geographic, and ecological distributions of a species.

The proposed critical habitat unit has been delineated to provide sufficient habitat to maintain a self-sustaining population of *Astragalus lentiginosus* var. *piscinensis* in Fish Slough and includes those habitat components essential for the conservation of the taxon. These habitat components provide for: (1) Individual and population growth, including sites for germination, pollination, reproduction, pollen and seed dispersal, and seed dormancy; (2) areas that allow gene flow and provide connectivity or linkage between different locations within Fish Slough; and (3) areas that provide basic requirements for growth, such as water, light, and minerals.

The presence of water is essential to the development and maintenance of alkaline soils and habitat upon which *Astragalus lentiginosus* var. *piscinensis* depends. The alkaline soils in Fish Slough where alkali flat, alkali scrub, and meadow habitats occur are generally classified as aquic torriorthents-aquent complex with 0–2 percent slope. These alkaline soils develop as mineral-rich, shallow ground water rises under capillary action to the surface by the high evaporation rates which prevail in the Fish Slough area. As this water evaporates at the soil surface, its solute load precipitates, creating a veneer of white salts and minerals. The alkaline habitat that *A. l.* var. *piscinensis* occupies is likely to have a water table that fluctuates between 19–60 in (0.5–1.5 m) below the land surface (Odion *et al.* 1991). In areas where water tables are more 2 m (6.6 ft) deep, capillary action is insufficient to promote and maintain the development of alkaline soils (Odion *et al.* 1991).

Between May 1999 and October 2001, a variety of *in situ* and experimental studies were conducted to evaluate the relationship between photosynthetic rates, growth rates, fecundity, and survivorship of *Astragalus lentiginosus* var. *piscinensis* as depth to a water table varied (Murray and Sala, 2003). Data from these studies suggest that elevated water tables are likely to adversely affect these variables if local water tables are less than 35–40 cm (13.8–15.7 in) below the land surface. Therefore, water tables that rise too close to the land surface and the root zone of *A. l.* var. *piscinensis* may be detrimental to individual plants that are subjected to saturated soils for a prolonged period of time.

Fish Slough is a wetland in an otherwise arid landscape. The average annual rainfall in the town of Bishop is 5.0 in (12.7 centimeters (cm)). The average annual evapo-transpiration rates in alkaline meadows or alkaline scrub habitats in the greater Owens Valley area which are most similar to the habitat type occupied by *Astragalus lentiginosus* var. *piscinensis* range between 18.5–40.5 in (47.0–102.9 cm) and 15.2–23.6 in (38.6–59.9 cm), respectively (Danskin 1998). Because the low annual rainfall and high annual evapo-transpiration rates in the Bishop area create an arid environment, it is essential that a substantial and sustained amount of surface and ground water exists to maintain the wetland and riparian habitats that are present in Fish Slough.

The sources of the water that discharge from springs in Fish Slough have not yet been conclusively identified. Available data indicate that Fish Slough water is derived from the Casa Diablo Mountain area (BLM 1984; MHA 2001), the Tri-Valley area, or a combination of the two areas (MHA 2001). The Casa Diablo Mountain area reaches a maximum elevation of 7,913 ft (2,412 m) and is located 9.5 mi (15.3 km) northwest of Fish Slough. The area between Fish Slough and Casa Diablo Mountain is locally referred to as the Volcanic Tableland. The geology of the Volcanic Tableland predominantly consists of the Bishop Tuff, which has a welded ash and tuff surface veneer. Underneath the surface veneer, a thicker, more permeable layer is present in the Volcanic Tableland. The lower unit of the tuff is extensively fractured and faulted, and some areas are more permeable than wind-blown sand (DWR 1964). These fractures act as conduits that convey ground water from higher elevation areas with greater levels of precipitation to the lower elevation Fish Slough area where low amounts of precipitation predominate. The Tri-Valley area is bounded on the east by the White Mountains, which reach an elevation of up to 14,245 ft (4,342 m), and to the west by a ridge that separates it from Fish Slough. This ridge is less than 280 ft (85 m) higher than the valley floor. The high elevation of the White Mountains promotes the deposition of precipitation. This water then percolates into alluvial fans at the base of the mountains, and ultimately enters the coarse alluvium that is present on the floors of Benton, Hammil, and Chalfant valleys. Because the surface elevation decreases from Benton Valley in the north to Chalfant Valley in the south, and because Fish Slough is lower in elevation than all three of these valleys, ground water tends to move in a southerly or southwesterly direction toward Fish Slough or toward Chalfant Valley east of Fish Slough. A number of fault lines are present in the Fish Slough and Volcanic Tableland area (MHA 2001) and these features likely affect the presence, distribution, and volume of ground water present in the local area (Andy Zdon, MHA Environmental Consulting, Inc., pers. comm. 2004).

The alkaline flats where *Astragalus lentiginosus* var. *piscinensis* occurs are typically dominated by a *Spartina—Sporobolis* (cordgrass—dropseed) plant association. *A. l.* var. *piscinensis* may also occur where a sparse amount of *Chrysothamnus albidus* (rabbit-brush) exists in the transition zone between *Spartina—Sporobolis* and *Chrysothamnus albidus—Distichlis* (rabbit-brush—saltgrass) plant associations. Sawyer and Keeler-Wolf (1995) classify the alkaline habitats where *A. l.* var. *piscinensis* occurs as a cordgrass series or saltgrass series. *Astragalus lentiginosus* var. *piscinensis* is frequently sympatric with *Ivesia kingii* (alkali ivesia). The higher elevation areas where *A. l.* var. *piscinensis* is absent consist of dry shadscale scrub communities that are dominated by various species of *Atriplex* spp. (saltbush).

Distribution of many alkaline-tolerant plant species is largely determined by a combination of environmental factors, predominantly soil moisture and salinity. These two factors in combination may affect the physiology of adult and immature plants, seed germination, and seedling survival. Mazer and Travers (1992) suggest that seed germination and successful establishment of *Astragalus lentiginosus* var. *piscinensis* seedlings are infrequent events, and that sufficient rainfall is necessary to promote seed germination and survivorship of young plants. The suite of environmental factors that determine where *Astragalus lentiginosus* var. *piscinensis* occurs is also likely to determine the composition of the broader plant community of which *A. l.* var. *piscinensis* is a part. Changes in soil moisture and salinity are likely to influence not only the abundance and presence of *A. l.* var. *piscinensis* but also to affect the persistence and character of the *Spartina—Sporobolis* plant association in which *A. l.* var. *piscinensis* occurs.

Upland areas adjacent to the alkaline habitat where *Astragalus lentiginosus* var. *piscinensis* currently exists are also important because some of these areas historically possessed alkaline habitat that no longer exists. The long-term success of the conservation of *Astragalus lentiginosus* var. *piscinensis* may depend upon efforts to restore the extent and character of the alkaline

habitat that historically existed. Inclusion of currently unoccupied upland habitat within the proposed critical habitat unit will therefore include the areas that are necessary to promote the conservation of the listed plant taxon. This need is identified in the recovery plan for the taxon (Owens Basin Wetland and Aquatic Species Recovery Plan Inyo and Mono Counties, California (USFWS 1998)).

Mazer and Travers (1992) examined various aspects that relate to the pollination ecology of *Astragalus lentiginosus* var. *piscinensis*. They found that *A. l.* var. *piscinensis* is dependant on insects for flower pollination and fertilization and the taxon is not capable of producing fruits in the absence of pollinators. Bumblebees (*Bombus* spp.) in the family Apidae were observed to pollinate *A. l.* var. *piscinensis* flowers on three occasions. Bees in the family Megachilidae are believed to be important pollinator insects for *Astragalus brauntonii* (Fotheringham and Keeley 1998), and various bee taxa in this family may occur in and adjacent to Fish Slough. With other milk-vetch species such as *A. cibarius* and *A. utahensis,* large bees in the families Anthophoridae and Apidae carry large pollen loads from plant to plant, while a variety of smaller beetle and fly species carry smaller pollen loads. These smaller insects are, therefore, likely to have a smaller potential for pollinating *Astragalus* plants (Green and Bohart 1975). Unless a specific endemic bee species is responsible for flower pollination, it is possible that multiple bee species pollinate the flowers of *A. l.* var. *piscinensis* (Terry Griswold, Utah State University, pers. comm. 2003).

Studies to quantify the distance that bees will fly to pollinate their host plants are limited in number, but the few that exist show that some bees will routinely fly 100 to 500 m (328 to 984 ft) to pollinate plants. Studies by Steffan-Dewenter and Tscharntke (2000) have demonstrated that it is possible for bees to fly at least 1,000 m (3,280 ft) to pollinate flowers, and at least one study suggests that bumblebees may forage many kilometers from a colony (Sudgen 1985). Studies by Steffan-Dewenter and Tscharntke (2000) also indicate that if pollinator habitat within 1,000 m of some host plants is eliminated, seed set of some plant species may be decreased by as much as 50 percent. Additional studies suggest that the degradation of pollinator habitat is likely to adversely affect the abundance of pollinator species (Jennersten 1988; Rathcke and Jules 1993).

Bumblebees usually nest in abandoned rodent burrows or bird nests (Thorpe *et al.* 1980), and bees in the family Megachilidae also nest in underground rodent burrows or in dry woody material. The alkaline nature of the habitat occupied by *Astragalus lentiginosus* var. *piscinensis* makes it unlikely that burrowing rodents are present in such areas. We believe insect pollinators are more likely to nest in upland habitats adjacent to alkaline areas because nesting and cover sites for various species of mice, kangaroo rats, and pocket mice are more likely to be common there (T. Griswold, pers. comm. 2003).

The upland areas adjacent to occurrences of *Astragalus lentiginosus* var. *piscinensis* are likely to include cover and nest sites for a variety of insects necessary for the pollination of this taxon. Surveys have not been conducted to specifically identify which species are responsible for the fertilization of *A. l.* var. *piscinensis* flowers but, at a minimum, they likely include a variety of ground-nesting bee taxa. Studies have demonstrated that it is possible for bees to fly 1,000 m (3,280 ft) or more to pollinate flowers. The bees that have been observed on *A. l.* var. *piscinensis* include taxa that routinely nest in underground burrows. We believe that rodent burrows are less likely to be common in alkaline habitats and so we have concluded that the bee pollinators that visit *A. l.* var. *piscinensis* are more likely to use rodent burrows in upland shrub scrub plant communities within 100–1,000 m (328–3,280 ft) of the alkaline habitat occupied by the listed plant taxon.

The maintenance of natural conditions in upland areas adjacent to the alkaline habitat where *Astragalus lentiginosus* var. *piscinensis* occurs is important because the presence of roads and use of motorized vehicles have a substantial potential to introduce non-native plant species. These upland areas may act as reservoirs for invasive plant species and facilitate their invasion into the more mesic habitat occupied by Fish Slough milk-vetch. Some species such as *Lepidium latifolium* and *Salsola iberica* can survive in soils that vary in texture and moisture. Proactive management of upland habitats at Fish Slough is necessary to preclude the establishment of invasive non-native plant species that could displace *A. l.* var. *piscinensis* and that such control should not be limited to the areas immediately adjacent to alkaline habitats.

The area we are proposing to designate as critical habitat provides some or all of the habitat components and the physical and hydrologic attributes that are essential for the conservation of *Astragalus lentiginosus* var. *piscinensis*. Based on the best available information at this time, the primary constituent elements of critical habitat for *A. l.* var. *piscinensis* include, but are not limited to:

(1) Alkaline soils that occur in areas with little or no slope, and which overlay a ground water table that is 19–60 in (0.5–1.5 m) below the land surface;

(2) Plant associations dominated by *Spartina—Sporobolis,* or where a sparse amount of *Chrysothamnus albidus* occurs in the transition zone between *Spartina—Sporobolis* and *Chrysothamnus albidus—Distichlis* plant associations;

(3) Upland areas within 1,000 m (3,280 ft) of the alkaline soils described in (1), that support sites where the listed plant's pollinator populations are likely to nest or obtain cover, that require minimal disturbance and active management to limit the establishment of non-native plant taxa, and portions of which may be suitable for restoration and recolonization by *Astragalus lentiginosus* var. *piscinensis*; and

(4) Hydrologic conditions that provide suitable periods of soil moisture and chemistry for *Astragalus lentiginosus* var. *piscinensis* germination, growth, reproduction, and dispersal.

All of the primary constituent elements outlined above do not have to occur simultaneously within the unit to constitute critical habitat for *Astragalus lentiginosus* var. *piscinensis*. We determined the primary constituent elements of critical habitat for *A. l.* var. *piscinensis* based on the best available scientific and commercial information, including professional studies and reports that pertain to its habitat and ecology and the hydrological conditions that are relevant to the quality of habitat in Fish Slough. These documents include, but are not limited to, BLM (1984); Odion *et al.* (1991); Ferren (1991a); Mazer and Travers (1992); Danskin (1998); and MHA (2001).

Criteria Used To Identify Critical Habitat

The criteria that have been used to identify the proposed critical habitat unit for *Astragalus lentiginosus* var. *piscinensis* include the known range of the taxon, the alkaline habitat where the taxon and its associated flora occurs, the upland areas within 1,000 m (3,280 ft) of the alkaline soils that are occupied by the taxon, and the hydrologic features that are essential to promote the survival and persistence of the taxon.

A number of botanical surveys have been completed in most of the alkaline habitats in the greater Owens Valley area and *Astragalus lentiginosus* var. *piscinensis* has not been found outside of Fish Slough (P. Hubbard, pers. comm. 2003). Mary DeDecker, the botanist who collected the type specimen of *A. l.* var. *piscinensis*, traveled extensively throughout the greater Owens Valley area and Inyo and Mono Counties collecting botanical specimens for her herbarium collection. Because her collection does not contain specimens of *A. l.* var. *piscinensis* collected outside of Fish Slough (Michael Denslow, Rancho Santa Ana Botanic Garden, pers. comm. 2004), it is unlikely that Fish Slough milk-vetch occurs outside of that area surrounding the Fish Slough oasis. Considering this, we conclude that the geographic range of *A. l.* var. *piscinensis* is limited to those disjunct occurrences within a 6 mi (9.7 km) stretch of alkaline habitat that borders aquatic habitat in Fish Slough in Inyo and Mono Counties, California. Because the taxon occurs within a relatively limited area and the alkaline habitat within the taxon's range forms a relatively continuous feature in the landscape, we are proposing a single critical habitat unit which is not separated into smaller, separate units. The critical habitat unit being proposed for *A. l.* var. *piscinensis* includes virtually all of the known locations of the taxon.

According to a recovery plan that includes *Astragalus lentiginosus* var. *piscinensis* (USFWS 1998), all remaining habitat of the taxon needs to be conserved. Virtually the entire geographic area which currently is and potentially can be occupied by the taxon is being proposed as critical habitat. This is being done because these areas are all considered essential to the conservation of the species, in accordance with Section 3(5)(C) of the Act. We have determined, however, that one privately-owned, 49-acre (20-ha) parcel within the historic range of *A. l.* var. *piscinensis* is not essential for its conservation. That parcel is in Township 6 South, Range 33 East, section 18 of U.S. Geological Survey quadrangle map titled Fish Slough. It is highly unlikely that this area is currently occupied by the taxon and it has little alkaline soil habitat. In addition, there is no chance that the taxon will be re-introduced on this property. Therefore, the parcel is not essential to conservation of the taxon, and is not included in the proposed critical habitat.

The critical habitat units are designed to encompass a large enough area to support existing ecological processes that may be essential to the conservation of *Astragalus lentiginosus* var. *piscinensis*. Some upland areas adjacent to the alkaline habitat where *A. l.* var. *piscinensis* occurs could potentially be restored to allow the taxon to re-occupy historically-occupied areas. Upland areas within 1,000 meters of the alkaline habitat also provide nest sites and cover for pollinators, and are important to help minimize the potential to introduce new non-native plant species that may adversely affect *A. l.* var. *piscinensis* and to control non-native plant species already present. Because these areas are essential for conservation of the taxon, we have included them in the proposed critical habitat unit in accordance with section 3(5)(A)(ii) of the Act.

Determining the geographic boundary of the critical habitat unit for *Astragalus lentiginosus* var. *piscinensis* would be relatively straightforward if the unit boundary was based only on the presence of alkaline soils, the *Spartina—Sporobolis* plant association where Fish Slough milk-vetch is found, and an upland zone inhabited by the plant's pollinators. We believe, however, that the long-term maintenance and recovery of *A. l.* var. *piscinensis* is ultimately dependent on the maintenance of the hydrologic system that promotes the development and persistence of the alkaline soils and plant communities that *A. l.* var. *piscinensis* is associated with. We believe that adverse changes in the hydrology of Fish Slough would reduce or eliminate those physical features essential for the conservation of the taxon.

Delineating a critical habitat unit for *Astragalus lentiginosus* var. *piscinensis* that includes the hydrologic system that supports this taxon poses significant challenges because the source(s) of the water that issues from the springs in Fish Slough is not precisely known and the location of the ground water flow paths between these sources and the spring orifices in Fish Slough have not yet been determined. Our current understanding of how pumping activities in Chalfant and Hammil valleys affects spring discharge rates or the local aquifer in Fish Slough is not sufficient to clearly illustrate these cause and effect relationships.

Because we believe the protection of the hydrologic conditions that supports the formation and maintenance of alkaline soils is essential to conserve occupied and suitable unoccupied habitat for *Astragalus lentiginosus* var. *piscinensis*, we have identified these hydrologic conditions as a primary constituent element in the ''Primary Constituent Element'' section of this proposed rule even though they may depend upon sources outside the proposed critical habitat unit boundary.

Delineating Critical Habitat

To delineate the critical habitat unit for Fish Slough milk-vetch, we used a computerized Geographic Information System to overlay various themes that included the known occurrences of *Astragalus lentiginosus* var. *piscinensis* and the primary constituent elements (see Primary Constituent Element section above). To map the distribution of *A. l.* var. *piscinensis*, we used information in the California Department of Fish and Game's Natural Diversity Database (CNDDB 2004) and plant distribution data from Novak (1992). These two information sources provide a comparable assessment of the locations of *A. l.* var. *piscinensis*.

The upland boundaries of alkaline soils in Fish Slough as depicted in Ferren (1991a) were then digitized. We digitized the boundaries of aquatic habitats and meadows mapped in this Ferren (1991a) and included these within the boundary of the proposed critical habitat unit. These two habitats do not provide suitable habitat for *Astragalus lentiginosus* var. *piscinensis*; however, they are included within the proposed unit because the precise boundaries of alkaline habitat in Fish Slough vary on an annual basis, and small-scale conversions of wetland habitat to alkaline flat habitat are likely to occur from time to time. In addition, as this ecosystem is dynamic, we believe that areas of alkaline soils may convert to wetland habitat. The mapped boundary based on alkaline soils also corresponds closely with the distribution of the *Spartina—Sporobolis* and *Chrysothamnus albidus—Distichlis* plant associations which are associated with *A. l.* var. *piscinensis*. The alkaline habitat occupied by *A. l.* var. *piscinensis* is a visually obvious feature of Fish Slough. It is present at elevations above the low-lying flooded aquatic habitat in Fish Slough and below the elevated and drier areas dominated by coarse alluvial soils lacking a white alkaline appearance. The alkaline habitat occupied by the taxon is dominated by a *Spartina—Sporobolis* plant association (Odion *et al.* 1991); the taxon may also occur where a sparse amount of *Chrysothamnus albidus* occurs in the transition zone between *Spartina—Sporobolis* and *Chrysothamnus albidus—Distichlis* plant associations. Collectively, these plant associations form the plant community of which *A. l.* var. *piscinensis* is a part, and are therefore

included in the proposed critical habitat unit in this rule. The higher elevation areas where *A. l.* var. *piscinensis* is absent consist of dry shadscale scrub communities that are dominated by various species of *Atriplex* spp. (saltbush).

Because we have concluded that upland area within 1,000 m (3,280 ft) of the alkaline habitats occupied by *Astragalus lentiginosus* var. *piscinensis* is essential for the taxon's conservation, we delineated a boundary that includes this distance as measured from the outer edge of the area that includes occurrences of *A. l.* var. *piscinensis*, alkaline soils, and the *Spartina—Sporobolis* plant association or transition zone between *Spartina—Sporobolis* and *Chrysothamnus albidus—Distichlis* plant associations. This boundary delineates the perimeter of the proposed critical habitat unit.

To provide a legal description of the critical habitat boundary, a final modification to the boundary described in the proceeding paragraphs was made. The proposed critical habitat unit boundary conforms to a Universal Transverse Mercator (UTM) North American Datum 1927 (NAD 27) coordinate system grid with a cell size of 100 m by 100 m. For the modification, those points which define the boundaries of our initial polygon were moved to an adjacent point lying on the UTM grid of 100-meter cells. Defining critical habitat boundaries to be coincident with points on a UTM grid is consistent with current practice and is intended to simplify interpretation of the coordinates while diminishing the number of coordinates necessary to define a boundary.

This proposed unit thus includes the following: Locations where pollinators are most likely to nest or obtain cover; some, but not all, of the surface and subsurface hydrologic features that are necessary to maintain the soils that are necessary for *Astragalus lentiginosus* var. *piscinensis* germination, growth, reproduction, and dispersal; an area where the successful exclusion of non-native plant species must take place in order to safeguard the status of the taxon; the plant communities that are associated with *A. l.* var. *piscinensis*; locations where the current normal year-to-year variations in surface water are likely to create new alkaline habitat; and the locations where the taxon occurred historically and could possibly be restored with active management. The critical habitat unit proposed constitutes our best assessment of that area essential to the conservation of *A. l.* var. *piscinensis*.

Manmade features within the boundaries of the mapped unit, such as buildings, roads, parking lots, and other paved areas, do not contain any of the primary constituent elements for *Astragalus lentiginosus* var. *piscinensis*. Federal actions limited to these areas, therefore, would not trigger a section 7 consultation, unless they affect the taxon and/or its primary constituent elements in adjacent critical habitat. In proposing to designate critical habitat, we made an effort to avoid the inclusion of such features in proposed critical habitat; however, critical habitat is not mapped in sufficient detail to exclude all developed areas, or other lands unlikely to contain the primary constituent elements.

Special Management Considerations or Protection

In 1982, the BLM established the Fish Slough Area of Critical Environmental Concern (ACEC) in an effort to provide protection for the federally endangered Owens pupfish (*Cyprinodon radiosus*), several rare plant taxa including *Astragalus lentiginosus* var. *piscinensis*, and the wetland and riparian habitats upon which these species depend. The listing of the Owens pupfish under the Act provides additional recognition of the need to protect the Fish Slough ecosystem and has indirectly provided some benefit to *A. l.* var. *piscinensis* by raising the level of management attention that is devoted to Fish Slough. Conversely, the creation of impoundments and other manipulations of spring systems in the slough which have been done to manage pupfish have likely affected the suitability of alkaline meadow habitat that could be occupied by *A. l.* var. *piscinensis* by increasing the length of inundation in certain areas. A management plan for the ACEC was finalized in 1984, and the plan has not been revised since it was completed. *Astragalus lentiginosus* var. *piscinensis* was not a listed taxon when the ACEC management plan was completed.

The Fish Slough ACEC has three zones (BLM 1984). Zone 1 is approximately 7,961 ac (3,221 ha) in size and is located within the southeastern portion of the ACEC. Zone 1 encompasses all but the southern-most occurrences of *Astragalus lentiginosus* var. *piscinensis*. The proposed critical habitat unit is predominantly located within Zone 1 of the ACEC, but also extends slightly beyond the boundary of this zone to the south and west. The land in this zone is owned by the BLM, CDFG, LADWP, and one private land owner. Zones 2 and 3 of the ACEC are located in the Volcanic Tableland area west or northwest of Zone 1, and collectively measure 27,964 ac (11,317 ha) in size. Zone 2 was included within the ACEC because this area includes the surface water drainage up-gradient of Fish Slough, and the area was deemed necessary to protect the quality and quantify of surface and ground water that enters Fish Slough. Zone 3 was included within the ACEC because this area is thought to include an aquifer that affects the hydrology of Fish Slough.

A joint management committee composed of representatives of the LADWP, BLM, the Service, and CDFG provides guidance on ACEC management issues. The committee meets at least once a year to discuss land management activities or new developments that have the potential to adversely affect *Astragalus lentiginosus* var. *piscinensis* or other regionally endemic species or their habitats. The annual meeting provides a forum that fosters communication, cooperation, and the coordination of activities among the different committee members.

The suite of factors that affect *Astragalus lentiginosus* var. *piscinensis* is complex. The establishment of the Fish Slough ACEC has helped provide some benefit for *A. l.* var. *piscinensis* by coordinating the activities of staff from the BLM, LADWP, and CDFG on various land management challenges which exist in the local area. Because the long, narrow configuration of the slough is bounded by upland habitat, the amount of alkaline habitat that can be occupied by *A. l.* var. *piscinensis* is limited. Ferren (1991b) summarizes threats to botanical resources at Fish Slough, noting that those related to the enhancement of fisheries (construction of ponds, impoundments, roads, and ditches) may have had the greatest effect on the Fish Slough ecosystem. In the central portion of the slough, Fish Slough Lake appears to have expanded in size between 1944 and 1981. This increase may be due to natural geologic subsidence, the construction of Red Willow Dam, or the construction of water impoundments by beavers. The increase in aquatic habitat has likely resulted in the loss of alkaline habitat for *A. l.* var. *piscinensis* as soils near the lake are now saturated for greater portions of the year (Ferren 1991c). Some earthquake events in Chalfant Valley appear to have resulted in decreases in spring discharge or changes in local water table levels (Brian Tillemans, LADWP, pers. comm. 2000), thereby making it more difficult to clearly understand the nature of the local aquifer. Conflicts that arise in the management of Fish Slough are not easily resolved, and modifications to the slough environment from changes in the

local hydrology are not well understood or easily reversed. These factors, in combination with essential data gaps that include, but are not limited to, a more thorough understanding of the ecology and habitat requirements of the listed plant taxon have made it difficult for local land managers to understand and reverse the decline in the number of *A. l.* var. *piscinensis* within the ACEC over the past decade. The trend in the taxon's abundance during the past decade suggests that, despite the ongoing efforts of the relevant land management agencies, additional factors need to be addressed to reverse the decline in the status of *A. l.* var. *piscinensis*.

In 1998, the Service completed the Owens Basin Wetland and Aquatic Species Recovery Plan Inyo and Mono Counties, California (USFWS 1998). The document describes the natural history and threats that pertain to *Astragalus lentiginosus* var. *piscinensis* and describes only those general recovery actions necessary for its delisting. If implementation of the recovery tasks described in the recovery plan proceeds as scheduled, the recovery and delisting of *A. l.* var. *piscinensis* is expected to take at least 15 years.

Because *Astragalus lentiginosus* var. *piscinensis* is not listed by the state of California as a rare, threatened, or endangered taxon, and is not a candidate for state listing as threatened or endangered, the CDFG does not have an agency management plan that provides prescriptions designed to conserve or actively manage this taxon. The agency is, however, signatory to the 1984 Fish Slough ACEC management plan.

Under section 404 of the Clean Water Act (CWA), the U.S. Army Corps of Engineers (Corps) regulates the discharge of fill into waters of the United States, including navigable waters, wetlands, and other waters (33 CFR parts 320–330). The CWA requires project proponents to obtain a permit from the Corps prior to undertaking activities that would result in the filling of wetlands subject to the Corps' jurisdiction. These activities include grading, discharge of soil or other fill material, etc. Habitat for *Astragalus lentiginosus* var. *piscinensis* consists of alkaline flats adjacent to jurisdictional wetlands under the purview of section 404 of the CWA. Some protection from wetland fill activity, such as the construction of new impoundments or diversion structures, may be afforded by the Corps' regulatory process; however, unless a population of *A. l.* var. *piscinensis* is present within the footprint of the fill area or zone of construction activities, the impacts of the project on the taxon (*e.g.*, changes in surface or ground water hydrology that affect the character and persistence of alkaline habitat) may not be considered.

Special management considerations or protection may be needed to maintain the physical and biological features as well as the primary constituent elements essential to the conservation of *Astragalus lentiginosus* var. *piscinensis* within the unit being proposed as critical habitat. As noted in the ''Critical Habitat'' section, ''special management considerations or protection'' is a term that originates in section 3(5)(A) of the Act under the definition of critical habitat. We believe that the proposed critical habitat unit may require special management considerations or protections due to the threats outlined below.

(1) Activities that have the potential to change the hydrology of Fish Slough and adversely affect the survivorship, seed germination, growth, or photosynthesis of *Astragalus lentiginosus* var. *piscinensis*, unless such activities are designed and have the effect of recreating the historic environmental conditions that existed in Fish Slough.

(2) Activities that have the potential to adversely affect the suitability of alkaline areas that could provide habitat for *Astragalus lentiginosus* var. *piscinensis* including, but not limited to, off-road vehicle use, levels of cattle grazing which could result in increased soil compaction, and road construction and maintenance activities.

(3) Activities that have the potential to modify the species composition, character, or persistence of the native plant associations that are associated with *Astragalus lentiginosus* var. *piscinensis*.

(4) Activities that could adversely affect the insect pollinators that inhabit the native upland desert scrub community that is adjacent to alkaline habitats in Fish Slough including, but not limited to, livestock grazing at levels which would increase soil compaction, use of heavy-wheeled vehicles or off-road vehicles (including motorcycles and all terrain vehicles), pesticide use, and incompatible recreational activities.

(5) Management activities, particularly those that involve cattle grazing and road maintenance, that have the potential to introduce new non-native plant species that may compete with or displace *Astragalus lentiginosus* var. *piscinensis*.

Relationship to Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data available after taking into consideration the economic impact, the effect on national security, and any other relevant impact, of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined, following an analysis, that the benefits of such exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species. Consequently, we may exclude an area from designated critical habitat based on economic impacts, effects on national security, or other relevant impacts such as preservation of conservation partnerships, if we determine the benefits of excluding an area from critical habitat outweigh the benefits of including the area in critical habitat, provided the action of excluding the area will not result in the extinction of the species. In this proposed rule we have not excluded any lands on the basis of economic impacts.

Further, we conducted an evaluation of other potential impacts that may result from this designation, including those to national security, partnerships with local jurisdiction in the development of habitat conservation plans, conservation agreements, and management plans, as well as Tribal nations. We determined that the lands within the designation of critical habitat for *Astragalus lentiginosus* var. *piscinensis* are not owned or managed by the Department of Defense, there are currently no habitat conservation plans or other management plans for *A. l.* var. *piscinensis*, and the designation does not include any Tribal lands or trust resources. As such, we have not excluded any lands from this proposed critical habitat designation based on potential impacts to these factors.

Proposed Critical Habitat Designation

We propose to designate a single critical habitat unit for *Astragalus lentiginosus* var. *piscinensis* that encompasses approximately 8,490 ac (3,435 ha). Within the proposed unit, the city of Los Angeles owns four separate parcels that total 2,923 ac (1,183 ha) in area. The CDFG owns a single 166 ac (67 ha) parcel in the proposed critical habitat unit. The remaining land within the proposed unit is owned by the BLM and comprises 5,401 ac (2,185 ha). The

approximate size of the different land ownership areas within the proposed critical habitat unit is shown in Table 1. Lands managed by the BLM and LADWP comprise 64 and 34 percent of the total proposed unit, respectively, with State lands comprising approximately 2 percent.

TABLE 1.—APPROXIMATE AREAS IN ACRES (AC) AND HECTARES (HA) OF PROPOSED CRITICAL HABITAT FOR *Astragalus lentiginosus* VAR. *piscinensis* BY LAND OWNERSHIP [1]

Critical habitat unit name	City of Los Angeles	State of California	Federal (BLM)	Total
Fish Slough unit	2,923 ac (1,183 ha)	166 ac (67 ha)	5,401 ac (2,185 ha)	8,490 ac (3,435 ha)

[1] Approximate acres have been converted to hectares (1 ha = 2.47 ac).

The proposed Fish Slough critical habitat unit described below constitutes our best assessment at this time of the area that is essential for the conservation of *Astragalus lentiginosus* var. *piscinensis* and includes Federal, State, and City lands. The land within the proposed critical habitat unit contains all of the known occurrences of *A. l.* var. *piscinensis*, alkaline habitat occupied by this taxon, and the upland areas that provide cover sites for insect pollinators and require special management to control non-native plant species. The land within the proposed unit also includes the *Spartina—Sporobolis* plant association and *Chrysothamnus albidus* which is present in the transition zone between the *Spartina—Sporobolis* and *Chrysothamnus albidus—Distichlis* plant associations. The unit also includes some of the hydrologic features that we believe are necessary to promote the persistence and successful recruitment of the listed plant taxon.

This unit boundary overlaps the boundary of Inyo and Mono counties in the state of California. The northern-most boundary of the proposed Fish Slough critical habitat unit is located approximately 3,444 ft (1,050 m) north of Northeast Spring in the northern portion of Fish Slough. The southern boundary of the proposed unit is approximately 510 ft (155 m) north of the Owens River near an area that is labeled ''Five Bridges'' on the Fish Slough U.S. Geological Survey 1:24,000 scale topographic quadrangle. The eastern and western boundaries of the proposed unit are parallel to, overlap, or are adjacent to the eastern and western boundaries of Zone 1 of the BLM's Fish Slough ACEC, respectively.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory. If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that the permitted actions do not destroy or adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. ''Reasonable and prudent alternatives'' are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (*see* 50 CFR 402.10(d)).

Activities on Federal lands that may affect *Astragalus lentiginosus* var. *piscinensis* or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the Army Corps under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (*e.g.*, Federal Highway Administration or Federal Emergency Management Agency funding), will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and

actions on non-Federal and private lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat include those that appreciably reduce the value of critical habitat to *Astragalus lentiginosus* var. *piscinensis.* We note that such activities may also jeopardize the continued existence of the species.

To properly portray the effects of critical habitat designation, we must first compare the section 7 requirements for actions that may affect critical habitat with the requirements for actions that may affect a listed species. Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Actions likely to ''jeopardize the continued existence'' of a species are those that would appreciably reduce the likelihood of the species' survival and recovery. Actions likely to ''destroy or adversely modify'' critical habitat are those that would appreciably reduce the value of critical habitat to the listed species.

Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species. Given the similarity of these definitions, actions likely to destroy or adversely modify critical habitat would often result in jeopardy to the species concerned when the area of the proposed action is occupied by the species concerned.

Federal agencies already consult with us on activities in areas currently occupied by the species to ensure that their actions do not jeopardize the continued existence of the species. These actions include, but are not limited to:

(1) Activities that disturb or degrade the character of alkaline soils or hydrology necessary to support wetlands in Fish Slough.

(2) Activities that have the potential to introduce new non-native plant species to Fish Slough or promote the spread of non-native plant species that are already present in the local area.

(3) Activities that alter the character of the native plant associations that co-occur with *Astragalus lentiginosus* var. *piscinensis.*

(4) Activities that adversely affect insect pollinators that facilitate viable seed production in *Astragalus lentiginosus* var. *piscinensis.*

(5) Activities on Federal lands (*e.g.*, BLM) or private lands that require permits from Federal agencies (*e.g.*, the U.S. Army Corps of Engineers) or use Federal funding (*e.g.*, dollars provided by the Natural Resource Conservation Service).

(6) Sale or exchange of lands by a Federal agency to a non-Federal entity; and

(7) Promulgation and implementation of a land use plan by a Federal agency such as the BLM that may alter management practices for critical habitat.

Activities that may destroy or adversely modify critical habitat include those that alter the primary constituent elements to an extent that the value of critical habitat for the conservation of *Astragalus lentiginosus* var. *piscinensis* is appreciably reduced. We note that such activities may also jeopardize the continued existence of the taxon.

If you have questions regarding whether specific activities will constitute destruction or adverse modification of critical habitat, contact the Field Supervisor, Ventura Fish and Wildlife Office (see **ADDRESSES** section). Requests for copies of the regulations on listed wildlife and plants and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Branch of Endangered Species, 911 N.E. 11th Ave, Portland, OR 97232 (telephone 503/231–2063; facsimile 503/231–6243).

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial data available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species.

An analysis of the economic impacts of proposing critical habitat for the *Astragalus lentiginosus* var. *piscinensis* is being prepared. 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://ventura.fws.gov*, or by contacting the Ventura Fish and Wildlife Office directly (*see* **ADDRESSES** section).

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we will solicit the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers a copy of the proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

All comments and information received during the 60-day comment period on this proposed rule will be considered as we prepare our final rulemaking. Accordingly, the final designation may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days of the date of publication of the proposal in the **Federal Register**. Such requests must be made in writing and be addressed to the Field Supervisor, Ventura Fish and Wildlife Office (*see* **ADDRESSES** section). We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following:

(1) Are the requirements in the proposed rule clearly stated?

(2) Does the proposed rule contain technical jargon that interferes with the clarity?

(3) Does the format of the proposed rule (grouping and order of the sections, use of headings, paragraphing, etc.) aid or reduce its clarity?

(4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule?

(5) What else could we do to make this proposed rule easier to understand?

Send a copy of any comments on how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to this address: *Exsec@ios.doi.gov.*

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but it is not anticipated to have an annual effect on the economy of $100 million or more or affect the economy in a material way. The Office of Management and Budget (OMB) has not reviewed this proposed rule, but intends to review the final rule.

We are preparing a draft economic analysis of this proposed action. We will use this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical habitat and excluding any area from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat, unless failure to designate such area as critical habitat will lead to the extinction of the *Astragalus lentiginosus* var. *piscinensis.* This draft economic analysis will be made available for public review and comment before we finalize this designation. At that time, copies of the analysis will be available for downloading from the Ventura Fish and Wildlife Office's Internet Web site at *http://ventura.fws.gov* or by contacting the Ventura Fish and Wildlife Office directly (*see* **ADDRESSES** section).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a 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, the Service lacks the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, the RFA finding is deferred until completion of the draft economic analysis prepared pursuant to section 4(b)(2) of the ESA and E.O. 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, the Service will publish a notice of availability of the draft economic analysis of the proposed designation and reopen the public comment period for the proposed designation for an additional 60 days. The Service will include with the notice of availability, 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. The Service has 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 the Service makes a sufficiently informed determination based on adequate economic information and provides the necessary opportunity for public comment.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2))

In the draft economic analysis, we will determine whether designation of critical habitat will cause (a) any effect on the economy of $100 million or more; (b) any increases in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (c) any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule to designate critical habitat for *Astragalus lentiginosus* var. *piscinensis* is considered a significant regulatory action under Executive Order 12866 in that it may raise novel legal and policy issues. However we do not anticipate that the proposed designation of critical habitat for this taxon will significantly affect energy supplies, distribution, or use because there are no pipelines, distribution facilities, power grid stations, etc. within the boundaries of proposed critical habitat. Therefore, we do not believe that this action is a significant energy action and no Statement of Energy Effects is required. We will further examine any potential effect in our economic analysis of this proposal.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from

participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the 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 who receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments. The term ''small governmental jurisdiction'' means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand (U.S.C. title 5, part I, chapter 6, section 601[5]). The lands being proposed for critical habitat designation are owned by the City of Los Angeles, the State of California, and the Federal Bureau of Land Management. None of these government entities fit the definition of ''small governmental jurisdiction''. As such, a Small Government Agency Plan is not required. We will, however, further evaluate this issue as we conduct our economic analysis and as appropriate, review and revise this assessment as warranted.

Takings

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 *Astragalus lentiginosus* var. *piscinensis.* This preliminary assessment concludes that this proposed rule does not pose significant takings implications; however, we have not yet completed the economic analysis for this proposed rule. Once the economic analysis is available, we will review and revise this preliminary assessment as warranted.

Federalism

In accordance with Executive Order 13132, this rule does not have significant federalism effects. A federalism assessment is not required. In keeping with Department of the Interior policies, we requested information from and coordinated development of this proposed critical habitat designation with appropriate State resource agencies in California. The proposed designation of critical habitat in areas currently occupied by *Astragalus lentiginosus* var. *piscinensis* imposes no additional significant restrictions beyond those currently in place and, therefore, has little incremental impact on State and local governments and their activities.

The proposed designation of critical habitat may have some benefit to the State and local resource agencies in that the areas essential to the conservation of this species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of this species are specifically identified. While this definition and identification does not alter where and what federally sponsored activities may occur, it may assist local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Interior's Office of the Solicitor has determined that this rule does not unduly burden the judicial system and does meet the requirements of sections 3(a) and 3(b)(2) of the Order. We are proposing to designate critical habitat in accordance with the provisions of the Endangered Species Act. The rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the *Astragalus lentiginosus* var. *piscinensis.*

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This proposed rule does not contain new or revised information collection for which OMB approval is required under the Paperwork Reduction Act. Information collections associated with certain Act permits are covered by an existing OMB approval and are assigned clearance No. 1018–0094, Forms 3–200–55 and 3–200–56, with an expiration date of July 31, 2004. Detailed information for Act documentation appears at 50 CFR 17. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have determined that an Environmental Assessment and/or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969 need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act, as amended. A notice outlining our reason for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244). This proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment.

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, 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. We have determined that there are no Tribal lands essential for the conservation of *Astragalus lentiginosus* var. *piscinensis.* Therefore, designation of critical habitat for *A. l.* var. *piscinensis* has not been proposed on Tribal lands.

References Cited

A complete list of all references cited in this proposed rule is available upon request from the Ventura Fish and Wildlife Office (*see* **ADDRESSES** section).

Author

The primary author of this notice is Douglas Threloff in the Ventura Fish and Wildlife Office staff (*see* **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and record keeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—[AMENDED]

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

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

2. In § 17.12(h), revise the entry for ''*Astragalus lentiginosus* var. *piscinensis,*'' under ''FLOWERING 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							
*	*	*	*	*	*		*
Astragalus lentiginosus var. *piscinensis*.	Fish Slough milk-vetch.	U.S.A. (CA)	Fabaceae-Pea	T	647	17.96(a)	NA
*	*	*	*	*	*		*

3. In § 17.96, amend paragraph (a) by adding an entry for *Astragalus lentiginosus* var. *piscinensis* in alphabetical order under Family Fabaceae to read as follows:

§ 17.96 Critical habitat—plants.

(a) *Flowering plants.*

* * * * *

Family Fabaceae: *Astragalus lentiginosus* var. *piscinensis* (Fish Slough milk-vetch)

(1) The critical habitat unit is depicted for Inyo and Mono Counties, California, on the map below.

(2) The primary constituent elements of critical habitat for *Astragalus lentiginosus* var. *piscinensis* consist of:

(i) Alkaline soils that occur in areas with little or no slope, and which overlay a ground water table that is 19–60 in (0.5–1.5 m) below the land surface;

(ii) Plant associations dominated by *Spartina—Sporobolis*, or where a sparse amount of *Chrysothamnus albidus* occurs in the transition zone between *Spartina—Sporobolis* and *Chrysothamnus albidus—Distichlis* plant associations;

(iii) Upland areas within 1,000 m (3,280 ft) of the alkaline soils described in (1), that support sites where the listed plant's pollinator populations are likely to nest or obtain cover, that require minimal disturbance and active management to limit the establishment of non-native plant taxa, and portions of which may be suitable for restoration and recolonization by *Astragalus lentiginosus* var. *piscinensis*; and

(iv) Hydrologic conditions that provide suitable periods of soil moisture and chemistry for *Astragalus lentiginosus* var. *piscinensis* germination, growth, reproduction, and dispersal.

(3) Critical habitat does not include existing features and structures, such as buildings, roads, parking lots, and other paved surfaces or areas not containing one or more of the primary constituent elements.

(4) Critical Habitat Map Unit.

(i) *Map Unit 1:* Fish Slough critical habitat unit, Inyo and Mono Counties, California. From USGS 1:24,000 quadrangle maps Chidago Canyon and Fish Slough, California. Lands bounded by UTM Zone 11, NAD 1927 coordinates (E, N): 375800, 4154200, 376100, 4154300; 376500, 4154200; 376700, 4154100; 377000, 4153900; 377200, 4153600; 377300, 4153400; 377400, 4153100; 377400, 4152400; 377300, 4151900; 377200, 4151600; 377300, 4150200; 377200, 4149900; 377100, 4149700; 377000, 4149500; 377300, 4149100; 377400, 4148900; 377500, 4148200; 377500, 4147700; 377400, 4147100; 377300, 4146400; 377200, 4145800; 377100, 4145600; 377000, 4145300; 377000, 4145200; 376900, 4144600; 376900, 4144300; 376900, 4144200; 376800, 4144000; 376800, 4143800; 376900, 4143700; 377100, 4143600; 377500, 4143000; 377500, 4142600; 377400, 4142200; 377100, 4141800; 376500, 4141600; 376100, 4141700; 376000, 4141700; 375600, 4141800; 375200, 4142000; 375000, 4142200; 374800, 4142500; 374700, 4142900; 374600, 4143500; 374500, 4144000; 374600, 4144400; 374700, 4144600; 374700, 4145600; 374800, 4145900; 374900, 4146300; 374900, 4146900; 374800, 4147300; 374700, 4147500; 374400, 4147800; 374000, 4148600; 373800, 4149200; 373700, 4149500; 373800, 4149800; 373800, 4150300, 373900, 4150700; 373900, 4151400; 374000, 4151800; 374100, 4152400; 374200, 4152700; 374400, 4153000; 374500, 4153100; 374800, 4153200; 375000, 4153300; 375100, 4153500; 375200, 4153700; 375400, 4154000; 375700, 4154200; 375800, 4154200; and returning to 375800, 4154200.

(ii) *Excluding*: 375700, 4143400; 375700, 4142900; 376300, 4142900; 376300, 4143400; returning to 375700, 4143400.

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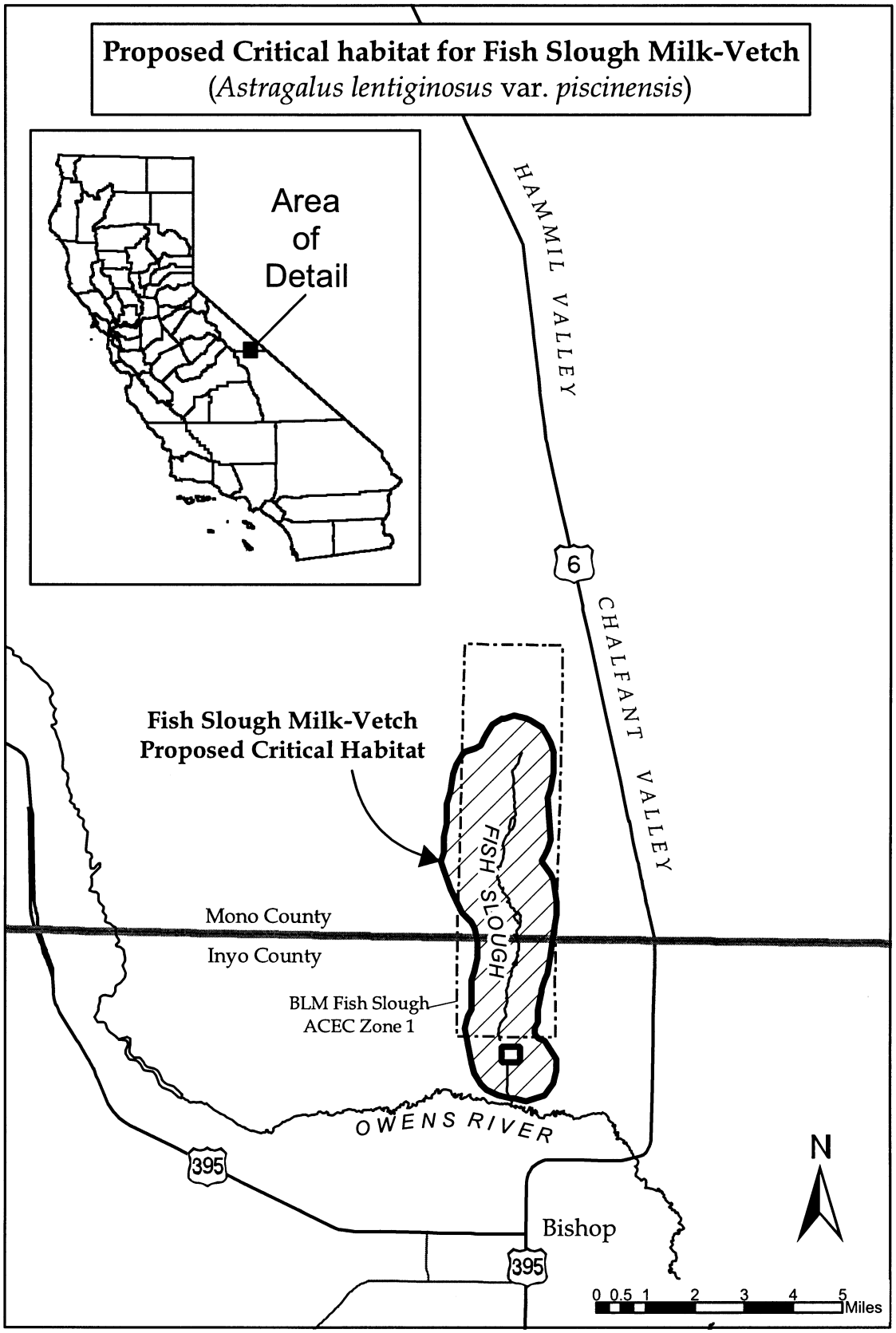
Proposed Critical habitat for Fish Slough Milk-Vetch
(Astragalus lentiginosus var. piscinensis)
Area of Detail
HAMMIL VALLEY
6
CHALFANT VALLEY
Fish Slough Milk-Vetch Proposed Critical Habitat
FISH SLOUGH
Mono County
Inyo County
BLM Fish Slough ACEC Zone 1
OWENS RIVER
395
Bishop
395
N
0 0.5 1 2 3 4 5 Miles

Dated: May 27, 2004.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–12658 Filed 6–3–04; 8:45 am]

BILLING CODE 4310–35–C

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AJ10

Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for Allium munzii (Munz's onion)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the federally endangered *Allium munzii* (Munz's onion) pursuant to the Endangered Species Act of 1973, as amended (Act). We propose to designate 227 acres (ac) (92 hectares (ha)) of critical habitat of Federal land in western Riverside County, California. We excluded 1,068 ac (433 ha) from proposed critical habitat within approved habitat conservation plans (HCPs) and the draft Western Riverside Multiple Species HCP (MSHCP), Riverside County, California.

We hereby solicit data and comments from the public on all aspects of this proposal, including data on economic and other impacts of the designation. We may revise this proposal prior to final designation to incorporate or address new information received during public comment periods.

DATES: We will accept comments until August 3, 2004. Public hearing requests must be received by July 19, 2004.

ADDRESSES: If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods:

1. You may submit written comments and information to the Field Supervisor, Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Carlsbad, CA 92009.

2. You may hand-deliver written comments and information to our Carlsbad Fish and Wildlife Office, at the above address, or fax your comments to 760/731–9618.

3. You may send your comments by electronic mail (e-mail) to *fw1cfwoalmu@r1.fws.gov.* For directions on how to submit electronic filing of comments, see the ''Public Comments Solicited'' section.

All comments and materials received, as well as supporting documentation used in preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Field Supervisor, Carlsbad Fish and Wildlife Office (telephone 760/431–9440; facsimile 760/431–9618).

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

It is our intent that any final action resulting from this proposal will be as accurate as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. Maps of essential habitat not included in the proposed critical habitat are available for viewing by appointment during regular business hours at the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section) or on the Internet at *http://carlsbad.fws.gov.* On the basis of public comment, during the development of the final rule we may find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2), or not appropriate for exclusion, and in all of these cases, this information would be incorporated into the final designation. We particularly seek comments concerning:

(1) The reasons why any areas should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefits of designation will outweigh any threats to the species resulting from the designation;

(2) Specific information on the amount and distribution of *Allium munzii* and its habitat, and which habitat or habitat components are essential to the conservation of this species and why;

(3) Land use designations and current or planned activities in or adjacent to the areas proposed and their possible impacts on proposed critical habitat;

(4) Any foreseeable economic or other potential impacts resulting from the proposed designation, in particular, any impacts on small entities;

(5) Most of the lands we have identified as essential for the conservation of *Allium munzii* are proposed for exclusion as critical habitat. Eighteen of 19 known occurrences of this species have been proposed for exclusion from this proposed designation of critical habitat because they are within approved HCPs or the draft Western Riverside MSHCP. These areas are proposed for exclusion from critical habitat because we believe the value of excluding these areas outweighs the value of including them. We specifically solicit comment on the inclusion or exclusion of such areas and: (a) Whether these areas are essential; (b) whether these areas warrant exclusion; and (c) the basis for excluding these areas as critical habitat (section 4(b)(2) of the Act); and

(6) Whether our approach to designate critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods. Please submit electronic comments in ASCII file format and avoid the use of special characters or any form of encryption. Please also include ''Attn: RIN 1018–AJ10'' in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your internet message, contact us directly by calling our Carlsbad Fish and Wildlife Office at phone number 760–431–9440. Please note that the e-mail address, *fw1cfwoalmu@r1.fws.gov,* will be closed out at the termination of the public comment period.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

Preamble

Designation Of Critical Habitat Provides Little Additional Protection to Species

In 30 years of implementing the ESA, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of conservation resources. The Service's present system for designating critical habitat is driven by litigation rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

Role of Critical Habitat in Actual Practice of Administering and Implementing the Act

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, ''Because the ESA can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7.''

Currently, only 445 species, or 36 percent, of the 1,244 listed species in the U.S. under the jurisdiction of the Service have designated critical habitat. We address the habitat needs of all 1,244 listed species through conservation mechanisms such as listing, section 7 consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, and the section 10 incidental take permit process. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

Procedural and Resource Difficulties in Designating Critical Habitat

We have been inundated with lawsuits regarding critical habitat designation, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits and to comply with the growing number of adverse court orders. As a result, the Service's own to proposals to undertake conservation actions based on biological priorities are significantly delayed.

The accelerated schedules of court ordered designations have left the Service with almost no ability to provide for additional public participation beyond those minimally required by the Administrative Procedures Act (APA), the Act, and the Service's implementing regulations, or to take additional time for review of comments and information to ensure the rule has addressed all the pertinent issues before making decisions on listing and critical habitat proposals, due to the risks associated with noncompliance with judicially imposed. This in turn fosters a second round of litigation in which those who will suffer adverse impacts from these decisions challenge them. The cycle of litigation appears endless, is very expensive, and in the final analysis provides little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA), all are part of the cost of critical habitat designation. These costs result in minimal benefits to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

Background

In January 1990, *Allium munzii* was listed as a threatened species by the State of California pursuant to the California Endangered Species Act. The Service listed *A. munzii* as endangered under the Act on October 13, 1998 (63 FR 54975).

Allium munzii is a member of the Liliaceae (lily family). *A. munzii* belongs to the *A. fimbriatum* complex, a group of seven species found primarily in California (McNeal 1992), and was first referred to as *A. fimbriatum* var. *munzii* by M. Ownbey (Munz and Keck 1959). McNeal (1992) elevated this taxon to species status based on unique morphological characteristics of the perianth (the outer parts of a flower, consisting of the calyx, corolla, and also enclosing the stamen and carpel) and ovarian crests.

Allium munzii is a bulb-forming perennial herb that annually produces a single leaf and a scapose inflorescence (a leafless flower stalk that grows directly from the ground) 0.5 to 1.2 feet (ft) (15 to 35 centimeters (cm)) tall. Each leaf is hollow and generally 1.5 times as long as the inflorescence and round (terete) in cross-section. The inflorescence is umbellate (a flat topped or rounded flower cluster where each flower stalk radiates from the same point), consisting of 10 to 35 flowers. The flowers have six white, or white with a red midvein, perianth segments that are 0.2 to 0.3 inches (in) (6 to 8 millimeters (mm)) long and become red with age. The ovary is crested with fine, irregularly dentate processes and the fruit is a three-lobed capsule (McNeal 1993). *A. munzii* can be distinguished from other members of the genus within its range by its single hollow and terete leaf, the shape of the perianth segments, flower color, and the irregularly dentate crest of the ovary.

Three to five years are required after seeds germinate for the plant to reach maturity and produce flowers (Schmidt 1980). The plants are dormant except in the spring and early summer months. Prior to flowering, a single, cylindrical leaf is produced (Munz 1974). The flowering period for this species is March to May (California Native Plant Society (CNPS) 2001). The best time to detect the species is in early May. *Allium munzii* shares its range and habitat with the similar-appearing *A. haematochiton* (red-skinned onion). Though the two species can occur within several feet of each other, the species do not interbreed (California Department of Fish and Game (CDFG) 1989). After flowering, the plant dies back to the bulb. *A. munzii* is well adapted to summer drought and varied amounts of rainfall from year to year and responds to environmental conditions in the aboveground emergence from year to year. McNeal (1992) observed that flowering in the *A. fimbriatum* complex appeared to be correlated with rains in the late fall and early winter. When rainfall is plentiful, most plants within a population bloom. When rainfall is light, most plants sprout leaves, but very few flower. There is no information regarding pollinators. No studies are available regarding seed dispersal.

Status and Distribution

Allium munzii is endemic to mesic clay soils in western Riverside County, California, throughout the foothills east of the Santa Ana Mountains extending south and east to the low hills south of Hemet (Roberts 1993; U.S. Fish and Wildlife Service 1998; CNDDB 2000; Natural Resource Consultants (NRC) 2000). Currently there are 19 occurrences of *Allium munzii* according to the California Natural Diversity Database (CNDDB 2004). One historical population in the CNDDB was lost to development, however, the extent of the historical distribution of this plant is unknown.

At the time of listing, the Service estimated the total population to be approximately 20,000 to 70,000 individuals. Six populations are large (around 2,000 or more individuals) and cover as much as 20 ac (8 ha). The largest populations are at Harford County Park and adjacent private lands (20,000 to 50,000 individuals altogether), Alberhill (at least 7,700 individuals), Elsinore Peak (~5,000 individuals), Dawson Canyon (~2,000 individuals), Estelle Mountain (at least 2,000 individuals), and Bachelor Mountain (over 3,000 individuals). Most populations contain fewer than 1,000 individuals, and occupy areas ranging from several square feet to less than 2.5 ac (several square meters to less than 1 ha.

Threats

As much as 80 to 90 percent of the suitable habitat for this species has been lost to agriculture, urbanization, and clay mining (California Department of Fish and Game 1989). Populations continue to be threatened by housing and business development, dry land farming activities, off-road vehicle activity, clay mining, and competition with non-native plants (Roberts 1993; U.S. Fish and Wildlife Service 1998; CNDDB 2003).

Clay pit mining has affected and continues to threaten *Allium munzii* populations. The largest disturbance resulting from clay mining operations have been west of Alberhill and northwest of Indian Truck Trail. At least three smaller historic clay mining areas are known from Dos Lagos (Butterfield Station) east of Temescal Wash, Estelle Mountain, and north Domenigoni Hills. Clay mining activities are ongoing in the area northwest of Alberhill and continue to threaten the large population there.

The native perennial and annual grasslands found on most clay soils in western Riverside County have been negatively affected by grazing activities and a frequent fire return interval. Even conserved areas that are protected through other rules and regulations are at risk of trampling and foraging primarily by sheep, which have been known to escape onto the Estelle Mountain areas containing the onion. Historic grazing has also led to invasion by non-native grasses and forbs over large areas. Fire and atmospheric nitrification of soil (resulting from air pollution) may each play a role in advancing the invasion of non-native grasses. Many of the native grasslands and a large portion of the sage scrub areas in western Riverside have been replaced by non-native annual grasses and forbs by repeated cycles of fire, grazing and nitrification. Competition with non-native grasses is a threat to *Allium munzii* because the non-native annual grasses form a dense cover that is more difficult for the *A. munzii* to penetrate than cover provided by the more patchily distributed native grasses or open sage scrub and chaparral communities.

Historic and recent housing and business development, road building, and road maintenance threaten *Allium munzii* populations. The Sycamore Creek housing development, for example, impacted a portion of the adjacent population, and development of a freeway interchange at Indian Truck Trail is known to have significantly reduced one population. Existing roads have bisected *A. munzii* populations or reduced population numbers significantly at Gavilan Hills, Alberhill, Di Palma, and Indian Truck Trail.

Off-road vehicle activity can trample onions and alter soil conditions. The Elsinore Peak population has been negatively affected by off-road vehicle activity. Off-road vehicle activity remains a threat to almost every remote occurrence of this species. Utility development has negatively affected *Allium munzii* populations at Elsinore Peak and Scott Road. Due to the large number of anthropogenic activities within occupied habitat, development and maintenance of these facilities remains a threat to the species where they intersect with suitable habitat. Right-of-way maintenance activities, such as mowing or grubbing, can result in degradation of population viability if repeatedly conducted during the spring and summer growth period.

Previous Federal Action

We published the final rule to list *Allium munzii* as endangered in the **Federal Register** on October 13, 1998 (63 FR 54975). The listing was based on a variety of factors including habitat destruction and fragmentation from agricultural and urban development, clay mining, off-road vehicle activity, cattle and sheep grazing, weed abatement, fire suppression practices, and competition from alien plant species. A Recovery plan for this species has not yet been completed.

At the time of listing, we concluded that designation of critical habitat for *Allium munzii* was not prudent because such designation would not benefit the species. On November 15, 2001, a lawsuit was filed against the Department of the Interior (DOI) and the Service by the Center for Biological Diversity and California Native Plant Society, challenging our ''not prudent'' determinations for eight plants including *A. munzii* (No. CV–01–2101) (*CBD et al.* v. *USDOI*). A second lawsuit asserting the same challenge was filed against DOI and the Service by the Building Industry Legal Defense Foundation (BILD) on November 21, 2001 (No. CV–01–2145) (*BILD* v. *USDOI*). Both cases were consolidated on March 19, 2002, and all parties agreed to remand the critical habitat determinations to the Service for additional consideration. In an order dated July 1, 2002, the U.S. District Court for the Southern District of California directed us to reconsider our not prudent finding and publish a proposed critical habitat rule for *A. munzii*, if prudent, on or before May 30, 2004. This proposed rule complies with the court's ruling. We have reconsidered our not prudent finding, and now believe that critical habitat designation may provide educational information to individuals, local and State governments, and other entities engaged in long-ranging planning, since areas essential to the conservation of the species are more clearly defined and, to the extent currently feasible, the primary constituent elements of the habitat necessary to the conservation of the species are identified.

Critical Habitat

Section 3(5)(A) of the Act defines critical habitat as—(i) the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures that are

necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. It does not allow government or public access to private lands. Under section 7 of the Act, Federal agencies must consult with the Service on activities they undertake, fund, or permit that may affect critical habitat and lead to its destruction or adverse modification. However, the Act prohibits unauthorized take of listed species and requires consultation for activities that may affect them, including habitat alterations, regardless of whether critical habitat has been designated. We have found that the designation of critical habitat provides little additional protection to most listed species.

To be included in a critical habitat designation, habitat must be either a specific area within the geographic area occupied by the species on which are found those physical or biological features essential to the conservation of the species (primary constituent elements, as defined at 50 CFR 424.12(b)) and which may require special management considerations or protection, or be specific areas outside of the geographic area occupied by the species which are determined to be essential to the conservation of the species. Section 3(5)(c) of the Act states that not all areas that can be occupied by a species should be designated as critical habitat unless the Secretary determines that all such areas are essential to the conservation of the species. Our regulations (50 CFR 424.12(e)) also state that, ''The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.''

Regulations at 50 CFR 424.02(j) define special management considerations or protection to mean any methods or procedures useful in protecting the physical and biological features of the environment for the conservation of listed species. When we designate critical habitat, we may not have the information necessary to identify all areas which are essential for the conservation of the species. Nevertheless, we are required to designate those areas we consider to be essential, using the best information available to us. Accordingly, we do not designate critical habitat in areas outside the geographic area occupied by the species unless the best available scientific and commercial data demonstrate that unoccupied areas are essential for the conservation needs of the species.

Section 4(b)(2) of the Act requires that we take into consideration the economic impact, effects to national security, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude areas from critical habitat designation when the benefits of exclusion outweigh the benefits of including the areas within critical habitat, provided the exclusion will not result in extinction of the species.

Our Policy on Information Standards Under the Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), provides criteria, establishes procedures, and provides guidance to ensure that our decisions represent the best scientific and commercial data available. It requires our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should be the listing package for the species. Additional information may be obtained from a recovery plan, articles in peer-reviewed journals, conservation plans developed by States and counties or other entities that develop HCPs, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Section 4 of the Act requires that we designate critical habitat on the basis of what we know at the time of designation. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. 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, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Criteria for Defining Essential Habitat

All of the areas known to support *Allium munzii* are considered essential habitat for this species. *A. munzii* is known only from a narrow geographic range and within that range is limited to clay soils. There are currently 19 occurrences of this plant known to exist. One known historical occurrence has been lost to agriculture and urban development; others have been degraded or reduced in size. Due to the limited range and distribution of this species and the degradation of known populations of this species, preservation of all the known occurrences is essential for its conservation. The majority of the known occurrences are in the Gavilan Hills, the Gavilan Plateau, and the Temescal Valley regions of Riverside County. Other populations are found near Elsinore Peak, the Domenigoni Hills, Paloma Valley, Bachelor Mountain, and Skunk Hollow. It is possible that there are populations of this species that have gone undetected in Riverside County due to the cryptic nature of this species. Plants are only obvious in April and May when in flower, and plants do not often flower in years of low rainfall.

Primary Constituent Elements

In accordance with section 3(5)(A)(I) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we consider those physical and biological features (primary constituent elements) that are essential to the conservation of the species and that may require special management considerations or protection. These features include but are not limited to: Space for individual and population growth and for normal behavior; food, water, air, light, minerals or other nutritional or physiological requirements; cover or shelter; sites for germination or seed dispersal; and habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

The specific biological and physical features, otherwise referred to as the primary constituent elements, that

comprise *Allium munzii* habitat are based on specific components that provide for the essential biological components of the species as described below.

Allium munzii is restricted to mesic clay soils in western Riverside County, California, along the southern edge of the Perris basin. The clay soils are scattered in a band several miles wide and extending 40 miles from Gavilan Hills to west of Temescal Canyon and Lake Elsinore at the eastern foothills of the Santa Ana Mountains and along the Elsinore Fault Zone to the southwestern foothills of the San Jacinto Mountains near Lake Skinner and Vail Lake. Clay soil associations include Altamont, Auld, Bosanko, Claypit and Porterville clay soil types. At least one population (Bachelor Mountain) was reported by Bramlet in 1991 to be associated with pyroxenite outcrops instead of clay (California Natural Diversity Data Base (CNDDB) 2003). Rounded cobbles and boulders are embedded within the clay, which has a sticky, adobe consistency when wet and large cracks when dry. *A. munzii* is typically found on the more mesic sites within the clay deposits (Boyd 1988). The clay deposits typically support grassland vegetation within a surrounding scrub community.

Allium munzii occurs at elevations from 984 to 3,511 feet (ft) (300 to 1,070 meters (m)), and on level or slightly sloping lands.

Allium munzii is typically found in open native grasslands and, increasingly, non-native grasslands which can be either the dominant community or found in a mosaic with Riversidean sage scrub, scrub oak chaparral, chamise chaparral, coast live oak woodland, or peninsular juniper woodland and scrub (Holland 1986). Based upon the dominant species, these plant communities where *A. munzii* is found have been further divided into series which include, but are not limited to, California annual grassland, nodding needlegrass, purple needlegrass, foothill needlegrass, black sage, white sage, California buckwheat, California buckwheat-white sage, California sagebrush, California sagebrush-black sage, California sagebrush-California buckwheat, mixed sage, chamise, chamise-black sage, coast live oak, scrub oak, and California juniper (Sawyer and Keeler-Wolf 1994).

A characteristic ''clay soil flora'' is associated with the island-like clay deposits in southwestern Riverside County. This includes perennial herbs, such as *Fritillaria biflora* (chocolate lily), *Harpagonella palmeri* (Palmer's grappling hook), *Chorizanthe polygonoides* var. *longispina* (knot-weed spine flower), *Sanicula bipinnatifida* (purple sanicle), *S. arguta* (snakeroot), *Lomatium utriculatum* (common lomatium), *L. dasycarpum* (lace parsnip), *Dodecatheon clevelandii* (Cleveland's shooting star), *Bloomeria crocea* (goldenstar), *Chlorogalum parviflorum* (soaproot), *Dudleya multicaulis* (many-stemmed dudleya), *Allium haematochiton* (red-skinned onion) and *A. munzii* (Boyd 1988).

Pursuant to our regulations, we are required to identify the known physical and biological features, *i.e.*, primary constituent elements, essential to the conservation of *Allium munzii*, together with a description of any critical habitat that is proposed. In identifying the primary constituent elements, we used the best available scientific and commercial data available. The physical ranges described in the primary constituent elements may not capture all of the variability that is inherent in natural systems that support *A. munzii.* The primary constituent elements determined essential to the conservation of *A. munzii* are:

(1) Clay soil series of sedimentary origin (*e.g.*, Altamont, Auld, Bosanko, Claypit, Porterville), or clay lenses of such which may be found as unmapped inclusions in other soil series, or soil series of sedimentary or igneous origin with a clay subsoil (*e.g.*, Cajalco, Las Posas, Vallecitos); found on level or slightly sloping landscapes; generally between the elevations of 985 ft and 3,500 ft (300 m and 1,068 m) above mean sea level (AMSL); and as part of open native or non-native grassland plant communities and ''clay soil flora'' which can occur in a mosaic with Riversidean sage scrub, chamise chaparral, scrub oak chaparral, coast live oak woodland, and peninsular juniper woodland and scrub; or

(2) Alluvial soil series of sedimentary or igneous origin (*e.g.*, Greenfield, Ramona, Placentia, Temescal) and terrace escarpment soils found as part of alluvial fans underlying open native or non-native grassland plant communities which can occur in a mosaic with Riversidean sage scrub generally between the elevations of 985 ft and 3,500 ft (300 m and 1,068 m) above mean sea level (AMSL); or Pyroxenite deposits of igneous origin found on Bachelor Mountain as part of non-native grassland and Riversidean sage scrub generally between the elevations of 985 ft and 3,500 ft (300 m and 1,068 m) above mean sea level (AMSL); and

(3) Clay soils or other soil substrate as described above with intact, natural surface and subsurface structure that have been minimally altered or unaltered by ground-disturbing activities (*e.g.*, disked, graded, excavated, re-contoured).

All areas proposed as critical habitat for *Allium munzii* are within the geographic area occupied by the species and contain one or more primary constituent elements (*e.g.*, soil, associated plant community) essential for its conservation.

Methods

In determining areas that are essential to conserve *Allium munzii*, we used the best scientific and commercial data available. These included data from research and survey observations published in peer-reviewed articles, regional Geographic Information System (GIS) vegetation, soil, and species coverages (including layers for Riverside County), and data compiled in the CNDDB. In addition, information provided in comments on the proposed critical habitat designation and draft economic analysis will be evaluated and considered in the development of the final designation for *A. munzii.*

After all the information about the known occurrences of *Allium munzii* was compiled, we created maps indicating the essential habitat associated with each of the occurrences. We used the information outlined above to aid in this task. The essential habitat was mapped using GIS and refined using topographical and aerial map coverages. These essential habitat areas were further refined by discussing each area in detail with Fish and Wildlife Service biologists familiar with each area. Areas not containing the primary constituent elements were not included in the boundaries of proposed critical habitat whenever possible.

After creating a GIS coverage of the essential areas, we created legal descriptions of the essential areas. We used a 100-meter grid to establish Universal Transverse Mercator (UTM) North American Datum 27 (NAD 27) coordinates which, when connected, provided the boundaries of the essential areas. The areas were then analyzed with respect to section 4(b)(2) of the Act, and any applicable and appropriate exclusions were made. The remaining essential areas are the proposed critical habitat. The essential areas, an elaboration on the exclusions, and the specific areas proposed for critical habitat are described below.

Special Management Considerations or Protection

As we undertake the process of designating critical habitat for a species, we first evaluate lands defined by those physical and biological features essential to the conservation of the

species for inclusion in the designation pursuant to section 3(5)(A) of the Act. Secondly, we then evaluate lands defined by those features to assess whether they may require special management considerations or protection. As discussed throughout this proposed rule, *Allium munzii* and its habitat are threatened by a multitude of factors. Threats to those features that define essential habitat (primary constituent elements) are caused by various types of development, dry-land farming activities, off-road vehicle activity, clay mining, and competition with non-native plants. Habitat loss continues to be the greatest threat to *A. munzii.* It is essential for the survival of this species to protect those features that define the remaining essential habitat, through purchase or special management plans, from irreversible threats and habitat conversion. We believe the area proposed for designation as critical habitat may require some level of management and/or protection to address the current and future threats to *A. munzii* and maintain the primary constituent elements essential to its conservation to ensure the overall recovery of the species.

Relationship to Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data available after taking into consideration the economic impact, effects to national security, and any other relevant impact, of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined, following an analysis, that the benefits of such exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species. Consequently, we may exclude an area from designated critical habitat based on economic impacts, effects to national security, or other relevant impacts such as preservation of conservation partnerships, if we determine the benefits of excluding an area from critical habitat outweigh the benefits of including the area in critical habitat, provided the action of excluding the area will not result in the extinction of the species.

In our critical habitat designations we have used the provisions outlined in section 4(b)(2) of the Act to evaluate those specific areas that are proposed for designation as critical habitat and those areas which are subsequently finalized (*i.e.*, designated). We have applied the provisions of this section of the Act to lands essential to the conservation of the subject species to evaluate them and either exclude them from final critical habitat or not include them in proposed critical habitat. Lands which we have either excluded from or not included in critical habitat based on those provisions include but are not limited to those covered by: (1) Legally operative HCPs that cover the species and provide assurances that the conservation measures for the species will be implemented and effective; (2) draft HCPs that cover the species, have undergone public review and comment, and provide assurances that the conservation measures for the species will be implemented and effective (*i.e.*, pending HCPs); (3) Tribal conservation plans that cover the species and provide assurances that the conservation measures for the species will be implemented and effective; (4) State conservation plans that provide assurances that the conservation measures for the species will be implemented and effective; and (5) Service National Wildlife Refuge System Comprehensive Conservation Plans that provide assurances that the conservation measures for the species will be implemented and effective. Within the essential habitat for *Allium munzii* there are no tribal lands or lands owned by the Department of Defense.

Relationship of Critical Habitat to Approved Habitat Conservation Plans and Draft Western Riverside Multiple Species Habitat Conservation Plan (MSHCP)

As described above, section 4(b)(2) of the Act requires us to consider other relevant impacts, in addition to economic and national security impacts, when designating critical habitat. Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed wildlife species incidental to otherwise lawful activities. Development of an HCP is a prerequisite for the issuance of an incidental take permit pursuant to section 10(a)(1)(B) of the Act. An incidental take permit application must be supported by an HCP that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the permitted incidental take.

HCPs vary in size and may provide for incidental take coverage and conservation management for one or many federally listed species. Additionally, more than one applicant may participate in the development and implementation of an HCP. The areas occupied by *Allium munzii* include approved HCPs and the Western Riverside MSHCP that address multiple species, cover a large area, and have many participating permittees. Large regional HCPs expand upon the basic requirements set forth in section 10(a)(1)(B) of the Act because they reflect a voluntary, cooperative approach to large-scale habitat and species conservation planning. Many of the large regional HCPs in southern California have been, or are being, developed to provide for the conservation of numerous federally listed species and unlisted sensitive species and the habitat that provides for their biological needs. These HCPs address impacts in a planning area and create a preserve design within the planning area. Over time, areas in the planning area are developed according to the HCP and the area within the preserve is acquired, managed, and monitored. These HCPs are designed to implement conservation actions to address future projects that are anticipated to occur within the planning area of the HCP in order to reduce delays in the permitting process.

In the case of approved regional HCPs (*e.g.*, those sponsored by cities, counties or other local jurisdictions) wherein *Allium munzii* is a covered species, a primary goal is to provide for the protection and management of habitat essential for the conservation of the species while directing development to non-essential areas. The regional HCP development process provides an opportunity for more intensive data collection and analysis regarding the use of particular habitat areas by *A. munzii.* The process also enables us to construct a habitat preserve system that provides for the biological needs and long-term conservation of the species.

Completed HCPs and their accompanying Implementing Agreements (IA) contain management measures and protections for identified preserve areas that protect, restore, and enhance the value of these lands as habitat for *Allium munzii.* These measures include explicit standards to minimize any impacts to the covered species and its habitat. In general, HCPs are designed to ensure that the value of the conservation lands are maintained, expanded, and improved for the species that they cover.

In approving these HCPs, the Service has provided assurances to permit holders that once the protection and management required under the plans are in place and for as long as the permit holders are fulfilling their obligations under the plans, no additional mitigation in the form of land or financial compensation will be required of the permit holders and in some cases,

specified third parties. Similar assurances will be extended to future permit holders in accordance with the Service's HCP Assurance (''No Surprises'') rule codified at 50 CFR 17.22(b)(5) and (6) and 17.32(b)(5) and (6).

Portions of the proposed critical habitat within approved and legally operative HCPs or Natural Community Conservation Plan (NCCP)/HCPs in which *Allium munzii* is a covered species warrant exclusion from the designation of critical habitat under section 4(b)(2) of the Act. We believe that in most instances, the benefits of excluding legally operative HCPs from the proposed critical habitat designations will outweigh the benefits of including them. We have considered but not proposed critical habitat within the Rancho Bella Vista, North Peak Development Project, and Lake Matthews HCPs. All of these HCPs are for a small number of private landowners. *A. munzii* is a covered species in these HCPs.

Draft Western Riverside MSHCP

The Draft Western Riverside MSHCP has been in development for several years. Participants in this HCP include 14 cities; the County of Riverside, including the Riverside County Flood Control and Water Conservation Agency, Riverside County Transportation Commission, Riverside County Parks and Open Space District, and Riverside County Waste Department; the California Department of Parks and Recreation; and the California Department of Transportation. The Western Riverside MSHCP is also being proposed as a subregional plan under the State's NCCP and is being developed in cooperation with the California Department of Fish and Game. Within the 1.26 million-acre (510,000 ha) planning area of the MSHCP, approximately 153,000 ac (62,000 ha) of diverse habitats are proposed for solely conservation uses. The proposed conservation of 153,000 ac (62,000 ha) will complement other existing natural and open space areas that are already conserved through other means (*e.g.*, State Parks, Forest Service, and County Park lands).

The County of Riverside and the participating jurisdictions have signaled their sustained support for the Western Riverside MSHCP as evidenced by the November 5, 2002, passage of a local bond measure to fund the acquisition of land in support of the MSHCP. On November 14, 2002, a Notice of Availability of a Draft Environmental Impact Report (EIS/EIR) and Receipt of and Application for an Incidental Take Permit was published in the **Federal Register** (67 FR 69236). Public comment on these documents was accepted until January 14, 2003. Subsequently, on June 17, 2003, the County of Riverside Board of Supervisors voted unanimously to support the completion of the Western Riverside MSHCP.

Conservation actions within the Western Riverside MSHCP planning area will be implemented to promote the long-term conservation of *Allium munzii.* Although the MSHCP is not yet completed and implemented, significant progress has been achieved in the development of this HCP, including the preparation of the EIS/EIR, the solicitation of public review and comment, and the preparation of final documents. We are proposing to exclude from the proposed critical habitat designation the non-Federal lands covered by the draft Western Riverside MSHCP. This includes all known occurrences except one, which is on lands managed by the Forest Service. We are proposing to designate critical habitat on Federal lands within the planning area boundary of the Western Riverside MSHCP because the activities of Federal agencies are not covered under the section 10(a)(1)(B) permit. In the event that the Western Riverside MSHCP does not provide the coverage for this species, we will include these essential areas in the final designation of critical habitat.

Specific conservation objectives are provided in the Western Riverside MSHCP to ensure that suitable habitat and known populations of the *Allium munzii* will persist. Conservation objectives for *A. munzii* are: (1) Include in the MSHCP Conservation Area at least 13 localities, including the two whole and two partial populations currently outside the MSHCP Conservation Area; (2) include in the MSHCP Conservation Areas the Additional Reserve Lands (as defined in the MSHCP), public/quasi-public (PQP) lands (as defined in the MSHCP), and *A. munzii* habitat identified in the MSHCP. Given the presently known *A. munzii* localities, all of the known populations will be conserved; (3) implement management and monitoring practices within the Additional Reserve Lands including surveys for the *A. munzii.* Cooperative management and monitoring is anticipated on PQP Lands; (4) *A. munzii* is considered a Narrow Endemic Plant Species (defined in section 6 of the Riverside MSHCP; requires specific consideration in the plan). Thus, until such time as the Additional Reserve Lands are assembled and conservation objectives for this species are met, surveys will be conducted as part of the project review process for public and private projects where suitable habitat for *A. munzii* is present within Narrow Endemic Plant Species Survey Area (NEPSSA) 1 and 4.

Other management actions described in the draft Western Riverside MSHCP include addressing competition with non-native plant species, clay mining, off-road vehicle use, and disking activities. This management will help maintain *Allium munzii* populations and habitat.

The following represents our rationale for excluding the proposed critical habitat within approved HCPs and the Draft Western Riverside MSHCP.

(1) Benefits of Inclusion

The principal benefit of any designated critical habitat is that federally funded or authorized activities in such habitat that require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid adverse modification of critical habitat. Where HCPs are in place, our experience indicates that this benefit is small or nonexistent. Currently approved and permitted HCPs and NCCP/HCPs are designed to ensure the long-term survival of covered species within the plan area. In an approved HCP or NCCP/HCP, lands we ordinarily would define as critical habitat for covered species will normally be protected in reserves and other conservation lands by the terms of the HCP or NCCP/HCP and their IAs. These HCPs or NCCP/HCPs and IAs include management measures and protections for conservation lands designed to protect, restore, and enhance their value as habitat for covered species, and thus provide benefits well in excess of those that would result from a critical habitat designation.

(2) Benefits of Exclusion

The benefits of excluding lands within HCPs from critical habitat designation include carrying out the assurances provided by the Service to landowners, communities, and counties in return for their voluntary adoption of the HCP, including relieving them of the additional regulatory burden that might be imposed by critical habitat. Many HCPs, particularly large regional HCPs take many years to develop and, upon completion, become regional conservation plans that are consistent with the recovery objectives for listed species that are covered within the plan area. Additionally, many of these HCPs provide conservation benefits to unlisted, sensitive species. Imposing an additional regulatory review after an

HCP is completed solely as a result of the designation of critical habitat may undermine conservation efforts and partnerships in many areas. In fact, it could result in the loss of species' benefits if participants abandon the voluntary HCP process because it may result in additional regulations requiring more of them than other parties who have not voluntarily participated in species conservation. Designation of critical habitat within the boundaries of approved HCPs could be viewed as a disincentive to those entities currently developing HCPs or contemplating them in the future.

A related benefit of excluding lands within HCPs from critical habitat designation is the unhindered, continued ability to seek new partnerships with future HCP participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within HCP plan areas are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop HCPs, particularly large, regional HCPs that involve numerous participants and address landscape-level conservation of species and habitats. By preemptively excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Furthermore, an HCP or NCCP/HCP application must itself be consulted upon. While this consultation will not look specifically at the issue of adverse modification to critical habitat, unless critical habitat has already been designated within the proposed plan area, it will determine if the HCP jeopardizes the species in the plan area. The jeopardy analysis is similar to the analysis of adverse modification to critical habitat. In addition, Federal actions that may affect listed species or any designated critical habitat would still require consultation under section 7 of the Act. HCP and NCCP/HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs and NCCP/HCPs assure the long-term protection and management of a covered species and its habitat, and funding for such management through the standards found in the 5 Point Policy for HCPs (64 FR 35242) and the HCP ''No Surprises'' regulation (63 FR 8859). Such assurances are typically not provided by section 7 consultations which, in accordance with the Provisions of the Act, are limited to requiring that the specific action being consulted upon not jeopardize the continued existence of the species. Thus, a consultation typically does not accord the lands it covers the extensive benefits a HCP or NCCP/HCP provides. The development and implementation of HCPs or NCCP/HCPs provide other important conservation benefits, including the development of biological information to guide the conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while allowing for development.

The Western Riverside MSHCP seeks to accomplish the goals of protecting, restoring, monitoring, managing, and enhancing the habitat to benefit the conservation of *Allium munzii* through the implementation of specific conservation objectives. Excluding non-Federal lands within the MSHCP from the proposed critical habitat will provide benefits, as follows: (1) Exclusion of the lands from the final designation will allow us to continue working with the participants in a spirit of cooperation and partnership; (2) other jurisdictions, private landowners, and other entities will see the benefit of working cooperatively with us to develop HCPs, which will provide the basis for future opportunities to conserve species and their essential habitat.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We have reviewed and evaluated the HCPs currently approved and being implemented, and the draft Western Riverside MSHCP within the areas being proposed as critical habitat for *Allium munzii*. Based on this evaluation, we find that the benefits of exclusion outweigh the benefits of proposing the portions of essential habitat for *A. munzii* covered by the approved HCPs and the draft Western Riverside MSHCP as critical habitat.

The exclusion of these lands from critical habitat will help preserve the partnerships that we have developed with the local jurisdictions and project proponents in the development of HCPs and NCCP/HCPs. The educational benefits of critical habitat, including informing the public of areas that are essential for the long-term survival and conservation of the species, is still accomplished from material provided on our website and through public notice and comment procedures required to establish an HCP or NCCP/HCP. The public has also been informed through the public participation that occurs in the development of many regional HCPs or NCCP/HCPs. For these reasons, we believe that proposing critical habitat has little benefit in areas covered by HCPs, provided that the HCP or NCCP/HCP specifically and adequately covers the species for which critical habitat is being proposed. We do not believe that these exclusions will result in the extinction of the species because the combination of existing preserves and the implementation of the draft Western Riverside MSHCP provide adequate conservation of this species on lands within the plan area.

Proposed Critical Habitat Designation

The proposed critical habitat includes *Allium munzii* habitat at a single location in the species' range and is located entirely within Riverside County, California. The majority of essential habitat for this species has been excluded under section 4(b)(2). As a result, only Federal lands are proposed as critical habitat. Areas proposed as critical habitat and the areas proposed for exclusion from critical habitat are summarized in Table 1.

TABLE 1.—SUMMARY OF ESSENTIAL HABITAT ACREAGE FOR *Allium munzii.*

	Federal*	Local/state	Private	Total
Essential Habitat	227 ac (92 ha)	73 ac (30 ha)	995 ac (403 ha)	1,295 ac (525 ha).
Excluded under 4(b)(2)	0 ac (0 ha)	73 ac (30 ha)	995 ac (403 ha)	1,068 ac (433 ha).
Proposed Critical Habitat	227 ac (92 ha)	0 ac (0 ha)	0 ac (0 ha)	227 ac (92 ha).

* Federal lands include U.S. Forest Service lands.

Western Riverside Unit, Riverside County, California (227 ac (92 ha))

As discussed above, the Western Riverside MSHCP, when approved, will provide for the conservation of all known occurrences of *A. munzii.* Only the habitat located on Federal lands is proposed as critical habitat. This is because the habitat is essential to the conservation of the species, but activities of Federal agencies are not covered under the section 10(a)(1)(B) permit. A map of the areas identified as essential habitat can be viewed on our Web site at *http://carlsbad.fws.gov.*

The single unit of essential habitat that we are proposing to designate as critical habitat is located in the vicinity of Elsinore Peak in the Cleveland National Forest. The easternmost stand of *Allium munzii* at this location is considered to be the most undisturbed and pristine of any of the known occurrences of this species (Boyd and Mistretta 1991). The land identified for this unit of critical habitat supports the first and third primary constituent elements discussed above. The habitat is characterized by mixed native/non-native grassland and chaparral vegetation. *A. munzii* occurs primarily in the grassland and the transitional vegetation between the grassland and chaparral. The soils are primarily mapped as Bosanko clay, Cieneba-blasingame-rock outcrop complex, and Cieneba-rock outcrop complex. The stands of *A. munzii* are associated with mesic microhabitats, such as the mesic exposures on cobble deposits and at the bottom of slopes. This population is estimated at 5,000 plants and is ranked as a top conservation priority by a working group assembled by the California Department of Fish and Game (Mistretta 1993).

This site represents the southwestern-most extent of the range for *Allium munzii.* The habitat at this location is high quality. This site also supports three other species of wild onion, *A. haematochition, A. lacunosum,* and *A. peninsulare.* This composition of four *Allium* species at a single location is important to understanding the evolutionary history and divergence of the *Allium* genus in southern California. The southwestern portion of the essential habitat at this site is located on land that will be subject to the terms and conditions of the Western Riverside MSHCP. This portion of essential habitat has been excluded from critical habitat, and only the essential habitat on Forest Service land is proposed as critical habitat.

Effects of Critical Habitat Designation

Section 7 Consultation

The regulatory effects of a critical habitat designation under the Act are triggered through the provisions of section 7, which applies only to activities conducted, authorized, or funded by a Federal agency (Federal actions). Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR 402. Individuals, organizations, States, local governments, and other non-Federal entities are affected by the designation of critical habitat only if their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

Section 7(a)(2) of the Act requires Federal agencies, including us, to insure that their actions are not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. This requirement is met through section 7 consultation under the Act. Our regulations define ''jeopardize the continued existence of'' as to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species (50 CFR 402.02). ''Destruction or adverse modification of designated critical habitat'' for this species would include habitat alterations that significantly affect any of those physical or biological features that were the basis for determining the habitat to be critical.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist Federal agencies in eliminating conflicts that may be caused by their proposed actions. The conservation measures in a conference report are advisory.

We may issue a formal conference report, if requested by the Federal action agency. Formal conference reports include an opinion that is prepared according to 50 CFR 402.14, as if the species was listed or critical habitat designated. We may adopt the formal conference report as the biological opinion when the species is listed or critical habitat designated, if no substantial new information or changes in the action alter the content of the opinion (50 CFR 402.10(d)).

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 such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the Federal action agency would ensure that the permitted actions do not destroy or adversely modify critical habitat.

If we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide ''reasonable and prudent alternatives'' to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Service's Regional Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions under certain circumstances, including instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiating of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat, or adversely modify or destroy proposed critical habitat.

Federal activities that may affect *Allium munzii* or its critical habitat will require consultation under section 7. Activities on private, State, or county lands, or lands under local jurisdictions

requiring a permit from a Federal agency, such as Federal Highway Administration or Federal Emergency Management Act funding, or a permit from the Corps under section 404 of the Clean Water Act, will continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on non-Federal lands that are not federally funded, authorized, or permitted, do not require section 7 consultations.

Section 4(b)(8) of the Act requires us to evaluate briefly and describe, in any proposed or final regulation that designates critical habitat, those activities involving a Federal action that may adversely modify such habitat or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat include those that alter the primary constituent elements to an extent that the value of critical habitat for both the survival and recovery of *Allium munzii* is appreciably reduced. We note that such activities may also jeopardize the continued existence of the species.

Activities that, when carried out, funded, or authorized by a Federal agency, may directly or indirectly destroy or adversely modify critical habitat for *Allium munzii* include, but are not limited to:

(1) Removing, thinning, or destroying *Allium munzii* habitat (as defined in the primary constituent elements discussion), whether by burning, mechanical, chemical, or other means;

(2) Activities that appreciably degrade or destroy *Allium munzii* habitat (and its primary constituent elements) that could include, but are not limited to, livestock grazing, clearing, disking, farming, residential or commercial development, the spread of nonnative species, off-road vehicle use, and heavy recreational use;

(3) Activities that appreciably diminish habitat value or quality through indirect effects (*e.g.,* edge effects, invasion of exotic plants or animals, or fragmentation); and

(4) Any activity that could alter watershed or soil characteristics in ways that would appreciably alter or reduce the quality or quantity of surface and subsurface flow of water needed to maintain *Allium munzii* habitat. These activities could include, but are not limited to, altering the natural fire regime; development, including road building; livestock grazing; and vegetation manipulation such as clearing or grubbing in the watershed upslope from *A. munzii.*

(5) Road construction and maintenance, right-of-way designation, and regulation of agricultural activities, or any activity funded or carried out by the Department of Transportation or Department of Agriculture that results in discharge of dredged or fill material, or mechanized land clearing of *Allium munzii* habitat;

(6) Sale or exchange of lands by a Federal agency to a non-Federal entity; and

(7) Licensing of construction of communication sites by the Federal Communications Commission.

All lands proposed as critical habitat are within the geographical area occupied by the species and are necessary for the conservation of *Allium munzii.* Federal agencies already consult with us on actions that may affect *A. munzii* to ensure that their actions do not jeopardize the continued existence of the species. Thus, we do not anticipate substantial additional regulatory protection will result from critical habitat designation.

If you have questions regarding whether specific activities will constitute destruction or adverse modification of critical habitat, contact the Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section). Requests for copies of the regulations on listed wildlife and plants and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Branch of Endangered Species, 911 NE. 11th Ave, Portland, OR 97232 (telephone 503/231–2063; facsimile 503/231–6243).

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial data available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species.

An analysis of the economic impacts of proposing critical habitat for *Allium munzii* is being prepared. 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://carlsbad.fws.gov,* or by contacting the Carlsbad Fish and Wildlife Office directly (see **ADDRESSES** section).

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we will solicit the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received during the 60-day comment period on this proposed rule as we prepare our final rulemaking. Accordingly, the final designation may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days of the date of publication of the proposal in the **Federal Register**. Such requests must be made in writing and be addressed to the Field Supervisor (see **ADDRESSES** section). We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of the sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? (5) What else could we do to make this proposed rule easier to understand? Send a copy of any comments on how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW.,

Washington, DC 20240. You may e-mail your comments to this address: *Exsec@ios.doi.gov.*

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is not a significant rule and, therefore, was not reviewed by the Office of Management and Budget (OMB). We will be preparing a draft economic analysis of this proposed action; we will use this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical habitat and excluding any area from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat, unless failure to designate such area as critical habitat will lead to the extinction of *Allium munzii.* This analysis will also be used to determine compliance with Executive Order 12866, Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and Executive Order 12630.

This draft economic analysis will be made available for public review and comment before we finalize this designation. At that time, copies of the analysis will be available for downloading from the Carlsbad Fish and Wildlife Office's Internet Web site at *http://carlsbad.fws.gov* or by contacting the Carlsbad Fish and Wildlife Office directly (see **ADDRESSES** section).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a 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, the Service lacks the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, the RFA finding is deferred until completion of the draft economic analysis prepared pursuant to section 4(b)(2) of the ESA and E.O. 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, the Service will publish a notice of availability of the draft economic analysis of the proposed designation and reopen the public comment period for the proposed designation for an additional 60 days. The Service will include with the notice of availability, 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. The Service has 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 the Service makes a sufficiently informed determination based on adequate economic information and provides the necessary opportunity for public comment.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2))

In the draft economic analysis, we will determine whether designation of critical habitat will cause (a) any effect on the economy of $100 million or more; (b) any increases in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (c) any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule to designate critical habitat for *Allium munzii* is not a significant regulatory action under Executive Order 12866, and it is not expected to significantly affect energy supplies, distribution, or use because there are no pipelines, distribution facilities, power grid stations, *etc.* within the boundaries of proposed critical habitat. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the 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 who receive Federal funding, assistance, or permits or who 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 on to State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments, because only Federal lands are involved in the proposed designation. As such, Small Government Agency Plan is not required. We will, however, further evaluate this issue as we conduct our economic analysis and, as appropriate, review and revise this assessment as warranted.

Takings

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 *Allium munzii.* This preliminary assessment concludes that this proposed rule does not pose significant takings implications. However, we have not yet completed the economic analysis for this proposed rule. Once the economic analysis is available, we will review and revise this preliminary assessment as warranted.

Federalism

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior policies, we requested information from and coordinated development of this proposed critical habitat designation with appropriate State resource agencies in California.

The proposed designation of critical habitat in areas currently occupied by *Allium munzii* imposes no additional significant restrictions beyond those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The proposed designation of critical habitat may have some benefit to the State and local resource agencies in that the areas essential to the conservation of this species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of this species are specifically identified. While this definition and identification does not alter where and what federally sponsored activities may occur, it may assist local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Interior's Office of the Solicitor has determined that this rule does not unduly burden the judicial system and does meet the requirements of sections 3(a) and 3(b)(2) of the Order. We are proposing to designate critical habitat in accordance with the provisions of the Endangered Species Act. The rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of Allium munzii.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This proposed rule does not contain new or revised information collection for which OMB approval is required under the Paperwork Reduction Act. Information collections associated with certain Act permits are covered by an existing OMB approval and are assigned clearance No. 1018–0094, Forms 3–200–55 and 3–200–56, with an expiration date of July 31, 2004. Detailed information for Act documentation appears at 50 CFR 17. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have determined that an Environmental Assessment and/or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969 need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act, as amended. A notice outlining our reason for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244). This proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment.

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, 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. We have determined that there are no Tribal lands essential for the conservation of *Allium munzii.* Therefore, designation of critical habitat for the *A. munzii* has not been proposed on Tribal lands.

References Cited

A complete list of all references cited herein, as well as others, is available upon request from the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

Author

The primary authors of this notice are the Carlsbad Fish and Wildlife Office staff (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—[AMENDED]

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

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

2. In § 17.12(h) revise the entry for ''Allium munzii'' under ''FLOWERING 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							
*	*	*	*	*	*	*	*
Allium munzii	Munz's onion	U.S.A. (CA)	Liliaceae—Lily	E	650	17.96(a)	NA
*	*	*	*	*	*	*	*

3. In § 17.96(a), add critical habitat for *Allium munzii* in alphabetical order under Family Liliaceae to read as follows:

§ 17.96 Critical habitat—plants.

(a) *Flowering plants.*

* * * * *

Family Liliaceae: *Allium munzii* (Munz's onion)

(1) Critical habitat unit for *Allium munzii* is depicted for Riverside County, California, on the map below.

(2) The primary constituent elements of critical habitat for *Allium munzii* are:

(i) Clay soil series of sedimentary origin (*e.g.*, Altamont, Auld, Bosanko, Claypit, Porterville), or clay lenses of such which may be found as unmapped inclusions in other soil series, or soil series of sedimentary or igneous origin with a clay subsoil (*e.g.*, Cajalco, Las Posas, Vallecitos); found on level or slightly sloping landscapes; generally between the elevations of 985 ft and 3,500 ft (300 m and 1,068 m) above mean sea level (AMSL); and as part of open native or non-native grassland plant communities and ''clay soil flora'' which can occur in a mosaic with Riversidean sage scrub, chamise chaparral, scrub oak chaparral, coast live oak woodland, and peninsular juniper woodland and scrub; or

(ii) Alluvial soil series of sedimentary or igneous origin (*e.g.*, Greenfield, Ramona, Placentia, Temescal) and terrace escarpment soils found as part of alluvial fans underlying open native or non-native grassland plant communities which can occur in a mosaic with Riversidean sage scrub generally between the elevations of 985 ft and 3,500 ft (300 m and 1,068 m) above mean sea level (AMSL); or Pyroxenite deposits of igneous origin found on Bachelor Mountain as part of non-native grassland and Riversidean sage scrub generally between the elevations of 985 ft and 3,500 ft (300 m and 1,068 m) above mean sea level (AMSL); and

(iii) Clay soils or other soil substrate as described above with intact, natural surface and subsurface structure that have been minimally altered or unaltered by ground-disturbing activities (*e.g.*, disked, graded, excavated, re-contoured).

(3) Critical habitat for *Allium munzii* does not include existing features and structures, such as buildings, roads, aqueducts, railroads, airport runways and buildings, other paved areas, lawns, and other urban landscaped areas not containing one or more of the primary constituent elements.

(4) Critical habitat unit for *Allium munzii* is described below.

(i) Map Unit 1: Riverside County, California. From USGS 1:24,000 quadrangle map Wildomar, California, land bounded by the following UTM 11 NAD27 coordinates (E, N): 467900, 3718200; 469000, 3718200; 469000, 3717300; 468500, 3717300; 468500, 3717500; 468100, 3717500; 468100, 3717400; thence east to the U.S. Forest Service, Cleveland National Forest boundary at y-coordinate 3717400; thence northwest following the U.S. Forest Service, Cleveland National Forest boundary to y-coordinate 371800; thence east to 467700, 3718000; 467700, 3718100; 467900, 3718100; returning to 467900, 3718200.

(ii) **Note:** Map of critical habitat unit follows:

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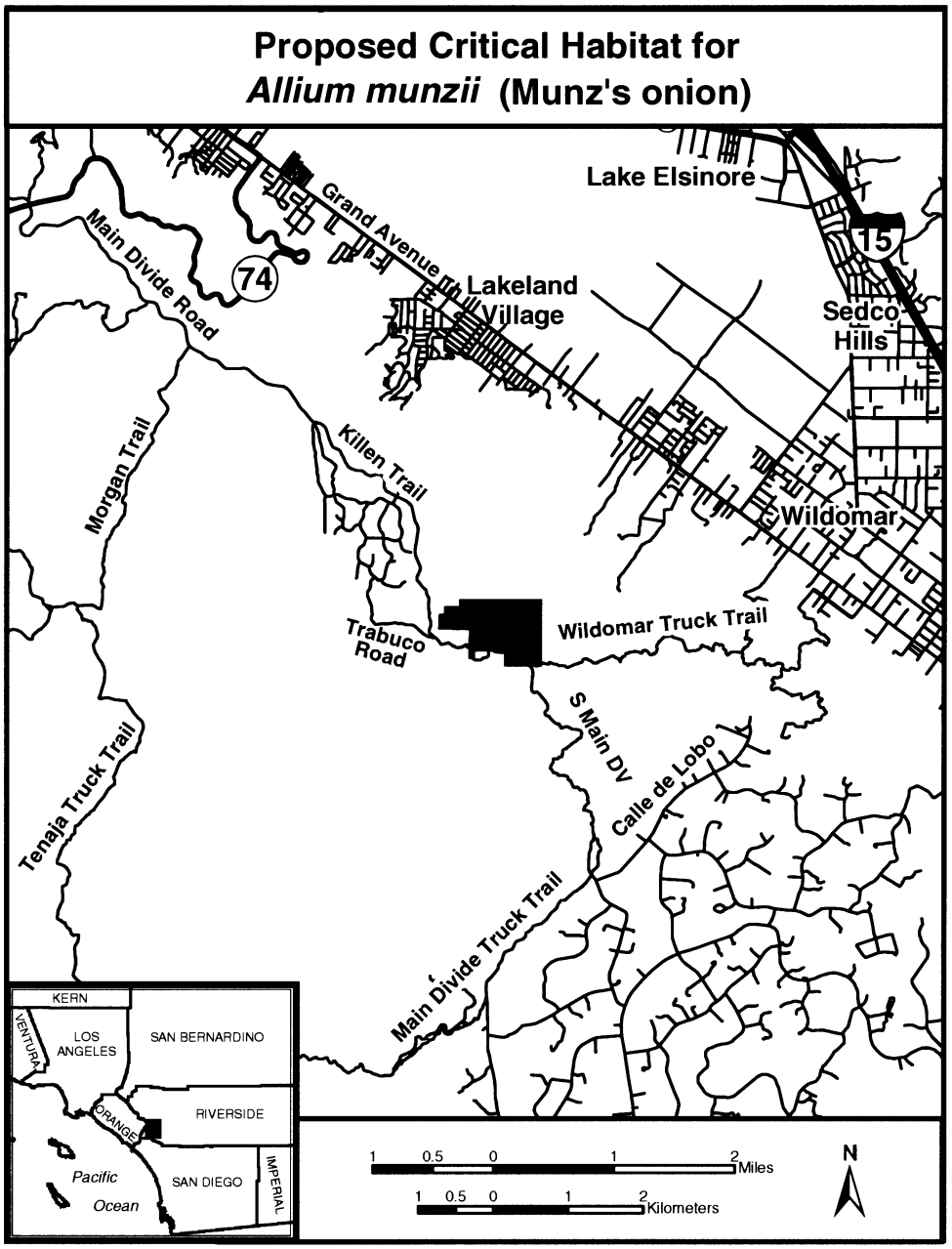

Dated: May 27, 2004.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–12657 Filed 6–3–04; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 18

RIN 1018–AT48

Marine Mammals; Native Exemptions

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the Fish and Wildlife Service (Service), propose to amend regulations implementing the Marine Mammal Protection Act of 1972 (MMPA), as amended. This action would revise our existing definition of ''authentic native articles of handicrafts and clothing'' to reflect a December 28, 1992, Court ruling, which found that our regulation defining ''authentic native articles of handicrafts and clothing'' is inconsistent with the MMPA.

DATES: We will consider comments on the proposed rule if received by August 3, 2004.

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

- By mail or hand-delivery to: Diane Bowen, Division of Federal Program Activities, U.S. Fish and Wildlife Service, Attention: Native Handicrafts, Room 400, ARLSQ, 4401 North Fairfax Drive, Arlington, Virginia 22203.

• By fax to: (703) 358–1869, Attention: Diane Bowen.

• By Internet, electronic mail by sending to: *FW9MMM@fws.gov*. Please submit Internet comments as an ASCII file avoiding the use of special characters and any form of encryption. Please also include ''Attn: RIN 1018–AT48'' and your name and return address in your Internet message subject header. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly at U.S. Fish and Wildlife Service, Branch of Resource Management Support, (703) 358–2161.

Background information and any comments that we receive on this action are available for inspection during normal business hours from 8 a.m. to 4:30 p.m., Monday through Friday, at the U.S. Fish and Wildlife Service, Division of Federal Program Activities, Room 400, Arlington Square, 4401 North Fairfax Drive, Arlington, Virginia. To be sure someone is available to help you, please call (703) 358–2161 before visiting.

FOR FURTHER INFORMATION CONTACT: Diane Bowen, Division of Federal Program Activities, in Arlington, Virginia, at 703/358–2161.

SUPPLEMENTARY INFORMATION:

Background

After passage of the Marine Mammal Protection Act in 1972, we promulgated regulations at 50 CFR part 18 to implement this authority. We included in our proposed regulations a definition similar to that in section 101(b)(2) of the MMPA for ''authentic native articles of handicrafts and clothing'' (37 FR 25524; December 1, 1972), part of which read:

. . . items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing, and painting, so long as the use of pantographs, multiple carvers, or similar mass copying devises, or other improved methods of production utilizing modern implements, such as sewing machines, are not utilized. . .

The final rule (37 FR 28173; December 21, 1972) added the requirement that these items must be ''commonly produced on or before December 21, 1972'' and read:

. . . items which (a) were commonly produced on or before December 21, 1972, and (b) are composed wholly or in some significant respect of natural materials, and (c) which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or similar mass copying devises, or other improved methods of production utilizing modern implements, such as sewing machines. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing, and painting.

Although our MMPA implementing regulations were published on December 21, 1972, as a final rule, we invited the public to provide comments, suggestions, and objections for a 60-day period. Based on comments received, we issued a proposed rule to amend our implementing regulations (38 FR 22143; August 16, 1973), followed by a final rule (38 FR 7262; February 25, 1974). The definition for ''authentic native articles of handicrafts and clothing'' at 50 CFR 18.3 was amended by the following additions: (1) The articles must have been made by an Indian, Aleut, or Eskimo; (2) the articles must be significantly altered from their natural form; (3) modern techniques at a tannery registered pursuant to § 18.23(c) may be used so long as no large scale mass production industry results; and (4) the formation of traditional native groups, such as cooperatives, is permitted as long as no large scale mass production results.

The regulations were enforced and subsequently challenged in court. While initially upheld in court, the U.S. District Court for the District of Alaska called for a thorough administrative review of the section of the regulations (50 CFR 18.23) that addresses the taking of northern sea otters under the native exemptions. Following the review, the Service published a notice of proposed rulemaking on November 14, 1988, to clarify the regulations as they apply to the sea otter (53 FR 45788). Those proposed regulations would prohibit all takings of sea otters by Alaska Natives for the purpose of creating and selling handicrafts or clothing. An interim rule was subsequently published on April 20, 1990 (55 FR 14973). This 1990 rule was identical to the 1974 rule, but included an additional restriction that stated ''[P]rovided that it has been determined that no items created in whole or in part from sea otter meet part (a) [that is, ''were commonly produced on or before December 21, 1972''] of this definition and therefore no such items may be sold'' (55 FR 14973). We further stated in the rule that, following the completion of a management plan for northern sea otter, we would replace the interim rule with a final rule, if appropriate. The interim rule became effective on May 21, 1990. Although we developed and issued a ''Conservation Plan for the Sea Otter in Alaska'' in June 1994, we did not revisit the regulatory definition put into place by our interim rule, and the language still exists in 50 CFR 18.3.

In 1990, a number of parties challenged our definition as violating the MMPA. On July 17, 1991, in *Didrickson* v. *U.S. Department of the Interior,* the U.S. District Court for the District of Alaska ruled in favor of the Plaintiffs. The Court wrote that we had defined ''authentic,'' as used in the phrase, ''authentic native articles of handicrafts and clothing * * *'' (in the Native exemption section of the Act), ''in such a way as to broaden [the Service's] own regulatory authority over [Native] activities that the plain language of the statute would not otherwise permit.'' The Court further ruled that the MMPA did not mandate restriction of its Alaska native handicraft exemption to apply only to artifacts commonly produced on or before December 21, 1972. In its conclusion, the Court stated that, while its ''opinion should not be construed as authorizing a ''free-for-all'' killing of hundreds of sea otters,'' the Service ''does not have the authority to regulate the harvesting of sea otters for purposes of creating native handicrafts absent a finding of depletion.'' The Court also stated that the Service has the authority to take enforcement action against any takings that are wasteful. This decision was appealed to the Ninth Circuit Court of Appeals, which, on December 28, 1992, affirmed the District Court's ruling.

Our present proposed rulemaking revises our regulations in 50 CFR part 18 to make them consistent with the court rulings described above. Specifically, this action would eliminate the requirement in 50 CFR 18.3 for ''*Authentic native articles of handicrafts and clothing*'' to have been commonly produced on or before December 21, 1972, and would delete the language at the end of the definition that states:

''Provided that, it has been determined that no items created in whole or in part from sea otter meet part (a) of this definition and therefore no such items may be sold.''

Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule.

Our practice is to make all comments, including names and home addresses of

respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. In some circumstances, we would withhold also from the rulemaking record a respondent's identity, as allowable by law. If you wish for us to withhold your name and/or address, you must state this prominently at the beginning of your comments. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations/notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain unnecessary technical language or jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Is the description of the proposed rule in the ''Supplementary Information'' section of the preamble helpful in understanding the proposed rule? (5) What else could we do to make the proposed rule easier to understand?

Send a copy of any comments that concern how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to the following address: *Execsec@ios.doi.gov.*

Required Determinations

Regulatory Planning and Review

In accordance with the criteria in Executive Order 12866, this proposed rule is not a significant regulatory action. The Office of Management and Budget makes the final determination under Executive Order 12866.

a. This proposed rule will not have an annual economic impact of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. There are no compliance costs to any sector of the economy. A cost-benefit analysis is not required. We do not expect that any significant economic impacts would result from the revision of this definition. The only expenses related to this will be to the Federal government to write the rule and required Record of Compliance, and to publish the final rule in the **Federal Register**; these costs should not exceed $25,000.

b. This proposed rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. This proposed rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

d. This proposed rule will not raise novel legal or policy issues.

Regulatory Flexibility Act

We certify that this proposed rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). An initial/final Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required.

Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a major rule under 5 U.S.C. 804(2). This rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

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

a. This proposed rule will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required.

b. This proposed rule will not produce a Federal mandate of $100 million or greater in any year. As such, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

Takings

In accordance with Executive Order 12630, this proposed rule does not have significant takings implications. We have determined that the rule has no potential takings of private property implications as defined by this Executive Order because it will remove a regulatory definition determined by a Federal Court to exceed the statutory provisions of the MMPA. A takings implication assessment is not required.

Federalism

In accordance with Executive Order 13132, this proposed rule does not have significant federalism effects. A federalism assessment is not required. This proposed rule will not have substantial direct effects on the State, in the relationship between the Federal government and the State, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This proposed regulation does not contain collections of information that require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* The proposed regulation will not impose new record keeping or reporting requirements on State or local governments, individuals, and businesses, or organizations.

National Environmental Policy Act

We have considered this action with respect to section 102(2)(C) of the National Environmental Policy Act of 1969, and have determined that the action is categorically excluded, pursuant to U.S. Department of the Interior criteria, from the NEPA process; the preparation of an Environmental Assessment is not required as defined by USDI categorical exclusion 1.10 (516 DM, Chapter 2, Appendix 1, Departmental Categorical Exclusions). This categorical exclusion exempts ''*[p]olicies, directives, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature.*'' Given that this proposed rule seeks to amend a regulation to make the regulation consistent with a court ruling, the exclusion applies to this action.

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 and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized tribes on a government-to-government basis. We have evaluated possible effects on federally recognized Indian tribes. Because this rule would amend our regulations to lift regulatory restrictions consistent with a court order, we have determined that there are no negative effects.

Energy Supply, Distribution or Use (Executive Order 13211)

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not a significant regulatory action under Executive Order 12866 and it is not expected to have any effect on energy supplies, distribution, and use. Therefore, this action is a not a significant energy action and no Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 18

Administrative practice and procedure, Alaska, Imports, Indians, Marine mammals, Oil and gas exploration, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 18, subpart A of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 18—MARINE MAMMALS

1. The authority citation for 50 CFR part 18 continues to read as follows:

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

2. In § 18.3, revise the definition for *Authentic native articles of handicrafts and clothing* as follows:

§ 18.3 Definitions.

* * * * *

Authentic native articles of handicrafts and clothing means items made by an Indian, Aleut, or Eskimo that (a) are composed wholly or in some significant respect of natural materials and (b) are significantly altered from their natural form and are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or similar mass-copying devices. Improved methods of production utilizing modern implements such as sewing machines or modern techniques at a tannery registered pursuant to § 18.23(c) may be used so long as no large-scale mass-production industry results. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting. The formation of traditional native groups, such as cooperatives, is permitted so long as no large-scale mass production results.

* * * * *

Dated: May 20, 2004.

Paul Hoffman,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–12139 Filed 6–3–04; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register

Vol. 69, No. 108

Friday, June 4, 2004

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Foreign Agricultural Service

Meeting of Advisory Committee on Emerging Markets

AGENCY: Foreign Agricultural Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the provisions of section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that the next meeting of the Advisory Committee on Emerging Markets will be held on June 15–16, 2004. The role of the committee is to provide information and advice, based upon knowledge and expertise of the members, useful to the U.S. Department of Agriculture (USDA) in implementing the Emerging Markets Program. The committee also advises USDA on the involvement of the U.S. private sector in cooperative work with emerging markets in food and rural business systems, and reviews proposals submitted to the Program.

DATES: The meeting will convene on June 15, 2004, from 1:30 p.m. to 4:30 p.m., and on June 16, 2004, from 9:30 a.m. to 4:30 p.m.

ADDRESSES: The meeting will be held in Room 5066—South Building, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250. Please send written comments to Douglas Freeman, Foreign Agricultural Service, U.S. Department of Agriculture, 14th and Independence Ave., SW., Washington, DC 20250, Stop 1042.

FOR FURTHER INFORMATION CONTACT: Douglas Freeman by e-mail at *emo@fas.usda.gov* or by telephone at (202) 720–4327.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to review and discuss those proposals submitted to the Emerging Markets Program, which qualify for funding from the program. The meeting is open to the public and members of the public may provide comments, but they should not make any oral comments at the meeting unless invited to do so by the co-chairpersons.

Signed at Washington, DC, on May 26, 2004.

A. Ellen Terpstra,

Administrator, Foreign Agricultural Service.

[FR Doc. 04–12694 Filed 6–3–04; 8:45 am]

BILLING CODE 3410–10–P

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent To Request an Extension of a Currently Approved Information Collection

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13) and Office of Management and Budget regulations at 5 CFR part 1320 (60 FR 44978, August 29, 1995), this notice announces the intention the National Agricultural Statistics Service (NASS) to request an extension of a currently approved information collection, the Cold Storage Survey.

DATES: Comments on this notice must be received by August 9, 2004, to be assured of consideration.

ADDRESSES: Comments may be sent to Ginny McBride, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue, SW., Washington, DC 20250 or to *gmcbride@nass.usda.gov*.

FOR FURTHER INFORMATION CONTACT: Carol House, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333.

SUPPLEMENTARY INFORMATION:

Title: Cold Storage Survey.

OMB Control Number: 0535–0001.

Expiration Date of Approval: 11/30/04.

Type of Request: To extend a currently approved information collection.

Abstract: The primary objective of the National Agricultural Statistics Service is to prepare and issue state and national estimates of crop and livestock production, prices, and disposition. The monthly Cold Storage Survey provides information on national supplies of food commodities in refrigerated storage facilities. A biennial survey of refrigerated warehouse capacity is also conducted to provide a benchmark of the capacity available for refrigerated storage of the nation's food supply. Information on stocks of food commodities facilitates proper price discovery and orderly marketing, processing, and distribution of agricultural products. The Cold Storage Survey was previously approved by OMB in 2001 for a 3-year period. NASS intends to request that the survey be approved for another 3 years.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 25 minutes per response.

Respondents: Refrigerated storage facilities.

Estimated Number of Respondents: 4,500.

Estimated Total Annual Burden on Respondents: 5,000 hours.

These data will be collected under the authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by section 1770 of the Food Security Act of 1985, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents.

Copies of this information collection and related instructions can be obtained without charge from Ginny McBride, the Agency OMB Clearance Officer, at (202) 720–5778.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection

techniques or other forms of information technology. Comments may be sent to: Ginny McBride, Agency OMB Clearance Officer, U.S. Department of Agriculture, Room 5330B South Building, 1400 Independence Avenue, SW., Washington, DC 20250–2024 or *gmcbride@nass.usda.gov*.

All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, May 18, 2004.

Carol House,

Associate Administrator.

[FR Doc. 04–12695 Filed 6–3–04; 8:45 am]

BILLING CODE 3410–20–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Addition and Deletion

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Addition to and deletion from procurement list.

SUMMARY: This action adds to the Procurement List a service to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes from the Procurement List a service previously furnished by such agencies.

EFFECTIVE DATE: July 4, 2004.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, (703) 603–7740.

SUPPLEMENTARY INFORMATION:

Addition

On March 19, 2004, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (69 F.R. 13019) of proposed additions to the Procurement List. The **Federal Register** proposed addition on March 19, 2004 identified the service as Furniture Rehabilitation Service. Review of the scope of work led to a decision to change the title of this Procurement List addition to more accurately reflect the work being done.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the service and impact of the addition on the current or most recent contractors, the Committee has determined that the service listed below is suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the service to the Government.

2. The action will result in authorizing small entities to furnish the service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the service proposed for addition to the Procurement List.

End of Certification

Accordingly, the following service is added to the Procurement List:

Service

Service Type/Location: System Furniture Reuse Services, North American Aerospace Defense Command (NORAD), Building 2, 250 Vandenberg Street, Peterson AFB, Colorado.

NPA: Aspen Diversified Industries, Inc., Colorado Springs, Colorado.

Contract Activity: Headquarters, Air Force Space Command, Peterson AFB, Colorado.

Deletion

On April 9, 2004, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (69 FR 18869) of proposed deletions to the Procurement List. After consideration of the relevant matter presented, the Committee has determined that the service listed below is no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action may result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the service deleted from the Procurement List.

End of Certification

Accordingly, the following service is deleted from the Procurement List:

Service

Service Type/Location: Wheelchair Maintenance, Veterans Affairs Medical Center, Louisville, Kentucky.

NPA: New Vision Enterprises, Inc., Louisville, Kentucky.

Contract Activity: VA Medical Center, Louisville, Kentucky.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 04–12710 Filed 6–3–04; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to procurement list.

SUMMARY: The Committee is proposing to add to the Procurement List products and a service to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Comments Must Be Received on or Before:* July 4, 2004.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, (703) 603–7740.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

If the Committee approves the proposed additions, the entities of the Federal Government identified in the notice for each product or service will be required to procure the products and service listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and service to the Government.

2. If approved, the action will result in authorizing small entities to furnish the products and service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and service proposed for addition to the Procurement List. Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following products and service are proposed for addition to Procurement List for production by the nonprofit agencies listed:

Products

Product/NSN: Folding Chairs, Metal & Padded:

7105–00–269–8463 (Metal);
7105–00–663–8475 (Padded).

NPA: ASPIRO, Inc., Green Bay, Wisconsin.
Contract Activity: GSA, National Furniture Center, Washington, DC.

Service

Service Type/Location: Telephone Switchboard Operations, VA Central California Health Care System, 2615 E. Clinton Avenue, Fresno, California.
NPA: Project HIRED, Santa Clara, California.
Contract Activity: VA Palo Alto Health Care System, Livermore, California.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 04–12711 Filed 6–3–04; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Notice of Renewal of the Advisory Committee on Commercial Remote Sensing

SUMMARY: In accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. App 2, and the General Services Administration (GSA) rule on Federal Advisory Committee Management, 41 CFR part 101–6, and after consultation with GSA, the Secretary of Commerce has determined that the renewal of the Advisory Committee on Commercial Remote Sensing (ACCRES) is in the public interest in connection with the performance of duties imposed on the Department by law. ACCRES was renewed on May 3, 2004.

SUPPLEMENTARY INFORMATION: The Committee was first established in May 2002, to advise the Under Secretary of Commerce for Oceans and Atmosphere on matters relating to the U.S. commercial remote-sensing industry and NOAA's activities to carry out the responsibilities of the Department of Commerce set forth in the Land Remote Sensing Policy Act of 1992 (15 U.S.C. Secs. 5621–5625).

The Committee will consist of no less than 12 but not more than 15 members serving in a representative capacity, each of whom shall be appointed by the Under Secretary to assure a balanced representation among remote sensing satellite operators, government and private users of data, and academia and researchers.

The Committee will function solely as an advisory body, and in compliance with provisions of the Federal Advisory Committee Act. Copies of the Committee's revised Charter have been filed with the appropriate committees of the Congress and with the Library of Congress.

FOR FURTHER INFORMATION CONTACT: Timothy Stryker, Chief, Satellite Activities Branch of the NOAA Satellite and Information Services Office of International and Interagency Affairs, 1335 East West Highway, Room 7311, Silver Spring, Maryland 20910; telephone (301) 713–2024 x205, fax (301) 713–2032, e-mail *Timothy.Stryker@noaa.gov*.

Colleen N. Hartman,

Deputy Assistant Administrator for Satellite and Information Services.

[FR Doc. 04–12674 Filed 6–3–04; 8:45 am]

BILLING CODE 3510–HR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 050304F]

Atlantic Coastal Fisheries Cooperative Management Act Provisions; Application for Exempted Fishing Permit (EFP)

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

ACTION: Notification of a request for an EFP to harvest horseshoe crabs; request for comments.

SUMMARY: NMFS announces that the Director, Office of Sustainable Fisheries, is considering issuing an EFP to Limuli Laboratories of Cape May Court House, NJ, to conduct the fourth year of an exempted fishing operation otherwise restricted by regulations prohibiting the harvest of horseshoe crabs in the Carl N. Schuster Jr. Horseshoe Crab Reserve (Reserve) located 3 nautical miles (nm) seaward from the mouth of the Delaware Bay. If granted, the EFP would allow the harvest of 10,000 horseshoe crabs for biomedical purposes and require, as a condition of the EFP, the collection of data related to the status of horseshoe crabs within the Reserve. This document also invites comments on the issuance of the EFP to Limuli Laboratories.

DATES: Comments on this action must be received on or before August 3, 2004.

ADDRESSES: Written comments should be sent to John H. Dunnigan, Director, Office of Sustainable Fisheries, NMFS, 1315 East-West Highway, Room 13362, Silver Spring, MD 20910. Mark the outside of the envelope ''Comments on Horseshoe Crab EFP Proposal.'' Comments may also be sent via facsimile (fax) to (301) 713–0596. Comments on this notice may also be submitted by e-mail to: *Horseshoe-Crab.EFP@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: Horseshoe Crab EFP Proposal. Comments will not be accepted if submitted via the Internet.

FOR FURTHER INFORMATION CONTACT: Tom Meyer, Fishery Management Biologist, (301) 713–2334.

SUPPLEMENTARY INFORMATION:

Background

The regulations that govern exempted fishing, at 50 CFR 600.745(b) and 697.22, allow a Regional Administrator or the Director of the Office of

Sustainable Fisheries to authorize for limited testing, public display, data collection, exploration, health and safety, environmental clean-up and/or hazardous removal purposes, the targeting or incidental harvest of managed species that would otherwise be prohibited. An EFP to authorize such activity may be issued, provided: there is adequate opportunity for the public to comment on the EFP application, the conservation goals and objectives of the fishery management plan are not compromised, and issuance of the EFP is beneficial to the management of the species.

The Reserve was established on February 5, 2001 (66 FR 8906) to protect the Atlantic coast stock of horseshoe crabs and to support the effectiveness of the Atlantic States Marine Fisheries Commission's (Commission) Interstate Fishery Management Plan (ISFMP) for horseshoe crabs. The final rule prohibited fishing for and possession of horseshoe crabs in the Reserve on a vessel with a trawl or dredge gear aboard while in the Reserve. While the rule did not allow for any biomedical harvest or the collection of fishery dependent data, NMFS stated in the comments and responses section that it would consider issuing EFPs for the biomedical harvest of horseshoe crabs in the Reserve.

The biomedical industry collects horseshoe crabs, removes approximately 30 percent of their blood, and returns them alive to the water. Approximately 10 percent do not survive the bleeding process. The blood contains a reagent called *Limulus* Amebocyte Lysate (LAL) that is used to test injectable drugs and medical devices for bacteria and bacterial by-products. Presently, there is no alternative to LAL derived from the horseshoe crab.

NMFS manages horseshoe crabs in the exclusive economic zone in close cooperation with the Commission and the U.S. Fish and Wildlife Service. The Commission's Horseshoe Crab Management Board met on April 21, 2000, and again on December 16, 2003, and recommended to NMFS that biomedical companies with a history of collecting horseshoe crabs in the Reserve be given an exemption to continue their historic levels of collection not to exceed a combined harvest total of 10,000 crabs annually. In 2000, the Commission's Horseshoe Crab Plan Review Team reported that biomedical harvest of up to 10,000 horseshoe crabs should be allowed to continue in the Reserve given that the resulting mortality should be only about 1,000 horseshoe crabs (10 percent mortality during bleeding process). Also in 2000, the Commission's Horseshoe Crab Stock Assessment Committee Chairman recommended that, in order to protect the Delaware Bay horseshoe crab population from over-harvest or excessive collection mortality, no more than a maximum of 20,000 horseshoe crabs should be collected for biomedical purposes from the Reserve. In addition to the direct mortality of horseshoe crabs that are bled, it can be expected that more than 20,000 horseshoe crabs will be trawled up and examined for LAL processing. This is because horseshoe crab trawl catches usually include varied sizes and sexes of horseshoe crabs and large female horseshoe crabs are the ones usually selected for LAL processing. The remaining horseshoe crabs are released at sea with some unknown amount of mortality. Although unknown, this mortality is expected to be negligible.

Collection of horseshoe crabs for biomedical purposes from the Reserve is necessary because of the low numbers of horseshoe crabs found in other areas along the New Jersey Coast from July through early November and because of the critical role horseshoe crab blood plays in health care. In conjunction with the biomedical harvest, NMFS is considering requiring that scientific data be collected from the horseshoe crabs taken in the Reserve as a condition of receiving an EFP. Since the Reserve was first established, the only fishery data from the Reserve were under EFPs issued to Limuli Laboratories for the past three years, and under Scientific Research Activity Permits issued to Dr. Jim Berkson, Virginia Polytechnic Institute and State University's Department of Fisheries and Wildlife Science on September 4, 2001 (for collections from September 1–October 31, 200l), on September 24, 2002 (for collections from September 24–November 15, 2002), and on August 14, 2003 (for collections from September 1–October 31, 2003). Further data are needed to improve the understanding of the horseshoe crab population in the Delaware Bay area and to better manage the horseshoe crab resource under the cooperative state/Federal management program. The data collected through the EFP will be provided to NMFS, the Commission, and to the State of New Jersey.

Results from 2003 EFP

Limuli Laboratories applied for an EFP to collect horseshoe crabs for biomedical and data collection purposes from the Reserve in 2003. The EFP application specified that: (1) the same methods would be used in 2003 that were used in 2002 and 2001, (2) 10 percent of the bled horseshoe crabs would be tagged, and (3) there had not been any sighting or capture of marine mammals or endangered species in the trawling nets of fishing vessels engaged in the collection of horseshoe crabs since 1993.

An EFP was issued to Limuli Laboratories on August 6, 2003, which allowed them to collect horseshoe crabs in the Reserve until October 31, 2003. A total of 5,889 horseshoe crabs were collected for the manufacture of LAL. The horseshoe crabs were collected on 20 dates (6 days in September and 14 days in October), and were transported to the laboratory for the bleeding operation and inspected for sex, size, injuries and responsiveness. Three to four tows were conducted during each fishing trip with the tows lasting no more than 30 minutes to avoid impacting loggerhead turtles. Horseshoe crabs were unloaded at Two Mile Dock, Wildwood Crest, New Jersey and at County Dock, Ocean City, Maryland and transported to the laboratory by truck. The average sex ratio for the landings in 2003 was 0.80 males per female, similar to the 2002 ratio of 0.85. Horseshoe crabs injured during transport and handling numbered 829 or 14.1 percent (115 or 11.4 percent in 2002) of the total while 108 horseshoe crabs or 1.8 percent (31 or 3.1 percent in 2002) were noted as unresponsive (presumed dead). Therefore, 4,952 healthy, uninjured crabs were available for LAL processing. Since large horseshoe crabs, which are generally females, are used for LAL processing, most of the crabs transported to the laboratory were females. Of those 4,952 processed for LAL, 199 female crabs were measured (interocular distances and prosoma widths), weighed, aged, and tagged to establish baseline morphometrics and ages, prior to being released. Bryozoans were found on 25.1 percent of the crabs and slipper shells were found on 20.1 percent. Twenty-eight of the crabs (14.1 percent) had damage to their tail, being either broken or abnormal.

Horseshoe crabs were aged in six categories using Dr. Carl N. Schuster Jr.'s criteria of aging by appearance: (1) first year or virgin, (2) young, (3) young/medium, (4) medium, (5) medium/old and, (6) old age. In 2003, the horseshoe crabs were categorized as virgin and young (34.68 percent), young/medium (55.27 percent), old (10.06 percent). This finding supports the basis for the Reserve which was established to protect young horseshoe crabs. The average measurements for the female horseshoe crabs (no males were measured) were 165.36 mm for the interocular distance, 267.42 mm for the

prosoma width, and 2.5 kg for weight. These averages are slightly lower than 2002.

In 2003, a total of 725 horseshoe crabs from the Reserve were tagged and released at the water's edge on Highs Beach, New Jersey. The beach was checked frequently, following release, to ensure the crabs had returned to the water. Twenty-eight crabs or 6.2 percent were recovered from the 2001 and 2002 tagging of 450 horseshoe crabs. There were 20 recoveries or 8 percent from the 250 horseshoe crabs tagged in 2001. Of these, 13 crabs were found alive and 7 were found dead. None of these crabs were bled for production of LAL in 2001. There were eight live returns or 4 percent from the 2002 tagging of 200 crabs, no dead returns were documented. The bled, tagged crabs were found spawning along the Delaware Bay shore in both New Jersey (Gradys, Fortescue, and Thompson beaches) and Delaware (Bowers, Kitts Hummock, and Slaughter beaches). The dates of recovery ranged from May 11 to June 23, coinciding with the spawning season. Tagged horseshoe crabs that were utilized for the manufacture of LAL in 2002 were observed spawning on Delaware Bay beaches in 2003.

Data collected under the EFP were supplied to NOAA Fisheries, the Commission, and the State of New Jersey.

Proposed 2004 EFP

Limuli Laboratories proposes to conduct an exempted fishery operation using the same means, methods, and seasons utilized during the EFPs in 2001–2003, as described below under terms and conditions. In addition, Limuli proposes to increase the percent of horseshoe crabs tagged from 10 to 15 percent.

The proposed EFP would exempt two commercial vessels from regulations at 50 CFR 697.7(e), which prohibit fishing for horseshoe crabs in the Reserve under § 697.23(f)(1) and prohibit possession of horseshoe crabs on a vessel with a trawl or dredge gear aboard in the same Reserve.

Limuli Laboratories, in cooperation with the State of New Jersey's Division of Fish and Wildlife, submitted an application for an EFP dated March 30, 2004, which was received on April 9, 2004. NMFS has made a preliminary determination that the subject EFP contains all the required information and warrants further consideration. NMFS has also made a preliminary determination that the activities authorized under the EFP would be consistent with the goals and objectives of the Federal horseshoe crab regulations and the Commission's Horseshoe Crab ISFMP.

Regulations at 50 CFR 600.745(b)(3)(v) authorize NMFS to attach terms and conditions to the EFP consistent with: the purpose of the exempted fishery, the objectives of horseshoe crab regulations and fisheries management plan, and other applicable law. NMFS is considering adding the following terms and conditions to the EFP:

1. Limiting the number of horseshoe crabs collected in the Reserve to no more than 500 per day and to a total of no more than 10,000 per year;

2. Requiring collections to take place over a total of approximately 20 days during the months of July, August, September, October, and early November. Horseshoe crabs are readily available in harvestable concentrations nearshore earlier in the year, and offshore in the Reserve during July through early November;

3. Requiring that a 5½ inch (14.0 cm) flounder net be used by the vessel to collect the horseshoe crabs. This condition would allow for continuation of traditional harvest gear and adds to the consistency in the way horseshoe crabs are harvested for data collection;

4. Limiting trawl tow times to 30 minutes as a conservation measure to protect sea turtles, which are expected to be migrating through the area during the collection period, and are vulnerable to bottom trawling;

5. Restricting the hours of fishing to daylight hours only, approximately from 7:30 a.m. to 5 p.m. to aid law enforcement. NMFS also is considering a requirement that the State of New Jersey Law Enforcement be notified daily as to when and where the collection will take place;

6. Requiring that the collected horseshoe crabs be picked up from the fishing vessels at docks in the Cape May Area and transported to local laboratories, bled for LAL, and released alive the following morning into the Lower Delaware Bay; and

7. Requiring that any turtle take be reported to NOAA Fisheries, NMFS, NERO Assistant Regional Administrator of Protected Resources Division [phone, (978) 281–9328] within 24 hours of returning from the trip in which the incidental take occurred.

Also as part of the terms and conditions of the EFP, for all horseshoe crabs bled for LAL, NMFS is considering a requirement that the EFP holder provide data on sex ratio and daily numbers, and tag 15 percent of the horseshoe crabs harvested. Also, the EFP holder may be required to examine at least 200 horseshoe crabs for:

1. Morphometric data, by sex (e.g., interocular distance and weight), and

2. Level of activity, as measured by a response or by distance traveled after release on a beach.

Based on the results of this EFP, this action may lead to future rulemaking.

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

Dated: May 28, 2004.

Alan D. Risenhoover,

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

[FR Doc. E4–1256 Filed 6–3–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Kids.us Forum: Developing a Safe Place on the Internet for Children

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce

ACTION: Notice of Public Meeting

SUMMARY: The National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce, will host a half-day forum, entitled ''The kids.us Internet Domain: Developing a Safe Place on the Internet for Children.'' The forum will address the current state of the kids.us domain and future content and applications for the space.

DATES: The Kids.us Forum will be held from 9:00 a.m. to 1:15 p.m. on Wednesday, July 14, 2004.

ADDRESSES: The Kids.us Forum will be held at the U.S. Department of Commerce, 1401 Constitution Avenue, N.W., Room 4830, Washington, D.C. (Entrance to the Department of Commerce is on 14th Street between Constitution and Pennsylvania Avenues.)

FOR FURTHER INFORMATION CONTACT: Sallianne Schagrin, Office of Policy Analysis and Development, NTIA, at (202) 482–1880, or electronic mail: sschagrin@ntia.doc.gov. Please direct media inquiries to the Office of Public Affairs, NTIA, at (202) 482–7002.

SUPPLEMENTARY INFORMATION: According to NTIA's 2002 report, *A Nation Online*, almost 60 percent of American children between the ages of 5 and 17 use the Internet. Ninety-nine percent of public schools in the United States had access to the Internet according to the U.S. Department of Education's National Center for Education Statistics as of fall 2002.

Internet access has benefitted children enormously by giving them new research tools and information sources, new avenues of expression, expanded and more collaborative learning opportunities, and connections to other communities. Parents want the Internet to be a place where children can access educational material and enjoy their experiences. Unfortunately, Internet access can also potentially expose children to unsafe content.

On December 4, 2002, President Bush signed into law HR 3833, the Dot Kids Implementation and Efficiency Act of 2002 (Dot Kids Act), giving parents and educators an additional tool to help protect children from these dangers. The Dot Kids Act required the Department of Commerce to modify the management of the .us country code top level domain to establish kids.us, a safe space on the Internet for our nation's children. The law also required NTIA to publicize the availability of the new domain and to educate parents regarding using the kids.us domain in combination with blocking and filtering technologies.

NTIA amended its contract with NeuStar, Inc., the private sector company which manages the .us country code top level domain, to establish kids.us and to monitor sites in the domain space for content and safety. NeuStar ensures that all content on kids.us websites is suitable for children under 13 years of age. Moreover, interactive services or hyperlinks that take a user outside of the kids.us domain are prohibited.

NeuStar launched general registrations for domain names in kids.us on September 4, 2003, and established a portal at www.kids.us to highlight websites in the space. Currently, kids.us is home to thirteen active websites. These websites showcase information about arts and entertainment, computers and technology, sports and recreation, science and government, and much more.

The purpose of the Kids.us Forum is to bring together technology experts, community and children's advocates, parents and educators and other interested parties to discuss the potential of the kids.us domain, and to assist would be users of the domain and prospective content providers in fulfilling their goals with the domain. The forum will consist of two panel discussions. The first panel will address the current state of kids.us, current uses of kids.us by parents and educators, future content and applications for kids.us, how kids.us can meet the needs of communities, and the interrelationship between kids.us and filtering and blocking technology, as well as other future technologies. Panelists will include representatives from online child-safety organizations, Congress, community groups, Internet filtering and blocking technology providers, and hardware and software developers. The second panel will address the process of developing a site in the kids.us domain, as well as lessons learned from current content providers, challenges for future content providers, and the resources available to assist would be content providers. Panelists will include representatives from current and prospective providers of content within the kids.us domain, foundations, and technology companies.

More information on the Kids.us Forum will be available on NTIA's web site at *www.ntia.doc.gov/kidsdotusforum.*

PUBLIC PARTICIPATION: The Kids.us Forum will be open to the public and press on a first-come, first-served basis. Space is limited. Due to security requirements and to facilitate entry to the Department of Commerce building, attendees must present photo identification and/or a U.S. Government building pass, if applicable, and should arrive at least one-half hour ahead of the panel sessions. The public meeting is physically accessible to people with disabilities. Any member of the public wishing to attend and requiring special services, such as sign language interpretation or other ancillary aids, should contact Sallianne Schagrin at (202) 482–1880 or at *sschagrin@ntia.doc.gov* at least three (3) days prior to the meeting.

Dated: May 28, 2004.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 04–12651 Filed 6–3–04; 8:45 am]

BILLING CODE 3510–60–S

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before July 6, 2004.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Alice Thaler, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: June 1, 2004.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

Institute of Education Sciences

Type of Review: Revision.

Title: Early Childhood Longitudinal Study: Birth Cohort/Preschool Year.

Frequency: One-time.

Affected Public: Individuals or household; Businesses or other for-profit; Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 2,398.

Burden Hours: 1,551.

Abstract: The Early Childhood Longitudinal Study, Birth Cohort (ECLS-B) is a nationally representative longitudinal study of children born in the year 2001. The preschool year follow-up represents the third round of data collection for members of this cohort. Children are assessed using state of the art assessment tools, parents are interviewed as well as child care providers and school personnel. Together with the Kindergarten

component of this early childhood studies program, the survey informs the research and general community about children's health, early learning, development and education experiences. The focus of this survey is on characteristics of children and their families that influence children's first experiences with the demands of formal schools as well as early health care and in- and out-of-home experiences.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 2485. When you access the information collection, click on ''Download Attachments ''to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW, Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address OCIO_RIMG@ed.gov or faxed to 202–245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at her e-mail address *Kathy.Axt@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 04–12698 Filed 6–3–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services; Overview Information; Special Education—Research and Innovation To Improve Services and Results for Children With Disabilities—National Center on Secondary, Transition, and Postsecondary School Outcomes for Students With Disabilities Notice Inviting Applications for New Awards for Fiscal Year (FY) 2004

Catalog of Federal Domestic Assistance (CFDA) Number: 84.324S.

Dates:

Applications Available: June 7, 2004.

Deadline for Transmittal of Applications: July 19, 2004.

Eligible Applicants: State educational agencies (SEAs), local educational agencies (LEAs), institutions of higher education (IHEs), other public agencies, nonprofit private organizations, outlying areas, freely associated States, and Indian tribes or tribal organizations.

Estimated Available Funds: $700,000.

Maximum Award: We will reject any application that proposes a budget exceeding $700,000 for a single budget period of 12 months. The Assistant Secretary for the Office of Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: To produce, and advance the use of, knowledge to improve the results of education and early intervention for infants, toddlers, and children with disabilities.

Priority: In accordance with 34 CFR 75.105(b)(2)(iv), this priority is from allowable activities specified in the statute (*see* sections 661(e)(2) and 672 of the Individuals with Disabilities Education Act (IDEA)).

Absolute Priority: For FY 2004 this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

National Center On Secondary, Transition, and Postsecondary School Outcomes for Students with Disabilities

Background: Better data on secondary and postsecondary school outcomes for students are needed to assess the effectiveness of programs and services provided under Part B of IDEA and to improve secondary and postsecondary school outcomes for students with disabilities.

While there is general agreement that assessing academic achievement should be part of school accountability systems, many individuals involved in the education of students with disabilities believe that for IDEA purposes it is also important to collect other types of information that focus on assessing transition and postsecondary school success.

A recent GAO study (GAO–03–773) entitled ''Special Education: Federal Actions Can Assist States in Improving Postsecondary Outcomes for Youth'' found that, while a majority of youth receiving IDEA services complete high school with a diploma, it is difficult to determine what happens to students after they leave high school.

GAO found that less than half of the States routinely collect data on students' employment or education status after graduation. Most States collecting postsecondary school data used it for program improvement purposes such as monitoring school districts or targeting schools for technical assistance. However, existing State methodologies for collecting such data often have limitations that preclude using the data to assess the status of youth in the State who are receiving IDEA services, or reduce the usefulness of the data in other ways.

GAO also found that many of the States that do not routinely collect postsecondary school data on the status of youth receiving IDEA services have expressed interest in doing so. For example, State educational agency officials familiar with State data collection efforts indicated that State and local school systems did not always have appropriate guidance on how data could be collected, analyzed, and used to improve programs and outcomes for youth with disabilities.

Priority: The Secretary establishes a priority for a cooperative agreement to support a National Center on Secondary, Transition, and Postsecondary School Outcomes for Students with Disabilities that will advance the development and use of secondary, transition, and postsecondary school outcome information. This center must conduct research activities and provide technical assistance to States, schools, communities, and agencies in developing and implementing practical, efficient, cost-effective, and sustainable strategies for collecting and using outcome data to improve secondary, transition, and postsecondary school outcomes.

Knowledge Development Activities of the Center must include, but are not limited to:

(a) Conducting a national survey to identify State systems for the collection of secondary, transition, and postsecondary school outcome data on youth with disabilities and to identify policies and practices that sustain these data systems.

(b) Conducting a literature review on the measures and methodologies that are used to collect data on secondary, transition, and postsecondary school outcomes for youth with disabilities.

(c) Conducting activities to develop and implement practical, efficient, cost-effective, and sustainable strategies for identifying, collecting, and using student secondary, transition, and postsecondary school data for school improvement.

(d) Reviewing the technical adequacy of measures used to assess secondary, transition, and postsecondary school outcomes.

Technical Assistance and Dissemination Activities of the Center must include, but are not limited to:

(a) Maintaining a user-friendly Web site with relevant information and documents in an accessible format, and responding to written and telephone inquiries with research validated information.

(b) Developing and implementing strategic technical assistance to States to assist them in (1) developing strategies for collecting and using secondary, transition, and postsecondary school outcome data; (2) developing approaches to assess the nature and extent of problems in data quality and address them; and (3) developing effective models for collecting and using data in districts and school sites and helping States replicate these throughout the State.

(c) Disseminating information on current practices for collection of secondary, transition, and postsecondary school outcome data.

(d) Conducting national and regional meetings, focused trainer forums, and other technical assistance activities on data collection, feedback, and the use of data to improve secondary education, transition, and postsecondary school outcomes. Meetings must be conducted to develop consensus among parents and other stakeholders on outcomes to be measured.

(e) Developing and applying strategies for the dissemination of information to specific audiences including teachers, parents, service providers, administrators, policy makers, and researchers. Such strategies must involve collaboration with other technical assistance providers, organizations, and researchers.

(f) Maintaining communication and collaboration with other Department of Education funded projects (such as the IDEA Partnerships, National Center on Educational Outcomes (NCEO), the Regional Resource Centers, the National Center on Secondary Education and Transition (NCSET), the National Center for Special Education Accountability and Monitoring (CSEAM), and Parent Training and Information Centers (PTIs)), and other agencies and organizations seeking to improve outcomes for youth with disabilities.

(g) Providing technical assistance to States focused on needs identified in a State survey to be conducted by the Center. The Center must also participate, as requested by the Office of Special Education Programs (OSEP), in providing technical assistance to States identified by OSEP as States in need. The Center must plan for assistance to three identified States per year (similar State assistance efforts have averaged approximately $40,000 per year).

The Center must also:

(a) Meet with the OSEP project officer in the first two months of the project to review and refine the strategic plan of technical assistance and dissemination approaches.

(b) Communicate with the OSEP project officer through monthly phone conversations and e-mail communication as needed. The Center must submit annual performance reports and provide additional written materials as needed for the OSEP project officer to monitor the Center's work.

(c) Establish, and meet at least annually with, a technical workgroup consisting of SEA and LEA data specialists, researchers, and other appropriate individuals to advise on the Center's technical and research activities.

(d) Conduct evaluations of the Center's specific activities and of the overall impact of those activities. The Center must report its evaluation findings annually to the OSEP project officer.

(e) Establish, maintain, and meet at least annually with an advisory committee consisting of representatives of SEAs and LEAs, individuals with disabilities, educators, parents, service providers, professional organizations and advocacy groups, and other appropriate groups to review and advise on the Center's activities and plans. The committee membership must include individuals from communities representing rural, low-income, urban, and limited English proficiency populations.

(f) Budget for (1) a two-day Project Directors' meeting in Washington, DC during each year of the project, (2) at least two annual planning meetings in DC, and (3) at least four two-day trips annually as requested by OSEP to attend meetings such as Department briefings, Department-sponsored conferences, and other OSEP requested activities.

Fourth and Fifth Years of Project: In deciding whether to continue this project for the fourth and fifth years, the Secretary will consider the requirements of 34 CFR 75.253(a), and in addition—

(a) The recommendation of a review team consisting of experts selected by the Secretary which review will be conducted during the last half of the project's second year in Washington, DC. Projects must budget for the travel associated with this one-day intensive review;

(b) The timeliness and effectiveness with which all requirements of the negotiated cooperative agreement have been or are being met by the Center; and

(c) Evidence of the degree to which the Center's activities have contributed to changed practices and improved child outcomes.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities. However, section 661(e)(2) of IDEA makes the public comment requirements inapplicable to the priority in this notice.

Program Authority: 20 U.S.C. 1461 and 1472.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 80, 81, 82, 84, 85, 86, 97, 98, and 99.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Cooperative agreement.

Estimated Available Funds: $700,000.

Maximum Award: We will reject any application that proposes a budget exceeding $700,000 for a single budget period of 12 months. The Assistant Secretary for the Office of Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

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:* SEAs, LEAs, IHEs, other public agencies, nonprofit private organizations, outlying areas, freely associated States, and Indian tribes or tribal organizations.

2. *Cost Sharing or Matching:* This competition does not involve cost sharing or matching.

3. *Other: General Requirements*—(a) The projects funded under this notice must make positive efforts to employ and advance in employment qualified individuals with disabilities (*see* section 606 of IDEA).

(b) Applicants and grant recipients funded under this notice must involve individuals with disabilities or parents of individuals with disabilities in planning, implementing, and evaluating the projects (*see* section 661(f)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Address to Request Application Package:* Education Publications Center

(ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), you may call (toll free): 1–877–576–7734.

You may also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs.html* or you may contact ED Pubs 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 Number 84.324S.

Individuals with disabilities may obtain a copy of the application package in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team listed under *For Further Information Contact* in section VII 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. You must limit Part III to the equivalent of no more than 70 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).

The 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, the references, or the letters of support. However, you must include all of the application narrative in Part III.

We will reject your application if—

- You apply these standards and exceed the page limit; or
- You apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: June 7, 2004.

Deadline for Transmittal of Applications: July 19, 2004. The dates and times for the transmittal of applications by mail or by hand (including a courier service or commercial carrier) are in the application package for this competition. The application package also specifies the hours of operation of the e-Application Web site.

We do not consider an application that does not comply with the deadline requirements.

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. *Other Submission Requirements:* Instructions and requirements for the transmittal of applications by mail or by hand (including a courier service or commercial carrier) are in the application package for this competition.

Application Procedures

Note: Some of the procedures in these instructions for transmitting applications differ from those in the Education Department General Administrative Regulations (EDGAR) (34 CFR 75.102). Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed regulations. However, these amendments make procedural changes only and do not establish new substantive policy. Therefore, under 5 U.S.C. 553(b)(A), the Secretary has determined that proposed rulemaking is not required.

Pilot Project for Electronic Submission of Applications

We are continuing to expand our pilot project for electronic submission of applications to include additional formula grant programs and additional discretionary grant competitions. The Special Education—Research and Innovation to Improve Services and Results for Children with Disabilities—National Center on Secondary, Transition, and Postsecondary School Outcomes for Students with Disabilities competition—CFDA Number 84.324S is one of the competitions included in the pilot project. If you are an applicant under the Special Education—Research and Innovation to Improve Services and Results for Children with Disabilities—National Center on Secondary, Transition, and Postsecondary school Outcomes for Students with Disabilities competition, you may submit your application to us in either electronic or paper format.

The pilot project involves the use of the Electronic Grant Application System (e-Application). If you use e-Application, you will be entering data online while completing your application. You may not e-mail an electronic copy of a grant application to us. If you participate in this voluntary pilot project by submitting an application electronically, the data you enter online will be saved into a database. We request your participation in e-Application. We shall continue to evaluate its success and solicit suggestions for its improvement.

If you participate in e-Application, please note the following:

- Your participation is voluntary.
- When you enter the e-Application system, you will find information about its hours of operation. We strongly recommend that you do not wait until the application deadline date to initiate an e-Application package.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You may submit all documents electronically, including the Application for Federal Education Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- Your e-Application must comply with any page limit requirements described in this notice.
- After you electronically submit your application, you will receive an automatic acknowledgement, which will include a PR/Award number (an identifying number unique to your application).
- Within three working days after submitting your electronic application, fax a signed copy of the Application for Federal Education Assistance (ED 424) to the Application Control Center after following these steps:

1. Print ED 424 from e-Application.
2. The institution's Authorizing Representative must sign this form.
3. Place the PR/Award number in the upper right hand corner of the hard copy signature page of the ED 424.
4. Fax the signed ED 424 to the Application Control Center at (202) 260–1349.

- We may request that you give us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of System Unavailability: If you elect to participate in the e-Application pilot for the Special Education—Research and Innovation to Improve Services and Results for Children with Disabilities—National Center on Secondary, Transition, and Postsecondary School Outcomes for

Students with Disabilities competition and you are prevented from submitting your application on the application deadline date because the e-Application system is unavailable, we will grant you an extension of one business day in order to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

1. You are a registered user of e-Application, and you have initiated an e-Application for this competition; and

2. (a) The e-Application system is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) The e-Application system is unavailable for any period of time during the last hour of operation (that is, for any period of time between 3:30 p.m. and 4:30 p.m., Washington, DC time) on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgement of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (*see* VII. Agency Contact) or (2) the e-GRANTS help desk at 1–888–336–8930.

You may access the electronic grant application for the Special Education—Research and Innovation to Improve Services and Results for Children with Disabilities— National Center on Secondary, Transition, and Postsecondary School Outcomes for Students with Disabilities competition at: *http://e-grants.ed.gov.*

V. Application Review Information

Selection Criteria: The selection criteria for this competition are listed in 34 CFR 75.210 of EDGAR. The specific selection criteria to be used for this competition are in the application package.

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 also notify you informally.

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:* 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 specified by the Secretary in 34 CFR 75.118.

4. *Performance Measures:* Because this project deals primarily with technical assistance activities, it will be assessed using performance measures for the Technical Assistance to Improve Services and Results for Children with Disabilities Program. Under the Government Performance and Results Act (GPRA), the Department is currently developing measures that will yield information on various aspects of the quality of the Technical Assistance to Improve Services and Results for Children with Disabilities Program (*e.g.*, the extent to which projects use high quality methods and materials, provide useful products and services, and contribute to improving results for children with disabilities). Data on these measures will be collected from the projects funded under this notice.

Grantees will also be required to report information on their projects' performance in annual reports to the Department (EDGAR, 34 CFR 75.590).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Selete Avoke, U.S. Department of Education, 400 Maryland Avenue, SW., room 4120, Potomac Center Plaza, Washington, DC 20202–2641. Telephone: (202) 205–8157.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request by contacting the following office: The Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center Plaza, Washington, DC 20202–2550. Telephone: (202) 205–8207.

VIII. Other Information

Electronic Access to This Document: You may 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) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: 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 on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: June 1, 2004.

Troy R. Justesen,

Acting Deputy Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 04–12712 Filed 6–3–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services; Overview Information; Research and Innovation To Improve Services and Results for Children With Disabilities—Research and Innovation: Notice Inviting Applications for New Awards for Fiscal Year (FY) 2004

Catalog of Federal Domestic Assistance (CFDA) Number: 84.324C.

Dates:

Applications Available: June 7, 2004.

Deadline for Transmittal of Applications: July 9, 2004.

Eligible Applicants: State educational agencies (SEAs); local educational agencies (LEAs); institutions of higher education (IHEs); other public agencies; nonprofit private organizations; outlying areas; freely associated States; and Indian tribes or tribal organizations.

Estimated Available Funds: $7,800,000.

Estimated Average Size of Awards: Innovation research and model development: $180,000; Replication and scale-up: $360,000.

Maximum Award: Innovation research and model development: $180,000; Replication and scale-up: $360,000. We will reject any application that proposes a budget exceeding the maximum award for a single budget period of 12 months. The Assistant

Secretary for the Office of Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: Information is provided elsewhere in this notice in Section II Award Information,

Estimated Number of Awards.

Project Period: Up to 60 months. Typical awards will be for 36 months. Projects requesting funding beyond 36 months must provide compelling evidence for up to a maximum of 60 months of funding.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: To produce, and advance the use of, knowledge to improve the results of education and early intervention for infants, toddlers, and children, with disabilities.

Priority: In accordance with 34 CFR 75.105(b)(2)(iv), this priority is from allowable activities specified in the statute (see sections 661(e)(2) and 672 of the Individuals with Disabilities Education Act (IDEA)).

Absolute Priority: For FY 2004 this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Research and Innovation To Improve Services and Results for Children With Disabilities—Research and Innovation

Background: This priority supports research to improve results for infants, toddlers, children, or youth with disabilities through early intervention, educational, transitional, post secondary, or related services. Proposals for three types of research will be accepted for this competition: (1) Innovation Research, (2) Model Development, and (3) Replication and Scale-up. Innovation Research projects assess the effectiveness of innovative practices including interventions, strategies, and policies. Model Development projects develop, implement, and evaluate models (including models for professional development). Projects supported as models must gather evidence of efficacy or usefulness of models for service providers. A successful Model Development project would be one that develops guidelines, procedures, or materials needed for implementation of the model and provides evidence that the model has the potential to improve the results. One goal of Model Development projects is to determine if the model is effective when implemented at a distance from the developers of the program and with no more support from the developers of the program than would be available under typical conditions. To do this, applicants should propose studies to determine the degree to which these models are effective when implemented by typical service providers in typical settings.

Replication and Scale-up projects assess the effectiveness of a proven model or practice when systematically replicated across a variety of settings by typical service providers. Applicants should provide a strong rationale, including empirical evidence, to support the efficacy of the model or practice.

An applicant must address only one of these types of research in its application.

Priority: Applicants must—

(a) Target intended beneficiaries of Part B and Part C of IDEA.

(b) Provide a strong rationale for the practical importance of the practice or model. The critical question is whether the focus of the research is likely to produce meaningful effects.

(c) Provide a detailed research design and describe how potential threats to internal and external validity will be addressed.

(d) Provide detailed descriptions of data analysis procedures.

(e) Provide documentation of the resources required to implement the program and a cost analysis.

(f) If applicable to the study, design research to account for sources of variation in outcomes across settings (*i.e.*, to account for what might otherwise be part of the error variance). Applicants should provide a theoretical rationale to justify the inclusion (or exclusion) of factors/variables in the design of the research that have been found to affect the success of a practice or model (*e.g.*, teacher experience, fidelity of implementation, characteristics of the student population). The research should demonstrate the conditions and critical variables that affect the success of a given practice or model.

(g) Specify how procedures, findings and conclusions will be prepared in a manner that advances the knowledge base and, if appropriate, professional practice. Publication through a peer review process is one expected method of dissemination.

(h) Define, as completely as possible, the sample to be selected and sampling procedures to be employed for the proposed study.

(i) Show how the long-term participation of those sampled would be assured.

(j) Supply information on the reliability, validity, and appropriateness of proposed measures, or if the reliability and validity of the measurement, assessment, or observational procedures are initially unknown, the applicant must include specific plans for establishing these measurement properties.

(k) Include standardized measures of learning and achievement when measuring student achievement.

(l) Specify how the implementation of the practice or model will be documented and measured. Either indicate how the practice or model will be maintained consistently across multiple environments (*e.g.*, classrooms or schools) over time or describe the parameters under which variations may be described.

(m) For quantitative data, cite specific statistical procedures. For qualitative data, delineate the specific methods used to index, summarize, and interpret data.

(n) If proposing to evaluate the effectiveness of a practice or model that is already widely used (*i.e.*, has already been scaled-up), provide a strong justification for evaluating the practice or model based on the implications for education that would result from conducting a rigorous evaluation of the practice or model. This justification must include documentation of the widespread use of the practice or model.

(o) If proposing to study the scale-up of a practice or model that has not yet been implemented widely, provide evidence of the efficacy of the practice or model as implemented on a small scale. That evidence should be based on the results of randomized field trials, or well-designed quasi-experimental evaluations.

(p) If posing a causal question, employ a randomized assignment to treatment and comparison conditions, unless a strong justification is made for why a randomized trial is not possible. In this case, employ alternatives that substantially minimize selection bias or allow it to be modeled. Such alternatives include appropriately structured regression-discontinuity designs and natural experiments in which naturally occurring circumstances or institutions (perhaps unintentionally) divide people into treatment and comparison groups in a manner akin to purposeful random assignment. Applicants proposing to use other than a randomized design must, first, make a compelling case that randomization is not possible and,

second, describe in detail the procedures to be used that will result in substantially minimizing the effects of selection bias on estimates of effect size. Choice of randomizing unit or units (*e.g.*, students, classrooms, schools) must be grounded in a theoretical framework. Observational, survey, or qualitative methodologies are encouraged as a complement to experimental methodologies to assist in the identification of factors that may explain the effectiveness or ineffectiveness of the practice. Proposals should provide research designs that permit the identification and assessment of factors impacting the fidelity of implementation. Mediating and moderating variables that are measured in the practice or model condition that are also likely to affect outcomes in the comparison condition should be measured in the comparison condition (*e.g.*, student time-on-task, teacher experience and time in position).

(q) Budget for a two-day Project Directors' meeting in Washington, DC during each year of the project.

(r) If the applicant plans to use a Web site during the funded period, relevant information and documents must conform to Department accessibility guidelines.

Waiver of Proposed Rulemaking

Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities. However, section 661(e)(2) of IDEA makes the public comment requirements inapplicable to the priorities in this notice.

Program Authority: 20 U.S.C. 1461, 1472.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 80, 81, 82, 84, 85, 86, 97, 98, and 99.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $7,800,000.

Estimated Average Size of Awards: Innovation research and model development: $180,000; Replication and scale-up: $360,000.

Maximum Award: Innovation research and model development: $180,000; Replication and scale-up: $360,000. We will reject any application that proposes a budget exceeding the maximum award for a single budget period of 12 months. The Assistant Secretary for the Office of Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 38. Contingent upon the availability of funds and the receipt of a sufficient number of meritorious applications, we intend to fund at least 38 awards in the areas of innovation research, model development, and replication and scale-up. Given a sufficient number of approved high quality applications, we intend to fund at least two Model Development projects that would develop effective models for ensuring the full and effective participation of parents in systemic efforts to improve outcomes for children with disabilities under IDEA and the No Child Left Behind Act of 2001 (NCLB). These models, in addition to the previous requirements, must: (1) Prepare parents to assume collaborative leadership roles as members of local and State education policy forums such as NCLB school improvement teams, local and State level advisory groups, special education advisory councils, and other coalitions designed to improve educational results; (2) include opportunities for parents to learn and apply collaborative leadership skills in real settings; and (3) include parent membership organizations and other organizations in the development, implementation, and evaluation of the models.

In addition, given a sufficient number of approved high quality applications, we intend to fund at least four Model Development projects for supporting students with disabilities in two postsecondary education settings, such as two-year colleges, four-year colleges, and universities. Within these models, supports and services for students with disabilities must be integrated, to the greatest extent possible, with the postsecondary institutions' supports and services for all students. At least two of these four models must include supporting students with intellectual disabilities (*i.e.*, mental retardation and related disabilities) and may be designed for students who did not graduate from high school with a regular diploma or students who are still IDEA-eligible (such as those in dual enrollment programs).

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months. Typical awards will be for 36 months. Projects requesting funding beyond 36 months must provide compelling evidence for up to a maximum of 60 months of funding.

III. Eligibility Information

1. *Eligible Applicants:* SEAs; LEAs; IHEs; other public agencies; nonprofit private organizations; outlying areas; freely associated States; and Indian tribes or tribal organizations.

2. *Cost Sharing or Matching:* This competition does not involve cost sharing or matching.

3. *Other: General Requirements*—(a) The projects funded under this notice must make positive efforts to employ and advance in employment qualified individuals with disabilities (*see* section 606 of IDEA).

(b) Applicants and grant recipients funded under this notice must involve individuals with disabilities or parents of individuals with disabilities in planning, implementing, and evaluating the projects (*see* section 661(f)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Address to Request Application Package:* Education Publications Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433–7827. Fax: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), you may call (toll free): 1–877–576–7734.

You may also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs.html* or you may contact ED Pubs 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 Number 84.324C.

Individuals with disabilities may obtain a copy of the application package in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team listed under *For Further Information Contact* in section VII 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. You must limit Part III to the equivalent of no more than 50 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).

The 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, the references, or the letters of support. However, you must include all of the application narrative in Part III.

We will reject your application if—

• You apply these standards and exceed the page limit; or

• You apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: June 7, 2004.

Deadline for Transmittal of Applications: July 9, 2004. The dates and times for the transmittal of applications by mail or by hand (including a courier service or commercial carrier) are in the application package for this competition. The application package also specifies the hours of operation of the e-Application Web site.

We do not consider an application that does not comply with the deadline requirements.

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. *Other Submission Requirements:* Instructions and requirements for the transmittal of applications by mail or by hand (including a courier service or commercial carrier) are in the application package for this competition.

Application Procedures:

Note: Some of the procedures in these instructions for transmitting applications differ from those in the Education Department General Administrative Regulations (EDGAR) (34 CFR 75.102). Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed regulations. However, these amendments make procedural changes only and do not establish new substantive policy. Therefore, under 5 U.S.C. 553(b)(A), the Secretary has determined that proposed rulemaking is not required.

Government-Wide Grants.gov Project for Electronic Submission of Applications

We have been accepting applications electronically through the Department's e-Application system since FY 2000. In order to expand on those efforts and comply with the President's Management Agenda, we are participating as a partner in the new government-wide Grants.gov Apply site in FY 2004. The Special Education—Research and Innovation to Improve Services and Results for Children with Disabilities—Research and Innovation competition—CFDA Number 84.324C is one of the competitions included in the pilot project. If you are an applicant under the Research and Innovation to Improve Services and Results for Children with Disabilities—Research and Innovation competition—CFDA Number 84.324C, you may submit your application to us in either electronic or paper format.

The project involves the use of the Grants.gov Apply site (Grants.gov). If you use Grants.gov, you will be able to download a copy of the application package, complete it offline, and then upload and submit the application via the Grants.gov site. You may not e-mail an electronic copy of a grant application to us. We request your participation in Grants.gov.

If you participate in Grants.gov, please note the following:

• Your participation is voluntary.

• 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. We strongly recommend that you do not wait until the application deadline date to begin the application process through Grants.gov.

• To use Grants.gov, you, as the applicant, must have a DUNS Number and register in the Central Contractor Registry (CCR). You should allow a minimum of five days to complete the CCR registration.

• You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.

• You may submit all documents electronically, including all information typically included on the Application for Federal Education Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.

• Your application must comply with any page limit requirements described in this notice.

• After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Department will retrieve your application from Grants.gov and send you a second confirmation, which will include a PR/Award number (an ED-specified identifying number) unique to your application.

• We may request that you give us original signatures on forms at a later date.

• If you experience technical difficulties on the application deadline date and are unable to meet the 4:30 p.m. (Washington, DC time) deadline, print out your application and follow the instructions included in the application package for the transmittal of paper applications.

You may access the electronic grant application for the Research and Innovation to Improve Services and Results for Children with Disabilities—Research and Innovation competition—CFDA Number 84.324C at: *http://e-grants.ed.gov.*

Note: Please note that 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.

V. Application Review Information

Selection Criteria: The selection criteria for this competition are listed in 34 CFR 75.210 of EDGAR. The specific selection criteria to be used for this competition are in the application package.

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 also notify you informally.

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:* 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 specified by the Secretary in 34 CFR 75.118.

4. *Performance Measures:* Under the Government Performance and Results Act (GPRA), the Department is currently developing indicators and measures that will yield information on various aspects of the quality of the Research and Innovation to Improve Services and Results for Children with Disabilities program. Included in these indicators and measures will be those that assess the quality and relevance of newly funded research projects. Two indicators will address the quality of new projects. First, an external panel of eminent senior scientists will review the quality of a randomly selected sample of newly funded research applications, and the percentage of new projects that are deemed to be of high quality will be determined. Second, because much of the Department's work focuses on questions of effectiveness, newly funded applications will be evaluated to identify those that address causal questions and then to determine what percentage of those projects use randomized field trials to answer the causal questions. To evaluate the relevance of newly funded research projects, a panel of experienced education practitioners and administrators will review descriptions of a randomly selected sample of newly funded projects and rate the degree to which the projects are relevant to practice.

Other indicators and measures are still under development in areas such as the quality of project products and long-term impact. Data on these measures will be collected from the projects funded under this notice. Grantees will also be required to report information on their projects' performance in annual reports to the Department (EDGAR, 34 CFR 75.590).

VII. Agency Contact

For Further Information Contact: Tom V. Hanley, U.S. Department of Education, 400 Maryland Avenue, SW., room 4066, Potomac Center Plaza, Washington, DC 20202–2550. Telephone: (202) 205–8110.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request by contacting the following office: the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center Plaza, Washington, DC 20202–2550. Telephone: (202) 205–8207.

VIII. Other Information

Electronic Access to This Document: You may 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) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: 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 on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: June 1, 2004.

Troy R. Justesen,

Acting Deputy Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 04–12713 Filed 6–3–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–303–000]

Dominion Transmission, Inc.; Notice of Report of Refunds

May 26, 2004.

Take notice that on May 14, 2004, Dominion Transmission, Inc. (DTI) tendered for filing a report of refunds that DTI flowed through to its customers.

DTI states that the purpose of this filing is to report the refunds that resulted from Columbia Gulf Transmission Company's (Columbia Gulf) settlement in Docket No. RP91–160, which required Columbia Gulf to refund environmental costs reimbursed by its insurance carriers. DTI further states that the refunds were allocated based on DTI's customers' fixed cost responsibility as set out on Sheet No. 38 of DTI's FERC Gas Tariff.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed on or before the date as indicated below. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. 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 e-Filing link.

Comment Date: June 2, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1251 Filed 6–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER04–874–000]

EnerNOC, Inc.; Notice of Filing

May 26, 2004.

Take notice that on May 14, 2004, EnerNOC, Inc. (EnerNOC) tendered for filing Service Agreement No. 1 to EnerNOC's Rate Schedule FERC No. 1, a long-term agreement for Supplemental Installed Capacity for Southwest Connecticut between ISO New England, as agent for the Market Participants in the New England Control Area, and EnerNOC. EnerNOC requested an effective date of June 1, 2004.

The Commission issued a Notice of Filing for this Service Agreement on May 18, 2004, in Docket No. ER04–846–000. The May 18, 2004, Notice of Filing also addressed EnerNOC's request for acceptance of EnerNOC Rate Schedule FERC No. 1 and the request for blanket approvals normally accorded to sellers permitted to sell at market-based rates.

The Commission has determined that the service agreement for Supplemental Installed Capacity for Southwest

Connecticut should be redocketed in ER04–874–000. The request for acceptance of EnerNoc Rate Schedule FERC No. 1 and the request for certain blanket approvals will remain docketed in Docket No. ER04–846–000.

Any person desiring to intervene or to protest the agreement for Supplemental Installed Capacity for Southwest Connecticut should file an intervention or protest in Docket No. ER04–874–000. Filings should be sent to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the eLibrary (FERRIS) link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper;*see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: June 4, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1243 Filed 6–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–12–005]

Florida Gas Transmission Company; Notice of Compliance Filing

May 26, 2004.

Take notice that on May 20, 2004, Florida Gas Transmission Company (FGT) tendered for filing to become part of its FERC Gas Tariff, Third Revised Volume No. 1, the following tariff sheets, to become effective November 1, 2003:

Second Substitute Third Revised Sheet No. 14
Second Revised Sheet No. 15
Second Substitute First Revised Sheet No. 22H
Second Revised Sheet No. 22I
Second Substitute Fourth Revised Sheet No. 59
Third Revised Sheet No. 60

FGT states that the referenced tariff sheets are being filed in compliance with the Commission's Order on Rehearing, Clarification, Compliance Filing and Technical Conference, issued April 20, 2004, in which the Commission directed FGT to file tariff revisions to provide for partial reservation charge credits only in force majeure situations and, in instances of full reservation charge credits, that reservation fixed cost surcharges shall be included.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's rules and regulations. All such protests must be filed in accordance with section 154.210 of the Commission's regulations. 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 proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. 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 e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1245 Filed 6–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–300–000]

Florida Gas Transmission Company; Notice of Proposed Changes in FERC Gas Tariff

May 26, 2004.

Take notice that on May 19, 2004, Florida Gas Transmission Company (FGT) tendered for filing to become part of its FERC Gas Tariff, Third Revised Volume No. 1, the following tariff sheets, effective June 1, 2004:

Sixty-Third Revised Sheet No. 8A
Fifty-Fifth Revised Sheet No. 8A.01
Fifty-Fifth Revised Sheet No. 8A.02
Fifteenth Revised Sheet No. 8A.04
Fifty-Eighth Revised Sheet No. 8B
Fifty-First Revised Sheet No. 8B.01
Eighth Revised Sheet No. 8B.02

FGT states that in Docket No. RP04–185–000 filed on February 27, 2004, FGT filed to establish a Base Fuel Reimbursement Charge Percentage (Base FRCP) of 3.14% to become effective for the six-month Summer Period beginning April 1, 2004. FGT further states that on March 19, 2004, in Docket No. RP04–222–000, FGT filed a flex adjustment of (0.39%) to be effective April 1, 2004, which, when combined with the Base FRCP of 3.14% resulted in an Effective FRCP of 2.75%. The Federal Energy Regulatory Commission (FERC) approved these filings on March 26, 2004, and April 14, 2004, respectively.

FGT states that in the instant filing, FGT is filing a flex adjustment of 0.25% resulting in a cumulative flex adjustment of (0.14%) to be effective June 1, 2004, which, when combined with the Base FRCP of 3.14% results in an Effective FRCP of 3.00%. FGT states that this filing is necessary because FGT is currently experiencing higher fuel usage than will be recovered by the currently Effective FRCP of 2.75%. Increasing the FRCP will reduce FGT's underrecovery of fuel and reduce the Unit Fuel Surcharge in the next Summer Period.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. 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 e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1248 Filed 6–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–301–000]

Gas Transmission Northwest Corporation; Notice of Proposed Change in FERC Gas Tariff

May 26, 2004.

Take notice that on May 20, 2004, Gas Transmission Northwest Corporation (GTN) tendered for filing to be part of its FERC Gas Tariff, Third Revised Volume No. 1–A, the tariff sheets listed in Appendix A to the filing, with an effective date of October 6, 2003.

GTN states that it is incorporating, into Third Revised Volume No. 1–A, tariff sheets which were previously approved by the Commission in GTN's superseded FERC Gas Tariff, Second Revised Volume No. 1–A.

GTN further states that a copy of this filing has been served on GTN's jurisdictional customers and interested State regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. 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 e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1249 Filed 6–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–302–000]

Gas Transmission Northwest Corporation; Notice of Proposed Change in FERC Gas Tariff

May 26, 2004.

Take notice that on May 20, 2004, Gas Transmission Northwest Corporation (GTN) tendered for filing various tariff sheets to be part of its superseded FERC Gas Tariff, Second Revised Volume No. 1–A, and its current FERC Gas Tariff, Third Revised Volume No. 1–A.

GTN states that this filing is necessary to incorporate tariff changes previously approved in GTN's First Revised Volume No. 1–A. GTN requests that the Commission accept the Second Revised Volume No. 1–A tariff sheets to be effective on August 22, 2002, and the Third Revised Volume No. 1–A tariff sheets to be effective October 6, 2003.

GTN further states that a copy of this filing has been served on GTN's jurisdictional customers and interested State regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. 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 e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1250 Filed 6–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–304–000]

Northwest Pipeline Corporation; Notice of Proposed Changes in FERC Gas Tariff

May 26, 2004.

Take notice that on May 21, 2004, Northwest Pipeline Corporation (Northwest) tendered as part of its FERC Gas Tariff, Third Revised Volume No. 1, Third Revised Sheet No. 373, to be effective June 21, 2004, and tendered for filing and acceptance a Rate Schedule TF–1 non-conforming service agreement.

Northwest states that the purpose of this filing is to submit a Rate Schedule TF–1 service agreement containing provisions that do not conform to the Rate Schedule TF–1 form of service agreement contained in Northwest's tariff, and to add this agreement to the list of non-conforming service agreements in Northwest's tariff.

Northwest states that a copy of this filing has been served upon Northwest's customers and interested State regulatory commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance

with section 154.210 of the Commission's regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. 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 e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1241 Filed 6–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP03–32–003]

Northwest Pipeline Corporation; Notice of Petition To Vacate Certificate in Part

May 26, 2004.

Take notice that Northwest Pipeline Corporation (Northwest), Post Office Box 58900, Salt Lake City, Utah 84158–0900, filed in Docket No. CP03–32–003 on May 6, 2004, a petition to vacate, in part, the certificate authorization that was issued by Commission order dated July 30, 2003, in Docket No. CP03–32–000, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The Commission will treat the petition as an application to amend the certificate order of July 30, 2003. Northwest proposes to proceed with the authorized abandonment of the existing 26-inch diameter pipeline at the White River Crossing, located in King County, Washington, but no longer plans to install the originally authorized 26-inch diameter replacement pipeline. This filing may be also viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call (202) 502–8659 or TTY, (202) 208–3676.

Any questions regarding this application should be directed to Gary K. Kotter, Manager, Certificates and Tariffs, at (801) 584–7117, fax (801) 584–7764.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's rules of practice and procedure (18 CFR 385.214 or 385.211) and the regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Comments Due: June 3, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1252 Filed 6–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–233–001]

Tennessee Gas Pipeline Company; Notice of Compliance Filing

May 26, 2004.

Take notice that on May 17, 2004, Tennessee Gas Pipeline Company, (Tennessee) tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, Substitute First Revised Sheet No. 339C, with an effective date of May 1, 2004.

Tennessee states that the tariff sheet is being filed in compliance with the Commission's order issued April 30, 2004, in the referenced proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's rules and regulations. All such protests must be filed in accordance with section 154.210 of the Commission's regulations. 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 proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. 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 e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1246 Filed 6–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–299–000

Viking Gas Transmission Company; Notice of Proposed Changes in FERC Gas Tariff

May 26, 2004.

Take notice that on May 18, 2004, Viking Gas Transmission Company (Viking) tendered for filing to become part of Viking's FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets to become effective May 1, 2004:

Fifteenth Revised Sheet No. 39
Original Sheet No. 87I

Viking is requesting that the Commission accept a non-conforming agreement with J.R. Simplot Company which contains language that is different from the form of agreement currently contained in its tariff.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. 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 e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1247 Filed 6–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER00–565–009, et al.]

Pacific Gas and Electric Company , et al.; Electric Rate and Corporate Filings

May 21, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Pacific Gas and Electric Company

[Docket No. ER00–565–009]

Take notice that on May 18, 2004, Pacific Gas and Electric Company (PG&E) tendered for filing its Phase II filing in the Scheduling Coordinator Services Tariff (SCS Tariff) proceeding. PG&E initially filed the SCS Tariff on November 12, 1999.

PG&E states that copies of this filing have been served upon the California Public Utilities Commission and all parties designated on the Official Service List compiled by the Federal Energy Regulatory Commission in FERC Docket ER00–565–000 and the ISO.

Comment Date: June 8, 2004.

2. Westar Energy, Inc.

[Docket No. ER02–2516–002]

Take notice that on May 19, 2004, Westar Energy, Inc. (Westar) amended itsMay 7, 2004, filing in Docket No. ER02–2516–001. Westar states that this amendment converts the City of Wamego's contract, inadvertently omitted from Westar's May 7, 2004, compliance filing, to an Order No. 614 compliant format and reflects the corporate name change to Westar.

Westar states that a copy of this filing was served upon the Kansas Corporation Commission and the affected customers.

Comment Date: June 9, 2004.

3. Southern California Edison Company

[Docket No. ER04–435–004]

Take notice that on May 19, 2004, Southern California Edison Company (SCE) tendered for filing revisions to its Wholesale Distribution Access Tariff (WDAT) in compliance with Commission's Order issued March 5, 2004, in Order No. 2003–A, Order on Rehearing, Standardization of Generator Interconnection Agreements and Procedures.

SCE states that copies of this filing were served upon each party designated on the official service list compiled by the Secretary in these proceedings.

Comment Date: June 9, 2004.

4. PJM Interconnection, L.L.C.

[Docket No. ER04–774–001]

Take notice that on May 19, 2004, PJM Interconnection, L.L.C. (PJM) amended its April 29, 2004, filing in Docket No. ER04–774–000. PJM states that in the April 29, 2004, filing, PJM submitted amendments to Schedule 2 of the PJM Open Access Transmission Tariff . PJM also states that it amended its April 29, 2004, filing to include CBLLC's revenue requirement in the list of revenue requirements for the PPL zone rather than for the DPL zone. PJM requests a waiver of the Commission's notice requirements to permit an effective date of April 1, 2004, for Sub 2nd Rev Seventh Revised Sheet No. 230, and an effective date of May 1, 2004, for Substitute Ninth Revised Sheet No. 230.

PJM states that copies of this filing have been served on all PJM members, including AE Supply, Mon Power, CBLLC, and MWGen, each State electric utility regulatory commission in the PJM region, and each person designated on the official service list compiled by the Secretary in this proceeding.

Comment Date: June 9, 2004.

5. PJM Interconnection, L.L.C.

[Docket No. ER04–796–002]

Take notice that on May 14, 2004, PJM Interconnection, L.L.C. (PJM) tendered for filing an executed Transition Service Agreement with Exelon Generation Company, L.L.C. for use solely in connection with a dynamic schedule to the Hannibal, Ohio facility of Ormet Primary Aluminum Corporation. PJM states that the agreement ratifies, amends, and replaces, effective May 15, 2004, the unexecuted service agreement filed by PJM in the proceeding on April 30, 2004. PJM further states that the service agreement is intended solely as a short-term transitional agreement to accommodate continuation for a few months of the unique arrangements that were in place for service to Ormet prior to the integration of Commonwealth Edison Company into PJM. PJM requests that the Commission waive certain otherwise applicable provisions of its tariff to accommodate continuation of this dynamic schedule through its short remaining term.

PJM requests that the agreement be accepted effective May 15, 2004, and

therefore requests waiver of the 60-day notice requirement. PJM states that copies of this filing were served upon ExGen and the state commissions in the PJM region.

Comment Date: June 4, 2004.

6. Bangor Hydro-Electric Company

[Docket No. ER04–853–000]

Take notice that on May 19, 2004, Bangor Hydro-Electric Company (BHE) filed proposed revisions to its FERC Open Access Transmission Tariff (OATT) to reflect minor modifications to BHE's existing ''Rate Formula'' to comply with changes made by the Commission to the FERC Annual Report Form 1 and to correct a reference in a footnote. BHE requests an effective date of June 1, 2004.

BHE states that copies of this filing were served on all interested parties.

Comment Date: June 9, 2004.

7. Entergy Services, Inc., et al.

[Docket No. ER04–854–000]

Take notice that on May 19, 2004, Entergy Services, Inc. (ESI), on behalf of Entergy Louisiana, Inc. (ELI) as purchaser, and Entergy Gulf States, Inc. (EGS) as seller, filed under section 205 of the Federal Power Act for approval an amendment to the master power purchase and sale agreement between ELI and EGS that the Commission accepted for filing in Docket No. ER03–744–000. ESI request an effective date of May 30, 2004, subject to refund.

ESI states that copies of this filing were served on the affected state utility commissions and members of the official service list.

Comment Date: June 9, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, call (202) 502–8222 or TTY, (202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1253 Filed 6–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EG04–70–000, et al.]

Exelon Boston Services, Inc., et al.; Electric Rate and Corporate Filings

May 26, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Exelon Boston Services, LLC

[Docket No. EG04–70–000]

On May 21, 2004, Exelon Boston Services, LLC, (Exelon) 300 Exelon Way, Kennett Square, PA 19348, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations. Exelon states that it will engage directly or indirectly and exclusively in the business of owning and/or operating eligible facilities in the United States and selling electric energy at wholesale. Exelon further states that it proposes to operate an approximately 573 MW gas-fired generation facility located in Everett, MA that is owned by Mystic 1, LLC. Exelon seeks a determination of its exempt wholesale generator status.

Comment Date: June 11, 2004.

2. Exelon New England Power Services, Inc.

[Docket No. EG04–71–000]

On May 21, 2004, Exelon New England Power Services, Inc., (Exelon) 300 Exelon Way, Kennett Square, PA 19348, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations. Exelon states that it will engage directly or indirectly and exclusively in the business of owning and/or operating eligible facilities in the United States and selling electric energy at wholesale. Exelon further states that it proposes to operate a 807 MW gas-fired combined-cycle generation facility located in Weymouth, MA electric that is owned by Exelon Fore River Development, LLC and a 1,614 MW gas-fired combined-cycle generation facility located in Everett, MA that is owned by Exelon Mystic Development LLC. Exelon seeks a determination of its exempt wholesale generator status.

Comment Date: June 11, 2004.

3. California Independent System Operator Corporation

[Docket No. ER03–1102–004]

Take notice that on May 21, 2004, the California Independent System Operator Corporation (ISO) submitted an errata filing concerning the compliance filing submitted on May 20, 2004, in Docket No. ER03–1102–003.

The ISO states that it has served copies of this letter, and all attachments, upon all parties on the official service list for the captioned docket. In addition, the ISO is posting this transmittal letter and all attachments on the ISO home page.

Comment Date: June 11, 2004.

4. California Independent System Operator Corporation

[Docket No. ER04–632–001]

Take notice that on May 21, 2004, the California Independent System Operator Corporation (ISO) tendered a filing in compliance with the Commission's Order Accepting Tariff Revisions Subject to Modification, which issued May 6, 2004, 107 FERC ¶ 61,114. The ISO states that the Commission accepted its proposed revisions to the ISO Tariff regarding the definition of ''PTO Service Territory'' and related matters subject to certain modifications that the ISO includes in this filing.

Comment Date: June 11, 2004.

5. Premcor Generating LLC

[Docket No. ER04–704–001]

Take notice that on May 21, 2004, Premcor Generating LLC filed a Notice of Succession adopting Williams Generating Memphis, LLC's FERC Rate Schedule No. 1 and a revised FERC Rate Schedule to reflect the name change from Williams Generating Memphis, LLC to Premcor Generating LLC.

Comment Date: June 11, 2004.

6. Jersey Central Power and Light Company

[Docket No. ER04–727–001]

Take notice that on May 21, 2004, Jersey Central Power and Light

Company, a FirstEnergy Company, amended its April 9, 2004, filing in this proceeding to include certain cost support data as requested by Commission staff.

Jersey Central Power and Light Company states that copies of this filing have been served on regulators in New Jersey, OPP and PJM.

Comment Date: July 11, 2004.

7. PJM Interconnection, L.L.C.

[Docket No. ER04–807–001]

Take notice that on May 20, 2004, PJM Interconnection, L.L.C. (PJM) tendered for filing certain sheets to the PJM Open Access Transmission Tariff (PJM Tariff) that were missing from, or incorrect in, PJM's April 30, 2004, filing in Docket No. ER04–807–000. PJM states that, consistent with the effective date requested in the April 30, 2004, filing, it requests that the submitted sheets become effective on May 1, 2004.

PJM states that copies of the filing were served on all PJM members, the utility regulatory commissions in the PJM region, and all persons on the service lists for these proceedings.

Comment Date: June 10, 2004.

8. Edgar Electric Cooperative Association d/b/a EnerStar Power Corp.

[Docket No. ER04–857–000]

Take notice that on May 21, 2004, Edgar Electric Cooperative Association, a rural electric cooperative doing business as EnerStar Power Corp. (EnerStar) filed with the Commission, pursuant to section 205 of the Federal Power Act, 16 U.S.C. 824d, and part 35 of the Commission's Regulations, a Notice of Cancellation of its Rate Schedule FERC No. 1 which became effective on May 14, 1998. EnerStar has requested that this cancellation be made effective as of May 21, 2004.

Comment Date: June 11, 2004.

9. California Independent System Operator Corporation

[Docket No. ER04–858–000]

Take notice that on May 21, 2004, the California Independent System Operator Corporation (ISO) submitted an informational filing in accordance with Article IX, section B of the Stipulation and Agreement approved by the Commission on May 28, 1999, California Independent System Operator Corp., 87 FERC ¶ 61,250 (1999) (Stipulation and Agreement). ISO states that this provision requires the ISO to provide on a confidential basis to the Commission (1) Information regarding any notice from an RMR Unit requesting a change of Condition; (2) the date the chosen Condition will begin; and (3) if the change is from Condition 2, the applicable level of Fixed Option Payment. ISO further states as required by the provision, it has provided notice of the changes of condition described in the informational filing (subject to the applicable Non-Disclosure and Confidentiality Agreement in the RMR Contract) to the designated RMR contact persons at the California Public Utilities Commission, the California Electricity Oversight Board, the applicable Responsible Utilities, and the relevant RMR Owners.

Comment Date: June 11, 2004.

10. Virginia Electric and Power Company

[Docket No. ER04–859–000]

Take notice that on May 21, 2004, Virginia Electric and Power Company doing business as Dominion Virginia Power (Dominion Virginia Power), tendered for filing a Generator Imbalance Service Schedule as Schedule 4G under its Open Access Transmission Tariff to match the differences in any given hour of the amount of energy scheduled by a generating facility and actually generated and delivered in that hour. Dominion Virginia Power respectfully requests that the Commission permit the Generator Imbalance Service Schedule to become effective one day after the filing.

Dominion Virginia Power states that copies of this filing were served upon the Virginia State Corporation Commission and Dominion Virginia Power's jurisdictional customers.

Comment Date: June 11, 2004.

11. AES Power, Inc.

[Docket No. ER04–860–000]

Take notice that, on May 21, 2004, AES Power, Inc. (AES Power) filed a Notice of Cancellation of its Rate Schedule FERC No. 1. AES Power requests that this Notice of Cancellation be effective as of May 22, 2004.

Comment Date: June 7, 2004.

12. Maine Public Service Company

[Docket No. ER04–861–000]

Take notice that on May 21, 2004, Maine Public Service Company submitted a Notice of Cancellation for its market-based rate schedule. Maine Public Service Company states that it no longer makes market-based rate sales.

Comment Date: June 11, 2004.

13. MDU Resources Group, Inc.

[Docket No. ES04–34–000]

Take notice that on May 20, 2004, MDU Resources Group, Inc. (MDU) submitted an application pursuant to section 204 of the Federal Power Act requesting that the Commission authorize the issuance of an additional 6,825,581 shares of common stock to be issued from time to time in connection with the Executive Long-Term Incentive Plan.

MDU also requests a waiver from the Commission's competitive bidding and negotiated placement requirements at 18 CFR 34.2.

Comment Date: June 17, 2004.

14. Wabash Valley Power Association, Inc.

[Docket No. ES04–35–000]

Take notice that on May 20, 2004, Wabash Valley Power Association, Inc. (Wabash Valley) submitted an application pursuant to section 204 of the Federal Power Act requesting that the Commission: (1) Authorize the issuance of long-term debt in an aggregate amount not to exceed $15 million; (2) authorize the issuance of short-term debt in an aggregate amount not to exceed $25 million under a revolving line of credit; and (3) grant waiver of the restrictions on public utility issuances of secured and unsecured debt set forth in Westar Energy, Inc., 106 FERC ¶ 61,186 (2003), with respect to securities issued pursuant to these requested authorizations.

Wabash Valley also requests a waiver from the Commission's competitive bidding and negotiated placement requirements at 18 CFR 34.2.

Comment Date: June 17, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, call (202) 502–8222 or TTY,

(202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1254 Filed 6–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER03-713-003, et al.]

Southern Power Company, et al.; Electric Rate and Corporate Filings

May 24, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Southern Power Company

[Docket No. ER03–713–003]

Take notice that on May 20, 2004, Southern Power Company (Southern Power) submitted a notice of cancellation of rates accepted for filing in the above-captioned dockets and any rate schedules or rate schedule designations assigned to such agreements. Southern Power also requests that the Commission approve the withdrawal of its application for approval of the McIntosh Power Purchase Agreements (PPAs) in the above-captioned dockets. Finally, Southern Power requests that the Commission terminate the above-captioned proceedings. The Commission invites comment on these requests and whether there are issues that were raised in the above-captioned dockets that remain unresolved despite Southern Power's request to withdraw the McIntosh PPAs.

Comment Date: June 9, 2004.

2. California Independent System Operator Corporation

[Docket No. ER03–1102–003]

Take notice that on May 20, 2004, the California Independent System Operator Corporation (ISO) submitted a filing to comply with the Commission's February 20, 2004, Order in Docket No. ER03–1102–000 concerning Amendment No. 55 to the ISO Tariff, 106 FERC ¶ 61,179 (Compliance Order). The ISO states that in drafting this compliance filing, it has taken into account the direction provided in the Commission's May 6, 2004, Order on rehearing of the Compliance Order, 107 FERC ¶ 61,118.

The ISO states that it has served copies of this letter, and all attachments, upon all parties on the official service list for the captioned docket. In addition, the ISO is posting this transmittal letter and all attachments on the ISO home page.

Comment Date: June 10, 2004.

3. Southern Company Services, Inc.

[Docket No. ER04–563–001]

Take notice that on May 19, 2004, Southern Company Services, Inc., acting as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company (collectively Southern Companies), filed with the Federal Energy Regulatory Commission a response to a letter issued by the Commission requesting additional information concerning Southern Companies' filing of a long-term firm point-to-point transmission service agreement under their Open Access Transmission Tariff (FERC Electric Tariff, Fourth Revised Volume No. 5) between Southern Companies and Calpine Energy Services, L.P. Southern Companies state that the agreement is designated Service Agreement No. 466 under Southern Companies' Tariff.

Comment Date: June 9, 2004.

4. Tor Power, LLC

[Docket No. ER04–698–002]

Take notice that on May 19, 2004, Tor Power, LLC (Tor) tendered for filing a Revision to Market-rate Authority Application. Tor filed a petition for acceptance of its initial rate schedule for market-based authority on April 1, 2004, and the Commission issued a notice for this application on April 7, 2004. On May 13, 2004, the Commission issued an order directing Tor and other entities that had pending applications for initial market-based rate authority to make certain revised filings. Tor states that it is submitting the instant filing in response to the Commission's May 13 order. Tor further states that the instant filing does not present material issues of market power and is not affiliated with entities that own or control generation or transmission.

Comment Date: June 1, 2004.

5. Access Energy Cooperative

[Docket No. ER04–856–000]

Take notice that on May 20, 2004, Access Energy Cooperative (AEC) tendered for filing with the Federal Energy Regulatory Commission pursuant to 18 CFR 35.13, its 2004 annual rate redetermination informational filing in accordance with section 1.05 of its FERC Rate Schedule No. 1. AEC's states that this filing is available for public inspection at its offices in Mt. Pleasant, Iowa.

AEC further states that copies of this filing have been served upon its transmission customer and the Iowa State Utilities Board.

Comment Date: June 10, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, call (202) 502–8222 or TTY, (202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1255 Filed 6–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP04–104–000]

Transwestern Pipeline Company; Notice of Availability of the Environmental Assessment for the Proposed San Juan 2005 Expansion Project

May 26, 2004.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) on the natural gas pipeline facilities proposed by Transwestern Pipeline Company (Transwestern) in the above-referenced docket.

The EA was prepared to satisfy the requirements of the National Environmental Policy Act. The staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major Federal action significantly affecting the quality of the human environment.

The EA assesses the potential environmental effects of the construction and operation of the proposed San Juan 2005 Expansion Project. Transwestern proposes to expand its natural gas system by the construction of approximately 72.6 miles of pipeline loop and modifying facilities at three existing compressor stations in New Mexico.

The purpose of the San Juan 2005 Expansion Project is to provide additional natural gas pipeline capacity for upstream producers and shippers of natural gas from the San Juan and Rocky Mountain basins. Transwestern states that it is proposing to construct these facilities in order to transport up to 375 million cubic feet per day (MMcf/d) of natural gas to downstream markets in the Southwestern and Midwestern United States.

The EA has been placed in the public files of the FERC. A limited number of copies of the EA are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street, NE., Room 2A, Washington, DC 20426, (202) 502–8371.

Copies of the EA have been mailed to Federal, State and local agencies, public interest groups, interested individuals, newspapers, and parties to this proceeding.

Any person wishing to comment on the EA may do so. To ensure consideration prior to a Commission decision on the proposal, it is important that we receive your comments before the date specified below. Please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- Send an original and two copies of your comments to: Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426;
- Label one copy of the comments for the attention of the Gas Branch 2, PJ 11.2.
- Reference Docket No. CP04–104–000; and
- Mail your comments so that they will be received in Washington, DC on or before June 28, 2004.

Please note that we are continuing to experience delays in mail deliveries from the U.S. Postal Service. As a result, we will include all comments that we receive within a reasonable time frame in our environmental analysis of this project. However, the Commission strongly encourages electronic filing of any comments or interventions or protests to this proceeding. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link and the link to the User's Guide. Before you can file comments you will need to create a free account which can be created by clicking on ''Sign-up.''

Comments will be considered by the Commission but will not serve to make the commentor a party to the proceeding. Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214). Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your comments considered.

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208-FERC or on the FERC Internet Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance with eLibrary, the eLibrary helpline can be reached at 1–866–208–3676, TTY (202) 502–8659 or at *FERCOnlineSupport@ferc.gov.* The eLibrary link on the FERC Internet Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *http://www.ferc.gov,* click on ''eSubscription'' and then click on ''Sign-up.''

Magalie R. Salas,

Secretary.

[FR Doc. E4–1242 Filed 6–3–04; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL ENERGY REGULATORY COMMISSION

[Docket Nos. PF04–2–000 and PF04–5–000]

BP Crown Landing, LLC and Texas Eastern Transmission, LP; Notice of Additional Scoping Meeting for the Proposed Crown Landing LNG and Logan Lateral Projects

May 26, 2004.

This notice announces an additional public scoping meeting regarding the Crown Landing LNG and Logan Lateral Projects. This meeting is scheduled at the request of the Delaware Department of Natural Resources and Environmental Control. Previous public scoping meetings were held on May 5 and 6, 2004, in Chester Township, Pennsylvania, and Swedesboro, New Jersey, respectively.

The location and time of the public scoping meeting is as follows: Wednesday, June 9, 2004, 7 p.m. (e.s.t.); Holiday Inn, 630 Naamans Road, Claymont, DE 19703; (302) 791–4603.

FERC staff is preparing an environmental impact statement (EIS) that will discuss the environmental impacts of BP Crown Landing, LLC's (Crown Landing) Crown Landing LNG Project located in Gloucester County, New Jersey and New Castle County, Delaware. The EIS will also address the associated Texas Eastern Transmission, LP's (Texas Eastern) Logan Lateral Project in Gloucester County, New Jersey and Delaware County, Pennsylvania.

On April 19, 2004, the staff of the Federal Energy Regulatory Commission (FERC or Commission) issued a Notice of Intent to Prepare an Environmental Impact Statement for the Proposed

Crown Landing LNG and Logan Lateral Projects, Request for Comments on Environmental Issues, and Notice of Public Scoping Meeting (Notice of Intent to Prepare EIS).

The Notice of Intent to Prepare EIS is attached for those who have been added to our mailing list since the first notice was issued. Those who have previously received the Notice of Intent to Prepare EIS will not get the attachment. However, the document can be viewed at the Commission's Internet Web site. *See* Availability of Additional Information at the end of this notice.

The public scoping meeting to be held on June 9, 2004, in Claymont, Delaware is designed to provide another opportunity to offer comments on the proposed projects. Interested groups and individuals are encouraged to attend these meetings and to present comments on the environmental issues they believe should be addressed in the EIS. Transcripts of the meetings will be made so that your comments will be accurately recorded. Please note that the scoping period will close on June 21, 2004.

Comments may be submitted in written form or verbally. Further details on how to submit written comments are provided in the Notice of Intent to Prepare EIS.

Availability of Additional Information

Additional information about the project is available from the Commission's Office of External Affairs at 1–866–208–FERC (3372) or on the FERC Internet Web site (*http://www.ferc.gov*). Using the ''eLibrary'' link, select ''General Search'' from the eLibrary menu, enter the selected date range and ''Docket Number'' (*i.e.*, PF04–2–000 or PF04–5–000), and follow the instructions. Searches may also be done using the phrase ''Crown Landing LNG'' or ''Logan Lateral'' in the ''Text Search'' field. For assistance with access to eLibrary, the helpline can be reached at 1–866–208–3676, TTY (202) 502–8659, or at *FERCOnlineSupport@ ferc.gov*. The eLibrary link on the FERC Internet Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

In addition, the FERC now offers a free service called eSubscription that allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. To register for this service, go to *http://www.ferc.gov/esubscribenow.htm*.

Finally, Crown Landing has established an Internet Web site for its project at *http://www.bpcrownlanding.com*. The Web site includes a description of the project, maps and photographs of the proposed site, information on LNG, and links to related documents. Texas Eastern has also established a Web site for its project at *http://www.degt-loganlateral.com*.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1244 Filed 6–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Southwestern Power Administration

Integrated System Power Rates

AGENCY: Southwestern Power Administration, DOE.

ACTION: Notice of public review and comment.

SUMMARY: The Administrator, Southwestern Power Administration (Southwestern), has prepared Current and Revised FY 2004 Power Repayment Studies which show the need for an increase in annual revenues to meet cost recovery criteria. Such increased revenues are needed primarily to cover increased investments and replacements in hydroelectric generating and high-voltage transmission facilities and increased operation and maintenance expenses. The Administrator has developed proposed Integrated System rates, which are supported by a rate design study, to recover the required revenues. Beginning January 1, 2005, and thereafter, the proposed rates would increase annual system revenues approximately 8 percent from $114,973,800 to $124,012,497.

DATES: The consultation and comment period will begin on the date of publication of this **Federal Register** notice and will end September 2, 2004.

1. Public Information Forum—June 29, 2004, 9 a.m., Tulsa, OK

2. Public Comment Forum—July 27, 2004, 9 a.m., Tulsa, OK

ADDRESSES: The forums will be held in Southwestern's offices, Room 1402, Williams Center Tower I, One West Third Street, Tulsa, Oklahoma 74103.

FOR FURTHER INFORMATION CONTACT: Mr. Forrest E. Reeves, Assistant Administrator, Office of Corporate Operations, Southwestern Power Administration, U.S. Department of Energy, One West Third Street, Tulsa, Oklahoma 74103, (918) 595–6696, *gene.reeves@swpa.gov*.

SUPPLEMENTARY INFORMATION: Established by Secretarial Order No. 1865 dated August 31, 1943, Southwestern is an agency within the U.S. Department of Energy which was created by an Act of the U.S. Congress, entitled the Department of Energy Organization Act, Pub.L. 95–91, dated August 4, 1977. Guidelines for preparation of power repayment studies are included in DOE Order No. RA 6120.2, Power Marketing Administration Financial Reporting. Procedures for Public Participation in Power and Transmission Rate Adjustments of the Power Marketing Administrations are found at title 10, part 903, subpart A of the Code of Federal Regulations (10 CFR 903).

Southwestern markets power from 24 multi-purpose reservoir projects with hydroelectric power facilities constructed and operated by the U.S. Army Corps of Engineers. These projects are located in the states of Arkansas, Missouri, Oklahoma, and Texas. Southwestern's marketing area includes these States plus Kansas and Louisiana. The costs associated with the hydropower facilities of 22 of the 24 projects are repaid via revenues received under the Integrated System rates, as are those of Southwestern's transmission facilities, which consist of 1,380 miles of high-voltage transmission lines, 24 substations, and 46 microwave and VHF radio sites. Costs associated with the Sam Rayburn and Robert D. Willis Dams, two Corps of Engineers projects that are isolated hydraulically, electrically, and financially from the Integrated System are repaid under separate rate schedules and are not addressed in this notice.

Following Department of Energy guidelines, the Administrator, Southwestern, prepared a Current Power Repayment Study using existing system rates. The Study indicates that Southwestern's legal requirement to repay the investment in power generating and transmission facilities for power and energy marketed by Southwestern will not be met without an increase in revenues. The need for increased revenues is primarily due to increased Operations and Maintenance (O&M) power-related expenses for the U.S. Army's Corps of Engineers and increased investments in the hydroelectric generating facilities. The Revised Power Repayment Study shows that additional annual revenues of $9,038,697, (an 8 percent increase),

beginning January 1, 2005, are needed to satisfy repayment criteria.

A Rate Design Study has also been completed which allocates the revenue requirement to the various system rate schedules for recovery, and provides for transmission service rates in general conformance with FERC Order No. 888. The proposed new rates would increase estimated annual revenues from $114,973,800 to $124,012,497 and would satisfy the present financial criteria for repayment of the project and transmission system investments within the required number of years. As indicated in the Integrated System Rate Design Study, this revenue would be developed primarily through increases in the charges for energy and transmission services, to include some of the ancillary services for deliveries of both Federal and non-Federal power and associated energy from the transmission system of Southwestern. There is also an increased charge for transformation services for deliveries at voltages of 69 kV (kilovolt) or less.

A second component of the Integrated System rates for power and energy, the purchased power adder, produces revenues which are segregated to cover the cost of power purchased to meet contractual obligations. The purchased power adder is established to reflect what is expected to be needed by Southwestern to meet purchased power needs on an average annual basis. It has been increased from the existing rate to reflect the projected power costs based on present market rates. The Administrator's authority to adjust the purchased power adder annually at his/her discretion, plus or minus $0.0011 per kilowatt hour (kWh), will remain the same.

Below is a general comparison of the existing and proposed system rates:

	Existing rates	Proposed rates
GENERATION RATES	**Rate Schedule P–02** (System Peaking)	**Rate Schedule P–04** (System Peaking)
Capacity		
Grid or 138–161kV	$2.72/kW/Mo + up to $0.0112/kW/Mo (ancillary services) for generation within control area: Regulatory Ancillary Services +$0.06/kW/Mo for deliveries within control area, + Reserve Ancillary Services: up to $0.0112/kW/Mo for generation in control area	$2.73/kW/Mo + up to $0.0112/kW/Mo ancillary services) for generation within control area: Regulation Ancillary Services +$0.07/kW/Mo for deliveries within control area, + Reserve Ancillary Services: up to: $0.0154/kW/Mo for generation in control area.
69 kV	Transformation Service + $0.28/kW/Mo (applied to usage, not reservation)	Transformation Service+ + $0.30/kW/Mo (applied to usage, not reservation)
Energy	$0.005/kWh of Peaking Energy + $0.005/kWh of Supplemental Peaking Energy + a Purchased Power Adder of $0.0025 of Peaking Energy (± 0.0011 annually at Administrator's discretion)	$0.0082/kWh of Peaking Energy + $0.005/kWh of Supplemental Peaking Energy + a Purchased Power Adder of $0.0028 of Peaking Energy (± 0.0011 annually at Administrator's discretion).
TRANSMISSION RATES	**Rate Schedule NFTS–02** (Transmission)	**Rate Schedule NFTS–04** (Transmission)
Capacity (Firm Reservation with energy)		
Grid or 138–161 kV	$0.73/kW/Mo $0.183/kW/Week $0.0332/kW/Day + Required Ancillary Services: $0.08/kW/Mo, or $0.021/kW/Week, or $0.0037/kW/Day + Reserve Ancillary Services: up to: $0.0112/kW/mo, or $0.0028/kW/Week, or $0.0005/kW/day, for generation in control area + Regulation & Freq Response Ancillary Service up to: $0.06/kW/Mo, or $0.015/kW/Week, or $0.0027/kW/Day, for deliveries within control area	$0.84/kW/Mo. $0.210/kW/Week. $0.0382/kW/Day. + Required Ancillary Services: $0.08/kW/Mo, or $0.021/kW/Week, or $0.0037/kW/Day. + Reserve Ancillary Services: up to: $0.0154/kW/Mo, or $0.0038/kW/week, or $0.0007/kW/day, for generation in control area + Regulation & Freq Response Ancillary Service up to: $0.07/kW/Mo, or $0.018/kW/Week, or $0.0032/kW/Day, for deliveries within control area.
69 kV and below	Transformation Service + $0.28/kW/Mo no separate charge (applied on usage, not reservation.) Weekly and daily rates not applied	Transformation Service + $0.30/kW/Mo no separate charge (applied on usage, not reservation) Weekly and daily rates not applied.
Capacity Non-firm with energy):	no separate capacity charge, 80% of firm monthly charge divided by 4 for weekly rate, divided by 22 for daily rate, and divided by 352 for hourly rate	no separate capacity charge, 80% of firm monthly charge divided by 4 for weekly rate, divided by 22 for daily rate, and divided by 352 for hourly rate.
Network Service	$0.73/kW/Mo of Network Load + Required Ancillary Services: $0.08/kW/Mo, or + Reserve Ancillary Services: up to: $0.00112/kW/Mo, for generation in control area + Regulation & Freq Response Ancillary Service up to: $0.06/kW/Mo, for deliveries within control area	$0.84/kW/Mo of Network Load + Required Ancillary Services: $0.08/kW/Mo, and/or + Reserve Ancillary Services: up to: $0.00154/kW/Mo, for generation in control area + Regulation & Freq Response Ancillary Service up to: $0.07/kW/Mo, for deliveries within control area.
	Rate Schedule EE–02 (Excess Energy)	**Rate Schedule EE–04** (Excess Energy)

	Existing rates	Proposed rates
Energy	$0.005/kWh + $0.0021/kWh (transmission) + required ancillary services $0.00023/kWh + $0.00004/kWh (ancillary service) for generation in control area + $0.00013/kWh (ancillary service) for deliveries in control area	$0.005/kWh + $0.0024/kWh (transmission) + required ancillary services $0.00023/kWh + $0.00004/kWh (ancillary service) for generation in control area + $0.0002/kWh (ancillary service) for deliveries in control area.

Opportunity is presented for Southwestern's customers and other interested parties to receive copies of the Integrated System Studies. If you desire a copy of the Integrated System Power Repayment Studies and Rate Design Study Data Package, submit your request to Mr. Forrest E. Reeves, Assistant Administrator, Office of Corporate Operations, Southwestern Power Administration, One West Third, Tulsa, OK 74103 (918) 595–6696.

A Public Information Forum is scheduled on June 29, 2004, to explain to the public the proposed rates and supporting studies. The proceeding will be transcribed. A chairman, who will be responsible for orderly procedure, will conduct the Forum. Questions concerning the rates, studies, and information presented at the Forum will be answered, to the extent possible, at the Forum. Questions not answered at the Forum will be answered in writing, except that questions involving voluminous data contained in Southwestern's records may best be answered by consultation and review of pertinent records at Southwestern's offices.

Persons interested in attending the Public Information Forum should indicate in writing (address cited above) by letter or facsimile transmission (918–595–6656) by June 22, 2004, their intent to appear at such Forum. If no one so indicates his or her intent to attend, no such Forum will be held.

A Public Comment Forum is scheduled on July 27, 2004, at which interested persons may submit written comments or make oral presentations of their views and comments related to the rate proposal. The proceeding will be transcribed. A chairman, who will be responsible for orderly procedure, will conduct the Forum. Southwestern's representatives will be present, and they and the chairman may ask questions of the speakers. Persons interested in attending the Public Comment Forum should indicate in writing by letter (address cited above) or facsimile transmission (918–595–6656) by July 20, 2004, their intent to appear at such Forum. If no one so indicates his or her intent to attend, no such Forum will be held. Persons interested in speaking at the Forum should submit a request to Mr. Forrest E. Reeves, Assistant Administrator, Southwestern, at least seven (7) calendar days prior to the Forum so that a list of speakers can be developed. The chairman may allow others to speak if time permits.

A transcript of each Forum will be made. Copies of the transcripts may be obtained, for a fee, from the transcribing service. Copies of all documents introduced will also be available from the transcribing service upon request for a fee. Ten copies of all written comments, together with a diskette or compact disk in MS Word, on the proposed Integrated System Rates are due on or before September 2, 2004. Comments should be submitted to Forrest E. Reeves, Assistant Administrator, Southwestern, at the above-mentioned address for Southwestern's offices.

Following review of the oral and written comments and the information gathered in the course of the proceedings, the Administrator will submit the finalized Integrated System Rate Proposal, Power Repayment Studies, and Rate Design Study in support of the proposed rates to the Deputy Secretary of Energy for confirmation and approval on an interim basis, and subsequently to the Federal Energy Regulatory Commission (Commission) for confirmation and approval on a final basis. The Commission will allow the public an opportunity to provide written comments on the proposed rate increase before making a final decision.

Issued in Tulsa, Oklahoma, this 21st day of May 2004.

Michael A. Deihl,

Administrator.

[FR Doc. 04–12714 Filed 6–3–04; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6651–9]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 564–7167. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 2, 2004 (69 FR 17403).

The following EPA Comments should have appeared in the May 28, 2004 **Federal Register**.

Draft EISs

ERP No. D–AFS–J65410–WY Rating EC2, Upper Green River Area Rangeland Project, Propose Site Specific Grazing Management Practices.

Summary: EPA expressed concerns relating to impacts from livestock grazing to streams and riparian zones; water quality impacts from sediment, bacteria, temperature modification; conflict between livestock, recreation and wildlife uses; impacts to endangered, threatened and sensitive fish and wildlife and their habitats; and degraded range conditions. EPA recommended modification of the Proposed Action by reducing or eliminating grazing impacts near important aquatic resources, to work with permittees and other stakeholders, and to develop an adaptive management monitoring plan.

ERP No. D–AFS–L65441–OR Rating EC2, Easy Fire Recovery Project and Proposed Nonsignificant Forest Plan Amendments, Timber Salvage, Future Fuel Reduction, Road Reconstruction and Maintenance, Road Closure, Tree Planting and Two Non-significant Forest Plan Amendments, Implementation, Malheur National Forest, Prairie City Ranger District, Grant County.

Summary: EPA expressed environmental concerns about potential impacts of salvage logging on surface water quality and surface water temperature.

ERP No. D–AFS–L65449–AK Rating EC2, Couverden Timber Sales, Harvesting Timber, NPDES, Coast Guard Bridge Permit, U.S. Army COE Section 10 and 404 Permits, Tongass National Forest, Juneau Ranger District, Chilkat Peninsula, AK.

Summary: EPA expressed concerns about the effect of new forest roads on water quality and requested that the Forest Service consider the closure of

more existing and new roads following harvest. EPA also requested that the Forest Service consider selecting Alternative 5, which avoids clear cutting and does not propose new forest roads.

ERP No. D–AFS–L65452–ID Rating EC2, South Fork Wildfire Salvage Project, Harvesting Fire-Killed and Imminently Dead Trees, Cascade Ranger District, Boise National Forest, Valley County, ID.

Summary: EPA expressed environmental concerns over potential salvage impacts to water quality, and requested that the EIS consider measures proposed in alternatives eliminated from consideration to further reduce impacts. EPA also requested that the EIS document potential project effects to Native Americans.

ERP No. D–NPS–F08011–WI Rating LO, Arrowhead-Weston Transmission Line Right-of-Way Crossing of the St. Croix National Scenic Riverway, U.S. Army COE Section 10 and 404 Permits, Washburn County, WI.

Summary: EPA has no objection to the proposed action.

ERP No. D–NPS–G65017–TX Rating LO, Rio Grande Wild and Scenic River General Management Plan, Implementation, Big Bend National Park, Brewster and Terrell Counties, TX.

Summary: EPA has no objection to the selection and implementation of the preferred alternative as described in the DEIS.

ERP No. D–UAF–K11113–00 Rating EC2, Air Force Mission at Johnston Atoll Airfield (Installation) Termination, Implementation, Johnston Atoll is an Unincorporated Territory of the United States.

Summary: EPA expressed concern relating to long-term ecological and health impacts from potential contaminant releases in the environment after a projected failure of the atoll's seawell by 2050. EPA also expressed concern regarding the integrity of waste management units after termination of the Air Force mission.

Final EISs

ERP No. F–AFS–J35006–UT Fox and Crescent Reservoirs Maintenance Project, Dam Structures Operation and Maintenance, Special Use Permit Issuance, High Uintas Wilderness, Ashley National Forest, Uinta Basin, Duchesne County, UT.

Summary: EPA continues to express concerns related to adverse impacts to wilderness values from reservoir operations and maintenance in a designated Wilderness Area.

Dated: May 28, 2004.

Ken Mittelholtz,

Environmental Protection Specialist, Office of Federal Activities.

[FR Doc. 04–12617 Filed 6–3–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6652–2]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under Section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 564–7167.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 2, 2004 (69 FR 17403).

Draft EISs

ERP No. D–AFS–J65403–00 Rating EC2, Southern Rockies Canada Lynx Amendment, Incorporating Management Direction for Canada Lynx Habitat by Amending Land and Resource Management Plans for Arapaho-Roosevelt, Pike-San Isabel, Grand Mesa-Uncompahgre-Gunnison, San Juan, Rio Grande and Medicine Bow-Routt National Forests, Implementation, CO and WY.

Summary: EPA expressed environmental concerns with potential adverse impacts from the Preferred Alternative's proposal to reduce Canada Lynx protections established by the U.S. Fish and Wildlife Service. EPA recommended that the Final EIS examine direct and cumulative impacts to water quality and from recreation.

ERP No. D–AFS–J65411–MT Rating EC2, Snow Talon Fire Salvage Project, Proposes to Salvage Harvest Trees Burned in the Fire, Helena National Forest, Lincoln Ranger District, Lewis and Clark County, MT.

Summary: EPA expressed environmental concerns with potential adverse impacts to soil and water quality from proposed salvage harvest on burned soils via summer tractor logging, as well as proposed salvage harvests in roadless areas. EPA's concerns also include potential effects on roadless characteristics, and the lack of air quality analysis for proposed burning of slash. This information and analysis should be included in the final EIS to fully assess and mitigate potential impacts of the management actions.

ERP No. D–AFS–J65412–MT Rating EC2, Grasshopper Fuels Management Project, Modify Vegetation Conditions, Reduce Fuel Loads and Break up Fuel Continuity, Beaverhead-Deerlodge National Forest, Dillon Ranger District, Beaverhead County, MT.

Summary: EPA supports the reduction of fire risks, but expressed environmental concerns with potential impacts to water quality and the need to avoid further degradation of 303(d) listed Grasshopper Creek and demonstrate consistency with TMDL development for Grasshopper Creek.

ERP No. D–AFS–L65454–OR Rating EC2, Diamond Lake Restoration Project, Improve Water Quality and the Recreational Fishery, Umpqua National Forest, Diamond Lake Ranger District, Umpqua River Basin, Douglas County, OR.

Summary: EPA expressed concerns with the lack of specificity of the adaptive management strategy that would be used following rotenone treatment of the lake. EPA recommended that additional information be included in the final EIS related to monitoring, fish stocking, tui chub contingency planning, preventing tui chub reintroduction, nutrient loading downstream of Diamond Lake and the dewatering of Lake Creek.

ERP No. D–AFS–L65456–AK Rating EC2, Resurrection Creek Stream and Riparian Restoration Project, Proposes to Accelerate the Recovery of Riparian Areas, Fish and Wildlife Habitat, Chugach National Forest, Seward Ranger District, Kenai Peninsula Borough, AK.

Summary: EPA expressed environmental concerns with the potential release of mercury from restoration activities to the creek and the ultimate placement and disposal of the tailings. EPA recommended that the final EIS detail where the tailings will be placed and provide additional information on the mitigation measures related to identifying and disposal of mercury found during project implementation.

ERP No. DS–AFS–L65378–ID Rating LO, Clean Slate Ecosystem Management Project, Aquatic and Terrestrial Restoration, Updated Information, Alternatives for the Identifies Unroaded Areas, Nez Perce National Forest, Salmon River Ranger District, Idaho County, ID.

Summary: EPA has no objections to the action as proposed.

Final EISs

ERP No. F–AFS–B65010—VT Greendale Project, Establishment of the Desired Condition stated in the Green Mountain National Forest Land and Resource Management Plan, Manchester Ranger District, Town of Western, Windor County, VT.

Summary: EPA has no objections to the project.

ERP No. F–AFS–E65065–KY Daniel Boone National Forest Land and Resource Management Plan Revision, Implementation, Winchester, several counties, KY.

Summary: EPA expressed environmental concerns due to impacts to water quality and provided additional comments to strengthen forest wide standards and monitoring commitments to protect water quality.

ERP No. F–AFS–J65395–WY Lost Cabin Mine Project, Improvement of Historic Mining Road (Way 4170H) to Allow Motorized Access to the Lost Mine for Mineral Exploration, Plan-of -Operations, Medicine-Bow Routt National Forests and Thunder Basin National Grassland, Carbon County, WY.

Summary: No formal comment letter was sent to the preparing agency.

ERP No. F–FAA–B51020–CT Groton-New London Airport, Construction of Runway 5–23 Safety Area, Permits and Approvals, Town of Groton, New London County, CT.

Summary: EPA has no objections to the proposed project.

ERP No. F–FHW–C40160–NY Cumberland Head Connector Road Construction, County Road 57 between U.S. 9 and the Peninsula (known as the Parkway), Funding, Town of Plattsburg, Clinton County, NY.

Summary: EPA continues to express concerns regarding project wetland impacts.

ERP No. F–FHW–F40404–MN Trunk Highway (TH) 53 Project, Transportation Improvements, from 1.2 km (3/4 mile) South of St. Louis County Road 307 to the South City Limits of Cook, NPDES Permit, COE Section 10 and 404 Permits, St. Louis County, MN.

Summary: EPA continues to express concern related to wetland mitigation. EPA requests additional mitigation information be included in the Record of Decision.

ERP No. F–NPS–B61024–MA Boston Harbor Islands National Recreation Area, Implementation, General Management Plan, Boston, MA.

Summary: EPA has no objections to the project.

ERP No. FA–FHW–B40037–RI Jamestown Bridge Replacement, Funding, North Kingstown and Jamestown, Washington and Newport Counties, RI.

Summary: EPA has no objection to the proposed project. However, EPA requests clarification on issues related to fisheries and air emissions.

Dated: June 1, 2004.

Ken Mittelholtz,

Environmental Protection Specialist, Office of Federal Activities.

[FR Doc. 04–12704 Filed 6–3–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6651–8]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information, (202) 564–7167 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements

Filed May 17, 2004 Through May 21, 2004

Pursuant to 40 CFR 1506.9.

The following Federal Register Report should have appeared in the May 28, 2004 **Federal Register**. The 45-day comment period and the 30-day wait period are still calculated from May 28, 2004.

EIS No. 040233, Revised Final EIS, BLM, NM, Sierra and Otero Counties Resource Management Plan Amendment and Federal Fluid Minerals Leasing and Development, Additional Information to Improve the Public Understanding of the Proposed Plan, Implementation, Sierra and Otero Counties, NM, Wait Period Ends: June 23, 2004, Contact: Tom Phillips (505) 515–4377. This document is available on the Internet at: *http://www.nm.blm.gov.*

EIS No. 040234, Final EIS, AFS, WA, 49 Degrees North Mountain Resort Revised Master Development Plan, Implementation, Colville National Forest, Newport Ranger District, Stevens County, WA, Wait Period Ends: June 28, 2004, Contact: Nancy Glines (509) 447–7300. This document is available on the Internet at: *http://www.fs.fed.us/r6/colville/forest/projects.*

EIS No. 040235, Final EIS, AFS, MT, Basin Creek and Blacktail Hazardous Watershed Fuels Reduction Project, Implementation, Highland Mountains, Butte Ranger District, Beaverhead-Deerlodge National Forest, Butte-Silver Bow County, MT, Wait Period Ends: June 28, 2004, Contact: Karen Gallogly (406) 683–3948.

EIS No. 040236, Draft EIS, NPS, VA, Petersburg National Battlefield General Management Plan, Implementation, Petersburg, VA, Comment Period Ends: July 30, 2004, Contact: Bob Kirby (804) 732–3571. This document is available on the Internet at: *http//www.nps.gov/pete.*

EIS No. 040237, Draft EIS, BIA, NV, Weber Dam Repair and Modification Project, Propose to Repair and Modify Dam, Walker River Paiute Tribe, Right-of-Way Grant and U.S. Army COE Section 404 Permit, Walker River Valley, Lyon and Mineral Counties, NV, Comment Period Ends: July 26, 2004, Contact: Amy L. Heuslein (602) 379–6750.

EIS No. 040238, Draft EIS, FHW, AR, I–69 Section of Independent Utility 13 EL Dorado to McGehee, Construction of Four-Lane Divided Access Facility, U.S. Coast Guard Bridge Permit, NPDES Permit and U.S. Army COE Section 404 Permit, Quachita River, Quachita, Union, Calhoun, Bradley Drew and Desha Counties, AR, Comment Period Ends: July 19, 2004, Contact: Randal Looney (501) 324–6430.

EIS No. 040239, Final EIS, BIA, UT, Tekoi Balefill Project on the Skull Valley Band of Goshute Indians Reservation, Approval of Long-Term Lease of Indian Land for a Commercial Solid Waste Disposal Facility, Salt Lake City, Tooele County, UT, Wait Period Ends: June 28, 2004, Contact: Amy L. Heuslein (602) 379–6750.

EIS No. 040240, DRAFT EIS, HUD, NY, Ridge Hill Village Project, Construction, Comprehensive Development Plan, (CDP), Planned Mixed-Use Development District (PMD), U.S. Army COE Section 404, City of Yonkers, Westchester County, NY, Comment Period Ends: July 12, 2004, Contact: Lee J. Ellman (914) 377–6558.

EIS No. 040241, Final EIS, USA, HI, Transformation of the 2nd Brigade, 25th Infantry Division (Light) to a Stryker Brigade Combat Team in Hawai'i, Implementation, Honolulu and Hawai'i Counties, HI, Wait Period Ends: June 28, 2004, Contact: Cindy Barger (808) 438–4812.

EIS No. 040242, Draft Supplement, FHW, NY, NY–9A Reconstruction Project, West Thames Street to Chambers Street in Lower Manhattan the Result of September 11, 2001 Attack, Lower Manhattan Redevelopment, New York County, NY, Comment Period Ends: July 28, 2004, Contact: Robert Arnold (518)

431–4127. This document is available on the Internet at: *http://www.route9a.info.*

EIS No. 040243, Draft EIS, NOA, Reef Fish Fishery Management Plan (FMP) Amendment 23, To Set Vermilion Snapper Sustainable Fisheries Act Targets and Thresholds and to Establish a Plan to End Overfishing and Rebuild the Stock, Gulf of Mexico, Comment Period Ends: July 14, 2004, Contact: Peter Hood (727) 570–5305. This document is available on the Internet at: *http://caldera.sero.nmfs.gov.*

EIS No. 040244, Final EIS, IBR, WA, Banks Lake Drawdown Project, Proposal to Lower the Water Surface Elevation from 1565 feet to 1560 feet in August of Each Year, Columbia River, Douglas and Grant Counties, WA, Wait Period Ends: June 28, 2004, Contact: Jim Blanchard (509) 754–0226.

EIS No. 040245, Final EIS, AFS, UT, Bear Hodges II Timber Sale Management Plan, Selective Timber Harvest of Spruce Stands With or Without Road Construction, Implementation, Wasatch National Forest (WCNF), Logan Ranger District, Cache and Rich Counties, UT, Wait Period Ends: June 28, 2004, Contact: Tom Scott (801) 625–5404. This document is available on the Internet at: *http://www.fs.fed.us/r4/ucnf/projects.*

EIS No. 040246, Final EIS, GSA, DC, Southeast Federal Center Development, Land Transfer for Mixed-Use Development of Residences, Offices, Shops, a Waterfront Park and Cultural Amenities, Implementation, DC, Wait Period Ends: June 28, 2004, Contact: Arthur Turowski (202) 708–5891.

EIS No. 040247, Final EIS, SFW, CA, Multiple Habitat Conservation Program for Threatened and Endangered Species Due to the Urban Growth within the Planning Area, Adoption and Incidental Take Permits Issuance, San Diego County, CA, Wait Period Ends: June 28, 2004, Contact: Lee Ann Carranza (760) 431–9440.

EIS No. 040248, Final EIS, FRC, CT, Housatonic River Hydroelectric Project, Application to Relicense Existing Licenses for Housatonic Project No. 2576–022 and the Falls Village Project No. 2597–019, Housatonic River Basin, Fairfield, New Haven and Litchfield Counties, CT, Wait Period Ends: June 28, 2004, Contact: Jack Duckworth (202) 502–6392.

EIS No. 040249, Final EIS, AFS, ID, Mission Brush Project, Proposes Vegetation, Wildlife Habitat, Recreation and Aquatic Improvement Treatments, Idaho Panhandle National Forests, Bonners Ferry Ranger District, Bounty County, ID, Wait Period Ends: June 28, 2004, Contact: Dough Nishek (208) 267–5561.

Amended Notices

EIS No. 040167, Draft Supplement, COE, CA, U.S. Army National Training Center, Proposed Addition of Maneuver Training Land at Fort Irwin, Implementation, San Bernardino County, CA, Comment Period Ends: June 16, 2004, Contact: Ray Marler (760) 380–3035. Revision of FR Notice Published on 4/16/2004: CEQ Comment Period Ending on 06/1/2004 has been Extended to 6/16/2004.

EIS No. 040213, Draft EIS, FHW, CA, South Orange County Transportation Infrastructure Improvement Project, To Locate, Construct and Operate Transportation Improvements, Orange and San Diego Counties, CA, Comment Period Ends: August 6, 2004, Contact: Maiser Khaled (949) 754–3481. Revision of FR Notice Published on 5/07/2004: CEQ Comment Period Ending 7/7/2004 has been Extended to 8/6/2004.

Dated: May 28, 2004.

Ken Mittelholtz,

Environmental Protection Specialist, Office of Federal Activities.

[FR Doc. 04–12618 Filed 6–3–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6652–1]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7167 or *http://www.epa.gov/compliance/nepa/.* Weekly receipt of Environmental Impact Statements Filed May 24, 2004 Through May 28, 2004 Pursuant to 40 CFR 1506.9.

EIS No. 040250, Final EIS, AFS, NE, Pine Ridge Geographic Area Rangeland Allotment Management Planning, To Permit Livestock Grazing on 34 Allotments, Nebraska National Forest, Pine Ridge Ranger District, Dawes and Sioux Counties, NE. Wait Period Ends: July 6, 2004, Contact: Jeffery S. Abegglen (308) 432–4475.

EIS No. 040251, Final Supplement, FHW, MI, US–31 Freeway Connection to I–94, Napier Avenue to I–94 Transportation Improvements, Berrien County, MI, Wait Period Ends: July 6, 2004, Contact: James Kirschensteiner (517) 702–1835.

EIS No. 040252, Final Supplement, AFS, NM, Agua/Caballos Timber Sale, Timber Harvest and Existing Vegetation Management, Implementation, Carson National Forest, EL Rito Ranger District, Taos County, NM, Wait Period Ends: July 6, 2004, Contact: Kurt Winchester (505) 758–6310. This document is available on the Internet at: *http://www.fs.fed.us/r3/carson/htm1_main/list_planning.htm1.*

EIS No. 040253, Draft EIS, FHW, ID, Fernan Lake Safety Improvement Project, Proposal to Reconstruct or Resurface 17.2 km (10.7 mi) Idaho Forest Highway 80 (ID PFH 80) commonly known as Fernan Lake Road, Right-of-Way Permit, Idaho Panhandle National Forests, Coeur d' Alene River Ranger District, Kootenai County, ID, Comment Period Ends: July 31, 2004, Contact: Sajiad Aftab (360) 619–7895. This document is available on the Internet at: *http://www.wfl.fhwa.dot.gov/projects/fernan/.*

EIS No. 040254, Final EIS, FRC, TX, Freeport Liquefied Natural Gas (LNG) Project, To Deliver Imported Liquefied Natural Gas to Shippers, Authorization of Site, Construction and Operation, Stratton Ridge Meter Station 2007, City of Freeport, Brazoria County, TX, Wait Period Ends: July 6, 2004, Contact: Thomas Russo (866) 208–3372.

EIS No. 040255, Draft Supplement, FHW, WA, Southeast Issaquah Bypass, Updated Information, Issaquah-Hobart Road in the South with I–90 at the Sunset Interchange, Right-of-Way Permit, NPDES Permit and U.S. Army COE Section 404 Permit, King County, WA, Comment Period Ends: July 30, 2004, Contact: Peter U. Eun (360) 753–9551.

EIS No. 040256, Final EIS, AFS, OR, Biscuit Fire Recovery Project, Various Management Activities Alternatives, Implementation, The Rogue River and Siskiyou National Forests, Josephine and Curry Counties, OR, Wait Period Ends: July 6, 2004, Contact: Tom Link (541) 471–6500. This document is available on the Internet at: *http//www.biscuitfire.com.*

EIS No. 040257, Draft EIS, FTA, NY, NJ, Permanent World Trade Center (WTC) PATH Terminal Project, Reconstruction of a Permanent Terminal at the WTC Site in Lower Manhattan, Port Authority Trans-Hudson (PATH), Several Permits Required for Approval, The Port

Authority of New York and New Jersey, NY and NJ, Comment Period Ends: July 21, 2004, Contact: Bernard Cohen (212) 668–1770. The document is available on the Internet at: *http://www.panynj.gov/pathrestoration*.

EIS No. 040258, Final EIS, UAF, Air Force Mission at Johnston Atoll Airfield (Installation) Termination, Implementation, Johnston Atoll is an Unincorporated Territory of the United States, Wait Period Ends: July 6, 2004, Contact: Patricia Vokoun (703) 604–5263.

EIS No. 040259, Final EIS, NOA, AK, Programmatic EIS—Alaska Groundfish Fisheries, New Information concerning the Ecosystem and a Preferred Alternative, Fishery Management Plans for the Groundfish Fishery of the Gulf of Alaska and the Groundfish of the Bering Sea and Aleutian Islands Area, North Pacific Fishery Management Council, AK, Wait Period Ends: July 6, 2004, Contact: James W. Balsiger (907) 586–7221. This document is available on the Internet at: *http://www.fakr.noaa.gov*.

EIS No. 0240260, Final EIS, BLM, WY, Desolation Flats Natural Gas Field Development Project, Drilling Additional Development Wells, Carbon and Sweetwater Counties, WY, Wait Period Ends: July 6, 2004, Contact: David Simons (307) 367–5309. This document is available on the Internet at: *http://www.wy.blm.gov/nepadocs.htm*.

Amended Notices

EIS No. 040027, Draft EIS, IBR, NE, CO, WY, Programmatic EIS—Platte River Recovery Implementation Program, Assessing Alternatives, Cooperative, Endangered Species Recovery Program, The Four Target Species are Whooping Crane, Interior Least Tern, Piping Plover and Pallid Sturgeon, NE, WY and CO, Comment Period Ends: August 20, 2004, Contact: Curt Brown (303) 445–2096. Revision of FR Notice Published on 1/30/2004: CEQ Comment Period Ending on 06/2/2004 has been Extended to 8/20/2004.

EIS No. 040222, Draft EIS, DOE, CA, Imperial-Mexicali 230-kV Transmission Lines, Construct a Double-Circuit 230-kV Transmission Line, Presidential Permit and Right-of-Way Grants, Imperial Valley Substation to Calexico at the U.S.-Mexico Border, Imperial County, CA and U.S.-Mexico Border, Comment Period Ends: July 30, 2004, Contact: Ellen Russell (202) 586–7624. Revision of FR Notice Published on 5/14/2004: CEQ Comment Period Ending 6/30/2004 has been Extended to 7/30/2004.

EIS No. 040233, Revised Final EIS, BLM, NM, Sierra and Otero Counties Resource Management Plan Amendment and Federal Fluid Minerals Leasing and Development, Additional Information to Improve the Public Understanding of the Proposed Plan, Implementation, Sierra and Otero Counties, NM, Wait Period Ends: June 23, 2004, Contact Tom Phillips (505) 525–4377. Revision of FR Notice Published on 5/21/2004: Correction to Contact Person Telephone Number.

Dated: June 1, 2004.

Ken Mittelholtz,

Environmental Protection Specialist, Office of Federal Activities.

[FR Doc. 04–12705 Filed 6–3–04; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

Sunshine Act Meeting

TIME AND DATE: 10 a.m.—June 9, 2004.

PLACE: 800 North Capitol Street, NW., First Floor Hearing Room, Washington, DC.

STATUS: Closed.

MATTERS TO BE CONSIDERED: 1. Licensing, Compliance, Enforcement Process and SHJ International Express, LLC and Gary Yenkok Tan.

CONTACT PERSON FOR MORE INFORMATION: Bryant L. VanBrakle, Secretary, (202) 523–5725.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 04–12817 Filed 6–2–04; 1:56 pm]

BILLING CODE 6730–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel: Occupational Health and Safety Research, Program Announcement Number 04038

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting:

Name: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Occupational Health and Safety Research, Program Announcement Number 04038.

Times and Dates: 2 p.m.-2:15 p.m., June 23, 2004 (Open), 2:15 p.m.-3:30 p.m., June 23, 2004 (Closed).

Place: Teleconference Phone Number 1.888.283.3870 Pass Code 11026.

Status: Portions of the meeting will be closed to the public in accordance with provisions set forth in section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters to be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to Program Announcement Number 04038.

For Further Information Contact: Bernadine B. Kuchinski, Ph.D., Occupational Health Consultant, National Institute for Occupational Safety and Health, CDC, 4676 Columbia Parkway MS C7, Cincinnati, OH 45226, Telephone 513.533.8511.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: May 27, 2004.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–12676 Filed 6–3–04; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following committee meeting.

Name: National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect (NTFFASFAE).

Times and Dates: 9 a.m.—4:30 p.m., June 16, 2004. 9 a.m.—12 noon, June 17, 2004.

Place: Doubletree Hotel Atlanta/Buckhead, 3342 Peachtree Road, NE., Atlanta, Georgia 30326, telephone 404/231–1234, fax 404/231–3112.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 65 people.

Purpose: The Secretary is authorized by the Public Health Service Act, Section 399G, (42 U.S.C. Section 280f, as added by Public Law 105–392) to establish a National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect to:

(1) Foster coordination among all governmental agencies, academic bodies and community groups that conduct or support Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effect (FAE) research, programs and surveillance; and

(2) To otherwise meet the general needs of populations actually or potentially impacted by FAS and FAE.

Matters to be Discussed: Agenda items include: a review of the September 2002 Task Force Recommendations and the activities undertaken by Federal and non-governmental agencies and organizations in response to the recommendations; the identification of priority areas for the current Task Force; and the reconvening of the Research working group and the Services and Public Awareness working group. Additional agenda items include: updates from Task Force members on current initiatives; an update on activities from the Interagency Coordinating Committee on Fetal Alcohol Syndrome, the CDC and other Federal agencies; reports from Task Force liaison organizations; future topics, and scheduling the next meeting.

Agenda items are subject to change as priorities dictate.

Due to programmatic issues that had to be resolved, the **Federal Register** notice is being published less than fifteen days before the date of the meeting.

For Further Information Contact: R. Louise Floyd, DSN, RN, Designated Federal Official, National Center on Birth Defects and Developmental Disabilities, CDC, 1600 Clifton Road, NE, (E–86), Atlanta, Georgia 30333, telephone 404/498–3923, fax 404/498–3550.

The Director, Management Analysis and Services Office, has been delegated the authority to sign Federal Register notices pertaining to announcements of meetings and other committee management activities for both the CDC and ATSDR.

Dated: May 28, 2004.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–12675 Filed 6–3–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Committee on Immunization Practices

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following committee meeting.

Name: Advisory Committee on Immunization Practices (ACIP).

Times and Dates: 9 am—5 pm, June 23, 2004. 8 am—5 pm, June 24, 2004.

Place: Atlanta Marriott Century Center, 2000 Century Boulevard, NE., Atlanta, Georgia 30345–3377.

Status: Open to the public, limited only by the space available.

Purpose: The Committee is charged with advising the Director, CDC, on the appropriate uses of immunizing agents. In addition, under 42 U.S.C. § 1396s, the Committee is mandated to establish and periodically review and, as appropriate, revise the list of vaccines for administration to vaccine-eligible children through the Vaccines for Children (VFC) program, along with schedules regarding the appropriate periodicity, dosage, and contraindications applicable to the vaccines.

Matters to be Discussed: The Agenda will include discussions on influenza; IOM report on autism and vaccines; an update on Hepatitis A vaccine; recommended childhood and adolescent immunization schedules; PCV7 shortage; discussion on meningococcal conjugate vaccine; smallpox pregnancy registry outcomes; pertussis; working group and departmental updates.

Agenda items are subject to change as priorities dictate.

For Further Information Contact: Demetria Gardner, Epidemiology and Surveillance Division, National Immunization Program, CDC, 1600 Clifton Road, NE, (E–61), Atlanta, Georgia 30333, telephone 404/639–8096, fax 404/639–8616.

The Director, Management Analysis and Services Office has been delegated the authority to sign Federal Register notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: May 27, 2004.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–12677 Filed 6–3–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0360]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Information Program on Clinical Trials for Serious and Life-Threatening Diseases: Maintaining a Databank

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Information Program on Clinical Trials for Serious and Life-Threatening Diseases: Maintaining a Databank'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of February 19, 2004 (69 FR 7753), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. 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. OMB has now approved the information collection and has assigned OMB control number 0910–0459. The approval expires on May 31, 2007. A copy of the supporting statement for this information collection is available on the Internet at *http://www.fda.gov/ohrms/dockets*.

Dated: March 27, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–12684 Filed 6–3–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0244]

Agency Information Collection Activities; Proposed Collection; Comment Request; Current Good Manufacturing Practice Regulations for Type A Medicated Articles

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and allow 60 days for public comment in response to the notice. This notice solicits comments on the recordkeeping requirements for manufacturers of type A medicated articles.

DATES: Submit written or electronic comments on the collection of information by August 3, 2004.

ADDRESSES: Submit electronic comments on the collection of information to: *http://www.fda.gov/dockets/ecomments*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1472.

SUPPLEMENTARY INFORMATION: Under the PRA, 44 U.S.C. 3501–3520, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Current Good Manufacturing Practice Regulations for Type A Medicated Articles—21 CFR Part 226 (OMB Control Number 0910–0154)—Extension

Under section 501 of the Federal Food, Drug, and Cosmetic Act (the act), FDA has the statutory authority to issue current good manufacturing practice (cGMP) regulations for drugs, including type A medicated articles. A type A medicated article is a feed product containing a concentrated drug diluted with a feed carrier substance. A type A medicated article is intended solely for use in the manufacture of another type A medicated article or a type B or type C medicated feed. Medicated feeds are administered to animals for the prevention, cure, mitigation, or treatment of disease or for growth promotion and feed efficiency.

Statutory requirements for cGMPs for type A medicated articles have been codified in part 226 (21 CFR part 226). Type A medicated articles which are not manufactured in accordance with these regulations are considered adulterated under section 501(a)(2)(B) of the act (21 U.S.C. 351(a)(2)(B). Under part 226, a manufacturer is required to establish, maintain, and retain records for type A medicated articles, including records to document procedures required under the manufacturing process to assure that proper quality control is maintained. Such records would, for example, contain information concerning receipt and inventory of drug components, batch production, laboratory assay results (i.e., batch and stability testing) and product distribution. This information is needed so that FDA can monitor drug usage and possible misformulation of type A medicated articles. The information could also prove useful to FDA in investigating product defects when a drug is recalled. In addition, FDA will use the cGMP criteria in part 226 to determine whether or not the systems used by manufacturers of type A medicated articles are adequate to assure that their medicated articles meet the requirements of the Act as to safety and also meet the article's claimed identity, strength, quality, and purity, as required by section 501(a)(2)(B) of the act.

The respondents for type A medicated articles are pharmaceutical firms that manufacture both human and veterinary drugs, those firms that produce only veterinary drugs, and commercial feed mills.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency of Recordkeeping	Total Annual Records	Hours per Record-keeper	Total Hours
226.42	115	260	29,000	0.75	22,425
226.58	115	260	29,000	1.75	52,325
226.80	115	260	29,000	0.75	22,425
226.102	115	260	24,000	1.75	52,325
226.110	115	260	29,000	0.25	7,475
226.115	115	10	1,150	0.5	575
Total					157,550

[1] There are no capital costs or operating and maintenance costs associated with this collection.

The estimate of the time required for record preparation and maintenance is based on agency communications with industry. Other information needed to calculate the total burden hours (i.e., manufacturing sites, number of type A medicated articles being manufactured, etc.) are derived from agency records and experience.

Dated: May 27, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–12685 Filed 6–3–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0481]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Food Additive Petitions

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) 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 (the PRA).

DATES: Fax written comments on the collection of information by July 6, 2004.

ADDRESSES: OMB is still experiencing significant delays in the regular mail, including first class and express mail, and messenger deliveries are not being accepted. To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: Fumie Yokota, Desk Officer for FDA, FAX: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1472.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Food Additive Petitions—21 CFR Part 571

Section 409(a) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 348 (a)), provides that a food additive shall be deemed to be unsafe unless its use is permitted by a regulation which prescribes the condition(s) under which it may safely be used, or unless it is exempted by regulation for investigational use. Section 409(b) of the act specifies the information that must be submitted by a petition in order to establish the safety of a food additive and to secure the issuance of a regulation permitting its use.

To implement the provision of section 409 of the act, procedural regulations have been issued under part 571 (21 CFR part 571). These procedural regulations are designed to specify more thoroughly the information that must be submitted to meet the requirement set down in broader terms by the law. The regulations add no substantive requirements to those indicated in the law, but attempt to explain the requirements and provide a standard format for submission to speed the processing of the petition. Labeling requirements for food additives intended for animal consumption are also set forth in various regulations contained in 21 CFR parts 572, 573, and 580. The labeling regulations are considered by FDA to be cross referenced to § 571.1, which is the subject of this same OMB clearance for food additive petitions.

In the **Federal Register** of November 12, 2003 (68 FR 64110), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	Number of Respondents	Annual Frequency	Per Response	Total Annual Responses	Hours per Response
571.1(c) moderate category	1	1	1	1,800	1,800
571.1(c) complex category	1	1	1	6,000	6,000
571.6	2	2	4	1,300	5,200
Total	4	4	6	9,100	13,000

[1] There are no capital costs or operating and maintenence costs associated with this collection of information.

Dated: May 27, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–12686 Filed 6–3–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection: Comment Request; Graduate Student Training Programs Application Correction Notice

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) previously published a notice soliciting pubic comment on the proposed data collection project entitled, ''Graduate Student Training Program Application'' in the **Federal Register** on May 5, 2004 (69 FR 25132–25133). In the notice we errantly identified the data collection project as an extension. However, the data collection project is a revision, not an extension. We apologize for any confusion this error may have caused you.

Dated: May 28, 2004.

Michael M. Gottesman,

Deputy Director for Intramural Research, National Institutes of Health.

[FR Doc. 04–12665 Filed 6–3–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose

confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel Grant Application Review.
Date: July 28, 2004.
Time: 1:30 p.m. to 3:30 p.m.
Agenda: To review and evaluate grant applications.
Place: NIEHS/National Institutes of Health, Building 4401, East Campus, 79 T.W. Alexander Drive, Research Triangle Park, NC 27709, (Telephone Conference Call).
Contact Person: Linda K. Bass, PhD, Scientific Review Administrator, Scientific Review Branch, Office of Program Operations Division of Extramural Research and Training, Nat. Institute of Environmental Health Sciences, P.O. Box 12233, MD EC–30, Research Triangle Park, NC 27709, (919) 541–1307.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: May 25, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–12664 Filed 6–3–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Initial Review Group Neurological Sciences and Disorders C NSD–C Study Meeting.
Date: June 9–10, 2004.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: La Fonda on the Plaza, 100 East San Francisco Street, Santa Fe, NM 87501.
Contact Person: Andrea Sawczuk, DDS, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS, 6001 Executive Boulevard, Room #3208, Bethesda, MD 20892, 301–496–0660, *sawczuka@ninds.nih.gov.*

Name of Committee: Training Grant and Career Development Review Committee.
Date: June 17–18, 2004.
Time: 8 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: The Fairmont Washington, DC., 2401 M Street, NW., Washington, DC 20037.
Contact Person: Raul A. Saavedra, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS, NSC; 6001 Executive Blvd., Ste. 3208, Bethesda, MD 20892–9529, 301–496–9223, *saavedrr@ninds.nih.gov.*

Name of Committee: National Institute of Neurological Disorders and Stroke Initial Review Group Neurological Sciences and Disorders B.
Date: June 17–18, 2004.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hotel Washington, 515 15th Street NW., Washington, DC 20004.
Contact Person: W. Ernest Lyons, PhD, Scientific Review Administrator, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–4056.

Name of Committee: National Institute of Neurological Disorders and Stroke Initial Review Group Neurological Sciences and Disorders A. NSD–A Study Meeting.
Date: June 24–25, 2004.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: The Fairmont Washington, DC, 2401 M Street, NW., Washington, DC 20037.
Contact Person: Richard D. Crosland, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–9223.

Name of Committee: National Institute of Neurological Disorders and Stroke Initial Review Group Neurological Sciences and Disorders K.
Date: June 28–29, 2004.
Time: 8:30 a.m. to 5 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: Katherine M. Woodbury, PhD, Scientific Review Administrator, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–9223.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: May 25, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–12666 Filed 6–3–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committtee: National Institute on Deafness and Other Communications Disorders Special Emphasis Panel Small Grant Program.
Date: July 14–15, 2004.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.
Contact Person: Sheo Singh, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Activities, Executive Plaza South, Room 400C, 6120 Executive Blvd., Bethesda, MD 20892, (301) 496–8683.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: May 25, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–12668 Filed 6–3–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel Xenopus Microarray Resource.

Date: June 11, 2004.

Time: 12 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select, 480 King Street, Alexandria, VA 22314, (Telephone Conference Call).

Contact Person: Sherry L. Dupere, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5136, MSC 7843, Bethesda, MD 20892, 301–435–1021, *duperes@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Digestive Sciences Integrated Review Group, Hepatobiliary Pathophysiology Study Section.

Date: June 14–15, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Fairmont Washington, DC, 2401 M Street, NW., Washington, DC 20037.

Contact Person: Patricia Greenwel, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2175, MSC 7818, Bethesda, MD 20892, 301–435–1169, *greenwep@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel Cell Biology Small Business, R01, and R21 Applications.

Date: June 14, 2004.

Time: 8:30 a.m. to 5 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: Marcia Steinberg, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5140, MSC 7840, Bethesda, MD 20892, (301) 435–1023, *steinberm@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel Genetic Diversity.

Date: June 14–15, 2004.

Time: 7 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: George Washington University Inn, 824 New Hampshire Ave., NW., Washington, DC 20037.

Contact Person: Michael A. Marino, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Rm. 2216, MSC 7890, Bethesda, MD 20892, 301–435–0601, *marinomi@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Biobehavioral and Behavioral Processes Initial Review Group Child Psychopathology and Developmental Disabilities Study Section.

Date: June 17–18, 2004.

Time: 8 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Swissotel Washington, The Watergate, 2650 Virginia Avenue, NW., Washington, DC 20037.

Contact Person: Karen Sirocco, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3176, MSC 7848, Bethesda, MD 20892, 301–435–0676, *siroccok@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Fellowships in Psychopathology and Disorders of Aging.

Date: June 18, 2004.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Radisson Barcello, 2121 P Street, NW., Washington, DC 20037.

Contact Person: Mariela Shirley, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3186, MSC 7848, Bethesda, MD 20892, 301–435–0913, *shirleym@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Alcohol Effects: NAL Member Conflicts.

Date: June 18, 2004.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Christine L. Melchior, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5176, MSC 7844, Bethesda, MD 20892, 301–435–1713, *melchioc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Psychiatric Genetics Collaborative Studies.

Date: June 18, 2004.

Time: 1:30 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select, 480 King Street, Alexandria, VA 22314.

Contact Person: Cheryl M. Corsaro, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2204, MSC 7890, Bethesda, MD 20892, (301) 435–1045, *corsaroc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel ZRG1 SBIB–L 90S: Electromagnetics.

Date: June 20, 2004.

Time: 7 p.m. to 8 p.m.

Agenda: To review and evaluate grant applications.

Place: Omni Hotels, 2500 Calver Street, NW., Washington, DC 20001.

Contact Person: Lee Rosen, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5116, MSC 7854, Bethesda, MD 20892, (301) 435–1171, *rosenl@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel ZRG1 SBIB–L 10B: Small Business: Electromagnetics.

Date: June 20, 2004.

Time: 8 p.m. to 9 p.m.

Agenda: To review and evaluate grant applications.

Place: Omni Hotels, 2500 Calver Street, NW., Washington, DC 20001.

Contact Person: Lee Rosen, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5116, MSC 7854, Bethesda, MD 20892, (301) 435–1171, *rosenl@csr.nih.gov.*

Name of Committee: Oncological Sciences Integrated Review Group, Radiation Therapeutics and Biology Study Section.

Date: June 21–22, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Swissotel Washington, The Watergate, 2650 Virginia Avenue, NW., Washington, DC 20037.

Contact Person: Bo Hong, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6194, MSC 7804, Bethesda, MD 20892, 301–435–5879, *hongb@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive

Sciences Integrated Review Group, Cellular, Molecular and Integrative Reproduction Study Section.

Date: June 21–22, 2004.

Time: 8 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: Churchill Hotel, 1914 Connecticut Avenue, NW., Washington, DC 20009.

Contact Person: Dennis Leszczynski, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6170, MSC 7892, Bethesda, MD 20892, (301) 435–1044, *leszczyd@csr.nih.gov.*

Name of Committee: Cardiovascular Sciences Integrated Review Group, Cardiac Contractility, Hypertrophy, and Failure Study Section.

Date: June 21–22, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Russell T. Dowell, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4128, MSC 7814, Bethesda, MD 20892, (301) 435–1850, *dowellr@csr.nih.gov.*

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group, Bioengineering, Technology and Surgical Sciences Study Section.

Date: June 21–22, 2004.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave., Bethesda, MD 20814.

Contact Person: Dharam S. Dhindsa, DVM, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5126, MSC 7854, Bethesda, MD 20892, (301) 435–1174, *dhindsad@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel NIH High End Shared Instrumentational Review Panel.

Date: June 21, 2004.

Time: 8:30 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Churchill Hotel, 1914 Connecticut Avenue, NW., Washington, DC 20009.

Contact Person: David R. Jolie, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4156, MSC 7806, Bethesda, MD 20892, (301) 435–1722, *jollieda@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Brian Disorders and Clinical Neuroscience/SBIR (10).

Date: June 21–22, 2004.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave, Bethesda, MD 20814.

Contact Person: Rene Etcheberrigaray, MD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5196, MSC 7846, Bethesda, MD 20892, (301) 435–1246, *etcheber@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Anterior Eye Diseases.

Date: June 21–22, 2004.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Fairmont Washington, DC, 2401 M Street, NW., Washington, DC 20037.

Contact Person: Christine A. Livingston, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5202, MSC 7846, Bethesda, MD 20892, (301) 435–1172, *livingsc@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group Neurodegeneration and Biology of Glia Study Section.

Date: June 21–22, 2004.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Radisson Barcello, 2121 P Street, NW., Washington, DC 20037.

Contact Person: Toby Behar, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4136, MSC 7850, Bethesda, MD 20892, (301) 435–4433, *behart@csr.nih.gov.*

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group Bacteriology and Mycology Subcommittee 1.

Date: June 21–22, 2004.

Time: 8:30 a.m. to 5 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: Timothy J. Henry, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Dr., RM 3212, MSC 7808, Bethesda, MD 20892, (301) 435–1147, *henryt@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Baroreflex Model.

Date: June 21–22, 2004.

Time: 3 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Olga A. Tjurmina, PhD, Scientific Review Administrator (SRA Intern), Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3028D, MSC 7814, Bethesda, MD 20892, (301) 451–1375, *ot3d@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Predoctoral Fellowships (F30/31): DIG, RUS, RES, CVS, MOSS.

Date: June 22, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott-Embassy Row, 1600 Rhode Island Ave, Washington, DC 20036

Contact Person: Najma Begum, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2175, MSC 7818, Bethesda, MD 20892, (301) 435–1243, *egumn@csr.nih.gov.*

Name of Committee: Cardiovascular Sciences Integrated Review Group Atherosclerosis and Inflammation of the Cardiovascular System Study Section.

Date: June 22–23, 2004.

Time: 8 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Swissotel Washington, The Watergate, 2650 Virginia Avenue, NW., Washington, DC 20037.

Contact Person: Larry Pinkus, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive Room 4132, MSC 7802, Bethesda, MD 20892, (301) 435–1214, *pincusl@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Fellowships: DIG, RES, CVS, RUS, and MOSS.

Date: June 22–23, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard By Marriott, Embassy Row, 1600 Rhode Island Avenue, General Scott Room, Washington, DC 20036.

Contact Person: Peter J. Perrin, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive Room 2183, MSC 7818, Bethesda, MD 20892, (301) 435–0682, *perrinp@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Cell Death and Injury in Neurodegeneration Study Section.

Date: June 22–23, 2004.

Time: 8 a.m to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.

Contact Person: David L. Simpson, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5192, MSC 7846, Bethesda, MD 20892, (301) 435–1278, *simpsond@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Olfactory Systems.

Date: June 22, 2004.

Time: 11 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Christine L. Melchior, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5176 MSC 7844, Bethesda, MD 20892, 301 435–1713, *melchioc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Neurophysiological Devices.
Date: June 22, 2004.
Time: 2:30 p.m. to 3:30 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave., Bethesda, MD 20814.
Contact Person: Rene Etcheberrigaray, MD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5196, MSC 7846, Bethesda, MD 20892, (301) 435–1246, *etcheber@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Chemoprevention of Cancer.
Date: June 22, 2004.
Time: 2:30 p.m. to 5:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Eun Ah Cho, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6202, MSC 7804, Bethesda, MD 20892, (301) 451–4467, *choe@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Prions.
Date: June 22, 2004.
Time: 3 p.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Fouad A. El-Zaatari, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3206, MSC 7808, Bethesda, MD 20892, (301) 435–1149, *elzaataf@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Gene Therapy and Inborn Errors Study Section.
Date: June 22–23, 2004.
Time: 5 p.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: One Washington Circle Hotel, One Washington Circle, Washington, DC 20037.
Contact Person: Barbara Whitmarsh, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2206, MSC 7890, Bethesda, MD 20892, (301) 435–4511, *whitmarshb@csr.nih.gov.*

Name of Committee: Oncological Sciences Integrated Review Group Chemo/Dietary Prevention Study Section.
Date: June 23–24, 2004.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave., Bethesda, MD 20814.
Contact Person: Victor A. Fung, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6178, MSC 7804, Bethesda, MD 20892, (301) 435–3504, *fungv@csr.nih.gov.*

Name of Committee: Biophysical and Chemical Sciences Integrated Review Group Medicinal Chemistry Study Section.
Date: June 23–24, 2004.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave., Bethesda, MD 20814.
Contact Person: Robert Lees, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4182, MSC 7806, Bethesda, MD 20892, (301) 435–2684, *leesro@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Nueroscience Integrated Review Group Neurodifferentiation, Plasticity, and Regeneration Study Section.
Date: June 23–24, 2004.
Time: 8 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: Washington Terrace Hotel, 1515 Rhode Island Ave., NW., Washington, DC 20005.
Contact Person: Joanne T Fujii, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5204, MSC 7850, Bethesda, MD 20892, (301) 435–1178, *fujiij@csr.nih.gov*

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group Microbial Physiology and Genetics Subcommittee 1.
Date: June 23–24, 2004.
Time: 8: a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Governor's House Hotel, 1615 Rhode Island Avenue, NW., Washington, DC 20036.
Contact Person: Diane L. Stassi, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3202, MSC 7808, Bethesda, MD 20892, 301–435–2514, *stassid@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Visceral and Ocular Pain.
Date: June 23, 2004.
Time: 2 p.m. 3:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Christine L. Melchior, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5176, MSC 7844, Bethesda, MD 20892, 301–435–1713, *melchioc@csr.nih.gov.*

Name of Committee: Musculoskeletal, Oral and Skin Sciences Integrated Review Group Musculoskeletal Rehabilitation Sciences Study Section
Date: June 23–25, 2004.
Time: 8 a.m. 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Wyndham City Center, 1143 New Hampshire Ave, NW., Washington, DC 20037.
Contact Person: Jo Pelham, BA, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4102, MSC 7814, Bethesda, MD 20892, (301) 435–1786, *pelhamj@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: May 26, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–12667 Filed 6–3–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel Alzheimer's Disease Clinical Trial.
Date: June 10, 2004.
Time: 12 p.m. to 2 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institute on Aging, Gateway, 7201 Wisconsin Ave., 2C212, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Ramesh Vemuri, PhD, National Institute on Aging, the Bethesda Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, (301) 402–7700, *rv23r@nih.gov.*
This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Aging Special Emphasis Panel Nature and Nurture of Dementias.
Date: June 17–18, 2004.
Time: 6 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Jon Rolf, PhD, Health Science Administrator, Scientific Review Office, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue/ Room 2C212, Bethesda, MD 20892–9205, (301) 402–7703, *rolfj@nia.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Interactions Between the Aging Brain and Female Reproductive Senescence.

Date: June 24, 2004.

Time: 11 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Mary Nekola, PhD, Chief, Scientific Review Office, National Institute on Aging, Gateway Building, Room 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814–9692, (301) 496–9666.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: May 25, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–12669 Filed 6–3–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

Departmental Advisory Committee on Commercial Operations of the Bureau of Customs and Border Protection (COAC)

AGENCY: Department of Homeland Security.

ACTION: Notice of meeting.

SUMMARY: This notice announces the date, time, and location for the third meeting of the ninth term of the Departmental Advisory Committee on Commercial Operations of the Bureau of Customs and Border Protection (COAC), and the expected agenda for its consideration.

DATES: The next meeting of the COAC will be held on Friday, June 18, 2004, 9:30 a.m. to 1 p.m.

ADDRESSES: The meeting of the Departmental Advisory Committee on Commercial Operations of the Bureau of Customs and Border Protection (COAC) will be held in the Ronald Reagan Building, Horizon Ballroom, located at 1300 Pennsylvania, NW., Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Vetta Jeffries, 202–282–8468.

SUPPLEMENTARY INFORMATION: This meeting is open to the public; however, participation in COAC deliberations is limited to COAC members, Homeland Security and Treasury Department officials, and persons invited to attend the meeting for special presentations. Since seating is limited, all persons attending this meeting should provide notice to Vetta Jeffries, 202–282–8468, no later than 2 p.m. e.s.t. on Wednesday, June 16, 2004.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Vetta Jeffries at 202–282–8468 as soon as possible.

Draft Agenda

The COAC is expected to pursue the following agenda, which may be modified prior to the meeting:

1. Elimination of Quotas & the Impact on CBP and Trade
2. Update on International Trade Data Systems (ITDS)
3. Update on Security Subcommittee
   —Advance Cargo Information
   —CTPAT
4. Maritime Transportation Security Act (MTSA) Implementation Subcommittee
5. Agriculture Subcommittee Activities and FDA Bioterrorism
6. US–VISIT Implementation/ Land Borders

C. Stewart Verdery, Jr.,

Assistant Secretary for Border and Transportation Security Policy and Planning.

[FR Doc. 04–12784 Filed 6–3–04; 8:45 am]

BILLING CODE 4820–02–U

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, U.S. Department of Homeland Security.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) has submitted the following information collection to the Office of Management and Budget (OMB) for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). The submission described the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and includes the actual data collection instruments FEMA will use.

Title: FEMA Grant Administrative Forms.

OMB Number: 1660–0025.

Abstract: The collection of information focuses on the standardization and consistent use of standard and FEMA forms associated with grantees requests for disaster and non-disaster Federal assistance submission of financial and administrative reporting, and recordkeeping. The use of the forms will minimize burden on the respondents and enable FEMA to continue to improve in its grants administration practices. The following FEMA grants are included in this collection:

- *Individual and Family Grants (IFG)*—To provide funds for the necessary expenses and serious needs of disaster victims which cannot be met through other forms of disaster assistance or through other means such as insurance.
- *Public Assistance Grants (PA)*—To provide supplemental assistance to States, local governments, and political subdivisions to the State, Indian Tribes, Alaskan Native Villages, and certain nonprofit organizations in alleviating suffering and hardship resulting from major disasters or emergencies declared by the President.
- *Crisis Counseling (SCC)*—To provide immediate crisis counseling services, when required, to victims of a major Federally-declared disaster for the purpose of relieving mental health problems caused or aggravated by a major disaster or its aftermath.
- *Hazard Mitigation Grant (HMGP)*—To provide States and local governments financial assistance to implement measures that will permanently reduce or eliminate future damages and losses from natural hazards through safer building practices and improving existing structures and supporting infrastructure.
- *Flood Mitigation Assistance (FMA)*—To assist States and communities in implement measures to reduce or eliminate the long-term risk of flood damage to buildings, manufactured homes, and other structures insurable under the National Flood Insurance Program (NFIP).
- *Pre-Disaster Mitigation (PDM)*—To provide States and communities with a

much needed source of pre-disaster mitigation funding for cost-effective hazard mitigation activities that are part of a comprehensive mitigation program, and that reduce injuries, loss of life, and damage and destruction of property.

• *National Urban Search and Rescue (US&R) Response System*—To develop an immediately deployable, national response capability to locate and extricate, and medically stabilize victims of structural collapse during a disaster, while simultaneously enhancing the US&R response capabilities of States and local governments.

• *Community Assistance Program-State Support Services Element (CAP–SSSE)*—To ensure that communities participating in the National Flood Insurance Program (NFIP) are achieving flood loss reduction measures consistent with program direction. The CAP–SSSE is intended to identify, prevent and resolve floodplain management issues in participating communities before they develop into problems requiring enforcement action.

• *Chemical Stockpile Emergency Preparedness Program (CSEPP)*—To enhance emergency preparedness capabilities of the States and local communities at each of the eight chemical agent stockpile storage facilities. The purpose of the program is to assist States and local communities in efforts to improve their capacity to plan for the respond to accidents associated with the storage and ultimate disposal of chemical warfare materials.

• *National Dam Safety Program (NDSP)*—To encourage the establishment and maintenance of effective State programs intended to ensure dam safety, to protect human life and property, and to improve State dam safety programs.

• *Emergency Management Performance Grants (EMPG)*—To encourage the development of comprehensive emergency management, including for terrorism consequence management, at the State and local level and to improve emergency planning, preparedness, mitigation, response, and recovery capabilities.

• *Community Emergency Response Teams (CERT)*—The purpose of the CERT program is to assist State and local efforts to start or expand CERT training and activities that contribute to the strengthening of homeland security by enhancing individual, community, family, and workplace preparedness.

• *Interoperable Communications Equipment (ICE)*—To provide funding to jurisdictions across the nation for demonstration projects on uses of equipment and technologies to increase communication interoperability among the fire service, law enforcement, and emergency medical service communities. These projects will illustrate and encourage the acceptance of new technologies and operating methods to assist communities in achieving interoperability.

• *Cooperating Technical Partners (CTP)*—To increase local involvement in, and ownership of, the development and maintenance of flood hazard maps produced for the National Flood Insurance Program (NFIP).

Affected Public: State, local or tribal government.

Number of Respondents: 56.

Estimated Time per Respondent: See Table Below.

DISASTER PROGRAMS

Disaster program data collections	Number of respondents	Number of responses	Hour burden per response	Total burden hours × 50 disasters annually (in hours)
IFG:				
SF 424	56	1	45 minutes	2,100
FF 20–20	56	1	9.7 hours	27,300
FF 20–16,A,B,C	56	1	1.7 hours	4,900
FF 20–10	56	1	1 hour	2,800
Subtotal	56	4		37,100
PA:				
SF 424	56	1	45 minutes	2,100
FF 20–20	56	1	9.7 hours	27,300
FF 20–16,A,B,C	56	1	1.7 hours	4,900
FF 20–10	56	1	1 hour	2,800
Subtotal	56	4		37,100
SCC:				
SF 424	17	1	45 minutes	637.5
FF 20–16,A,B,C	17	1	1.7 hours	1,487.5
FF 20–10 (SF 269)	17	1	1 hour	850
SF LLL	17	1	10 minutes	141.5
Subtotal	17	4		3,116.5
HMGP:				
SF 424	52	1	45 minutes	1,950
FF 20–20	52	15	9.7 hours	380,250
FF 20–16,A,B,C	52	1	1.7 hours	4,550
FF 20–10	52	4	1 hour	10,400
FF 20–17	52	15	17.2 hours	672,750
FF 20–18	52	6	4.2 hours	66,300
FF 20–19	52	6	5 minutes	1,300
SF LLL	52	1	10 minutes	433

DISASTER PROGRAMS—Continued

Disaster program data collections	Number of respondents	Number of responses	Hour burden per response	Total burden hours × 50 disasters annually (in hours)
Subtotal	52	49		1,137,933
FMA:				
SF 424	56	3	45 minutes	6,300
FF 20–20	56	3	9.7 hours	81,900
FF 20–16,A,B,C	56	1	1.7 hours	4,900
FF 76–10A	56	3	1.2 hours	10,500
FF 20–10	56	4	1 hour	11,200
FF 20–18	56	1	4.2 hour	11,900
FF 20–19	56	1	5 minutes	233
SF LLL	56	1	10 minutes	466.5
Subtotal	56	17		127,399.5
PDM				
SF 424	56	2	45 minutes	4,200
FF 20–15	56	1	17.2 hours	48,300
FF 20–20	56	2	9.7 hours	54,600
FF 76–10A	56	2	1.2 hours	7,000
FF 20–16,A,B,C	56	2	1.7 hours	9,800
FF 20–10	56	8	1 hour	22,400
FF 20–17	56	20	17.2 hours	966,000
FF 20–18	56	2	4.2 hours	23,800
FF 20–19	56	2	5 minutes	466.6
SF LLL	56	2	10 minutes	933
Subtotal	56	43		1,137,499.5
Total-Disaster				2,480,150

NON-DISASTER PROGRAMS

Non-disaster program data collection	Number of respondents	Number of responses	Hour burden per response	Total burden hours (in hours)
US&R:				
SF 424	28	1	45 minutes	21
FF 20–20	28	1	9.7 hours	7,644
FF 20–16,A,B,C	28	1	1.7 hours	49
FF 76–10A	28	1	1.2 hours	35
FF 20–10 (SF 270)	28	1	1 hour	28
SF LLL	28	1	10 minutes	4.7
Subtotal	28	6		7,781.7
CAP–SSSE:				
SF 424	56	1	45 minutes	42
FF 20–20	56	1	45 minutes	42
FF 20–20	56	1	9.7 hours	546
FF 20–15	56	1	17.2 hours	966
FF 20–16,A,B,C,	56	1	1.7 hours	98
FF 76–10A	56	1	1.2 hours	70
FF 20–10	56	1	1 hour	56
FF 20–18	56	1	4.2 hours	238
FF 20–19	56	1	5 minutes	4.7
SF LLL	56	1	10 minutes	9.5
Subtotal	56	9		2,030.2
CSEPP:				
SF 424	10	1	45 minutes	7.5
FF 20–20	10	1	9.7 hours	97.5
FF 20–10	10	1	1 hour	10
FF 20–16,A,B,C	10	1	1.7 hour	17.5
FF 76–10A	10	1	1.2 hour	12.5
FF 20–10	10	1	1 hour	10
FF 20–18	10	1	4.2 hours	42.5

NON-DISASTER PROGRAMS—Continued

Non-disaster program data collection	Number of respondents	Number of responses	Hour burden per response	Total burden hours (in hours)
FF 20–19	10	1	5 min	50
SF LLL	10	1	10 minutes	1.7
Subtotal	10	9		200
NDSSP:				
SF 424	51	1	45 minutes	38.2
FF 20–20	51	1	9.7 hours	497.2
FF 20–16,A,B,C	51	1	1.7 hours	89.2
FF 76–10A	51	1	1.2 hours	63.7
FF 20–10 (SF 270)	51	1	1 hour	51
SF LLL	51	1	10 minutes	8.5
Subtotal	51	6		748
EMPG:				
SF 424	56	1	45 minutes	42
FF 20–20	56	1	9.7 hours	546
FF 20–15	56	1	17.2 hours	966
FF 20–16,A,B,C	56	1	1.7 hours	98
FF 76–10A	56	1	1.2 hours	70
FF 20–10	56	2	1 hour	112
FF20–17	56	1	17.2 hours	966
FF 20–18	56	1	4.2 hours	238
FF 20–19	56	1	5 minutes	4.7
SF LLL	56	1	10 minutes	9.5
Subtotal	56	11		3,052.2
CERT:				
SF 424	56	1	45 minutes	42
FF 20–20	56	1	9.7 hours	546
FF 20–16,A,B,C	56	1	1.7 hours	98
FF 20–10	56	1	1 hour	56
SF LLL	56	1	10 minutes	9.5
Subtotal	56	5		751.5
ICE:				
SF 424	17	1	45 minutes	12.7
FF 20–20	17	1	9.7 hours	165.7
FF 20–16,A,B,C	17	1	1.7 hours	29.7
FF 76–10A	17	1	1.2 hours	21.2
FF 20–10	17	1	1 hour	17
SF LLL	17	1	10 minutes	3
Subtotal	17	6		249.5
CTP:				
SF 424	20	1	45 minutes	15
FF 20–20	20	1	9.7 hours	195
FF20–15	20	1	17.2 hours	345
FF 20–16,A,B,C	20	1	1.7 hours	35
FF 20–10	20	1	1 hour	20
SF LLL	20	1	10 minutes	3.5
Subtotal	20	6		613.5
Total-Non-Disaster				15,425
Grand Total—All Programs				2,495,575

Estimated Total Annual Burden Hours: 2,480,150 for disaster grants and 15,425 for non-disaster grants for a total of 2,495,575 burden hours.

Frequency of Response: On Occasion and Quarterly.

Comments: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs at OMB, Attention: Desk Officer for the Emergency Preparedness and Response Directorate/Federal Emergency Management Agency, Department of Homeland Security, 725 17th Street, NW., Docket Library Room 10102, Washington, DC 20503. Comments must be submitted on or before July 6, 2004. In addition, interested persons may also send

comments to FEMA (see contact information below).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Muriel B. Anderson, Chief, Records Management, FEMA at 500 C Street, SW., Room 316, Washington, DC 20472, facsimile number (202) 646–3347, or e-mail address *FEMA-Information-Collections@ddhs.gov.*

Dated: May 26, 2004.

Edward W. Kernan,

Branch Chief, Information Resources Management Branch, Information Technology services Division.

[FR Doc. 04–12696 Filed 6–3–04; 8:45 am]

BILLING CODE 9110–07–M

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, U.S. Department of Homeland Security.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) is submitting a request for review and approval of a collection of information under the emergency processing procedures in Office of Management and Budget (OMB) regulation 5 CFR 1320.13. FEMA is requesting that this information collection be approved by June 25, 2004. The approval will authorize FEMA to use the collection through December 25, 2004. FEMA plans to follow this emergency request with a request for a 3-year approval. The request will be processed under OMB's normal clearance procedures in accordance with the provisions of OMB regulation 5 CFR 1320.10. To help us with the timely processing of the emergency and normal clearance submissions to OMB, FEMA invites the general public to comment on the proposed collection of information.

SUPPLEMENTARY INFORMATION: Homeland Security Presidential Directive (HSPD)–5, Management of Domestic Incidents, directs the Secretary of Homeland Security to develop and administer a National Incident Management System (NIMS). The NIMS provides a consistent nationwide approach for Federal, State, local and tribal governments to work together to prepare, prevent, respond, and recover from domestic incidents, regardless of cause, size, or complexity. Beginning in FY 2005, Federal departments and agencies must make adoption of the NIMS by State, local, and tribal governments a requirement for Federal preparedness assistance through grants, contracts and other activities. The Secretary must develop standards and guidelines for determining whether a State or local entity has adopted the NIMS. To evaluate compliance with NIMS, the Emergency Preparedness & Response Directorate (EPR) developed the National Incident Management System Compliance Assurance Support Tool (NIMCAST), a Web-based self-assessment tool designed to help Federal, State, local and tribal governments, organizations, and jurisdictions determine their capabilities and compliance against the requirements established by NIMS.

Collection of Information

Title: National Incident Management System Compliance Assurance Support Tool (NIMCAST).

Type of Information Collection: New collection.

OMB Number: 1660–NEW8.

Abstract: The National Incident Management System Compliance Assurance Support Tool (NIMCAST) is the assessment tool used to: (a) Evaluate State, local and Tribal governments' compliance with the standards and requirements established in the National Incident Management System (NIMS) as mandated by HSPD–5, (b) determine eligibility for Federal preparedness assistance, and (c) provide management tools to strengthen incident management programs at the department, agency, or jurisdiction level. Information collected through NIMCAST contains readiness metrics and elements that support the national preparedness goal, including standards for preparedness assessments and strategies, and a system for assessing the Nation's overall preparedness to respond to major events, regardless of cause, size, or complexity, especially those involving acts of terrorism. By contributing to the establishment of a national baseline for compliance by all Federal, State, local, and tribal governments with the NIMS, NIMCAST enhances the ability of the United States to manage domestic incidents by establishing a single, comprehensive national incident management system.

Affected Public: Officials at the Federal, State, local and tribal governments, and other organizations involved in emergency management functions. There will be 5 categories of jurisdictions and/or organizations comprised of: (a) 50 states (b) 3,066 counties (c) 140 independent cities (d) 579 federally-recognized Indian tribes, and (e) 27 federal agencies.

Number of Respondents: 39,620.

Estimated Time per Respondent: Overall completion time for compiling and reporting information in the self-assessment questionnaire is 30 hours. Due to the diversity of functions involved in emergency management activities, it is estimated that 10 respondents per jurisdiction will spent 3 hours each toward the completion of the instrument.

Estimated Total Annual Burden Hours: 118,860 hours.

Estimated Cost: The total cost to the Federal government for this information collection is estimated at $493,000, allocated as follows: $400,000 for Contract support for software development, $10,000 for Maintenance service, and $83,000 for one GS–13 permanent full-time (PFT) employee coordinating information collection activities. There is no cost to the respondents other than the hourly wage proportional to the time spent compiling and reporting the information. Estimates of the Annualized Cost to respondents is based on the national average hourly rate of emergency management and related functions and occupations of $ 26.00 for a total of $3,090,360 for all respondents combined. Based on the estimated completion time of 3-hours, the cost per respondent is approximately $78.00. Total cost per completed questionnaire equals $780, based on the overall completion time of 30 hours per questionnaire per jurisdiction.

Frequency of Response: One-time.

Comments: Written comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) 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 technology, *e.g.,* permitting electronic submission of responses. Submit comments to OMB within 30 days of the date of this notice. FEMA will continue

to accept comments for 60 days from the date of this notice.

OMB Address: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Federal Emergency Management Agency, Emergency Preparedness & Response Directorate, U.S. Department of Homeland Security, (Proposed New Information Collection—National Incident Management System Compliance Assurance Support Tool (NIMCAST), facsimile number (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Muriel B. Anderson, Chief, Records Management, Information Resources Management Branch, Information Technology Services Division, Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, U.S. Department of Homeland Security, 500 C Street, SW., Room 316, Washington, DC 20472. Facsimile number (202) 646–3347, or at e-mail address *FEMA-Information-Collections@dhs.gov.*

Dated: May 28, 2004.

George S. Trotter,

Acting Branch Chief, Information Resources Management Branch, Information Technology Services Division.

[FR Doc. 04–12697 Filed 6–3–04; 8:45 am]

BILLING CODE 9110–17–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4903–N–38]

Notice of Submission of Proposed Information Collection to OMB; Application for Insurance of Advance of Mortgage Proceeds

AGENCY: Office of the Chief Information Officer.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

HUD is requesting extension of OMB approval for the application for Insurance of Advance of Mortgage Proceeds.

DATES: *Comments Due Date:* July 6, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2577–0097) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, AYO, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail *Wayne_Eddins@HUD.gov;* telephone (202) 708–2374. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Mr. Eddins and at HUD's Web site at *http://www5.hud.gov:63001/po/i/icbts/collectionsearch.cfm.*

SUPPLEMENTARY INFORMATION: This Notice informs the public that the U.S. Department of Housing and Urban Development (HUD) has submitted to OMB, for emergency processing, a survey instrument to obtain information from faith based and community organizations on their likelihood and success at applying for various funding programs. This Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Application for Insurance of Advance of Mortgage Proceeds.

OMB Approval Number: 2577–0097.

Form Numbers: HUD–92403.

Description of the Need for the Information and Its Proposed Use:

The application for Insurance of Advance of Mortgage Proceeds, is submitted by mortgagors to request the advance of mortgage proceeds to reimburse the mortgagor for funds expended or obligated for construction related items; and by mortgagees to request mortgage insurance for funds so advanced. HUD transmits the form as its certificate for mortgage insurance for funds it approves for advance

Frequency of Submission: Quarterly.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	33,600	16,800		0.2		3,360

Total Estimated Burden Hours: 3,360.

Status: Request for extension of an existing information collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: May 27, 2004.

Wayne Eddins,

Departmental PRA Compliance Officer, Office of the Chief Information Officer.

[FR Doc. 04–12648 Filed 6–3–04; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4901–N–23]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Kathy Burruss, room 7266, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Heather Ranson, Division of Property Management, Program Support Center, HHS, room 5B–41, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Mark Johnston at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.,* acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: *Air Force:* Mr. Albert F. Lowas, Jr., Air Force Real Property Agency, 1700 North Moore Street, Suite 2300, Arlington, VA 22209–2802; (703) 696–5501; *Coe:* Ms. Shirley Middleswarth, Army Corps of Engineers, Civil Division, Directorate of Real Estate, 441 G Street, NW., Washington, DC 20314–1000; (202) 761–7425; *Coast Guard:* Commandant, United States Coast Guard, Attn: Teresa Sheinberg, 2100 Second St., SW., Rm 6109, Washington, DC 20314–1000; (202) 267–6142; *GSA:* Mr. Brian K. Polly, Assistant Commissioner, General Services Administration, Office of Property Disposal, 18th and F Streets, NW., Washington, DC 20405; (202) 501–0084; *Energy:* Mr. Andy Duran, Department of Energy, Office of Engineering & Construction Management, ME–90, 1000 Independence Ave., SW., Washington, DC 20585; (202) 586–4548; *Navy:* Mr. Charles C. Cocks, Director, Department of the Navy, Real Estate Policy Division, Naval Facilities Engineering Command, Washington Navy Yard, 1322 Patterson Ave., SE., Suite 1000, Washington, DC 20374–5065; (202) 685–9200. (These are not toll-free numbers.)

Dated: May 27, 2004.

Mark R. Johnston,

Acting Director, Office of Special Needs Assistance Programs.

Title V, Federal Surplus Property Program Federal Register Report for 6/4/04

Suitable/Available Properties

Buildings (by State)

California

Bldg. 29
Naval Base Point Loma
San Diego Co: CA
Landholding Agency: Navy
Property Number: 77200420038
Status: Excess
Comment: 40x28x15 metal bldg., most recent use—storage, off-site use only

Kentucky

Comfort Station
Rough River Lake
Grayson Co: KY
Landholding Agency: COE
Property Number: 31200420004
Status: Unutilized
Comment: 160 sq. ft., concrete block, off-site use only

Ranger Residence
420 South Willow
Morehead Co: KY
Landholding Agency: GSA
Property Number: 54200420016
Status: Excess
Comment: 1860 sq. ft., possible asbestos/lead paint, GSA Number: 4–A–KY–0615

Maryland

SSA Building
6400 Old Branch Avenue
Prince Georges Co: Temple Hills MD 20748
Landholding Agency: GSA
Property Number: 54200420019
Status: Excess
Comment: 7232 sq. ft. office space in an industrial area, GSA Number: MD(R11)1102

Pennsylvania

SSA Bldg.
330 West Main Street
West Chester Co: Chester PA 19382–
Landholding Agency: GSA
Property Number: 54200420018
Status: Surplus
Comment: 8395 sq. ft. office building, roof repair needed, GSA Number: 4–G–PA–0793

South Dakota

Tract 155
Oahe Dam/Lake Oahe
Pierre Co: Hughes SD 57501–
Landholding Agency: COE
Property Number: 31200420019
Status: Excess
Comment: 1008 sq. ft. residence, off-site use only

Tract 806
Oake Dam/Lake Oahe
Ft. Pierre Co: Stanley SD 57532–
Landholding Agency: COE
Property Number: 31200420020
Status: Excess
Comment: 1624 sq. ft. residence, off-site use only

Land (by State)

Virginia

5.53 acres
Deep Creek
Chesapeake Co: VA 23322–4094
Landholding Agency: GSA
Property Number: 54200420020
Status: Surplus
Comment: 5.53 acres, GSA Number: 4–N–VA–0745

Suitable/Unavailable Properties

Buildings (by State)

Washington

22 Bldgs./Geiger Heights
Fairchild AFB
Spokane Co: WA 99224–
Landholding Agency: Air Force
Property Number: 18200420001
Status: Unutilized
Comment: 1625 sq. ft., possible asbestos/lead paint, most recent use—residential

Bldg. 404/Geiger Heights
Fairchild AFB
Spokane Co: WA 99224–
Landholding Agency: Air Force
Property Number: 18200420002
Status: Unutilized
Comment: 1996 sq. ft, possible asbestos/lead paint, most recent use—residential

11 Bldgs./Geiger Heights
Fairchild AFB
Spokane Co: WA 99224–
Landholding Agency: Air Force
Property Number: 18200420003
Status: Unutilized
Comment: 2134 sq. ft., possible asbestos/lead paint, most recent use—residential

Bldg. 297/Geiger Heights
Fairchild AFB
Spokane Co: WA 99224–
Landholding Agency: Air Force
Property Number: 18200420004
Status: Unutilized
Comment: 1425 sq. ft., possible asbestos/lead paint, most recent use—residential

9 Bldgs./Geiger Heights
Fairchild AFB
Spokane Co: WA 99224–
Landholding Agency: Air Force
Property Number: 18200420005
Status: Unutilized
Comment: 1620 sq. ft., possible asbestos/lead paint, most recent use—residential

22 Bldgs./Geiger Heights
Fairchild AFB
Spokane Co: WA 99224–
Landholding Agency: Air Force
Property Number: 18200420006
Status: Unutilized
Comment: 2850 sq. ft., possible asbestos/lead paint, most recent use—residential

51 Bldgs./Geiger Heights
Fairchild AFB
Spokane Co: WA 99224–
Landholding Agency: Air Force
Property Number: 18200420007
Status: Unutilized
Comment: 2574 sq. ft., possible asbestos/lead paint, most recent use—residential

Bldg. 402/Geiger Heights
Fairchild AFB
Spokane Co: WA 99224–
Landholding Agency: Air Force
Property Number: 18200420008
Status: Unutilized
Comment: 2451 sq. ft., possible asbestos/lead paint, most recent use—residential

5 Bldgs./Geiger Heights
Fairchild AFB
222, 224, 271, 295, 260
Spokane Co: WA 99224–
Landholding Agency: Air Force
Property Number: 18200420009
Status: Unutilized
Comment: 3043 sq. ft., possible asbestos/lead paint, most recent use—residential

5 Bldgs./Geiger Heights
Fairchild AFB
102, 183, 118, 136, 113
Spokane Co: WA 99224–
Landholding Agency: Air Force
Property Number: 18200420010
Status: Unutilized
Comment: 2599 sq. ft., possible asbestos/lead paint, most recent use—residential

Unsuitable Properties

Buildings (by State)

Alaska

7 Bldgs.
Coast Guard
L05B thru L05K
Homer Co: AK 99603–
Landholding Agency: Coast Guard
Property Number: 88200420006
Status: Excess
Reasons: Secured Area, Extensive deterioration

California

Bldg. 972
Naval Air Station
Lemoore Co: CA
Landholding Agency: Navy
Property Number: 77200420039
Status: Excess
Reason: Extensive deterioration

Bldgs. 26, 27, 28
Naval Outlying Landing Field
Imperial Beach Co: CA
Landholding Agency: Navy
Property Number: 77200420040
Status: Excess
Reason: Extensive deterioration

Bldg. 99
Naval Base
San Diego Co: CA
Landholding Agency: Navy
Property Number: 77200420041
Status: Excess
Reason: Extensive deterioration

Bldg. 197
Naval Base
San Diego Co: CA
Landholding Agency: Navy
Property Number: 77200420042
Status: Excess
Reason: Extensive deterioration

Bldg. 3139
Naval Base
San Diego Co: CA
Landholding Agency: Navy
Property Number: 77200420043
Status: Excess
Reason: Extensive deterioration

Bldg. 135
Naval Base
San Diego Co: CA
Landholding Agency: Navy
Property Number: 77200420044
Status: Excess
Reason: Extensive deterioration

Bldg. 253
Naval Base
San Diego Co: CA
Landholding Agency: Navy
Property Number: 77200420045
Status: Excess
Reason: Extensive deterioration

Bldg. 68
Naval Weapons Station
Seal Beach Co: CA 90740–5000
Landholding Agency: Navy
Property Number: 77200420046
Status: Unutilized
Reason: Extensive deterioration

Bldgs. 72–73
Naval Weapons Station
Seal Beach Co: CA 90740–5000
Landholding Agency: Navy
Property Number: 77200420047
Status: Unutilized
Reason: Extensive deterioration

Bldg. 76
Naval Weapons Station
Seal Beach Co: CA 90740–5000
Landholding Agency: Navy
Property Number: 77200420048
Status: Unutilized
Reason: Extensive deterioration

Bldgs. 81–84
Naval Weapons Station
Seal Beach Co: CA 90740–5000
Landholding Agency: Navy
Property Number: 77200420049
Status: Unutilized
Reason: Extensive deterioration

Bldg. 91
Naval Weapons Station
Seal Beach Co: CA 90740–5000
Landholding Agency: Navy
Property Number: 77200420050
Status: Unutilized
Reason: Extensive deterioration

Bldgs. 93–94
Naval Weapons Station
Seal Beach Co: CA 90740–5000
Landholding Agency: Navy
Property Number: 77200420051
Status: Unutilized
Reason: Extensive deterioration

Bldgs. 98–104
Naval Weapons Station

Seal Beach Co: CA 90740–5000
Landholding Agency: Navy
Property Number: 77200420052
Status: Unutilized
Reason: Extensive deterioration

Bldg. 108
Naval Weapons Station
Seal Beach Co: CA 90740–5000
Landholding Agency: Navy
Property Number: 77200420057
Status: Unutilized
Reason: Extensive deterioration

Bldg. 599
Naval Weapons Station
Seal Beach Co: CA 90740–5000
Landholding Agency: Navy
Property Number: 77200420058
Status: Unutilized
Reason: Extensive deterioration

Idaho

Bldg. PBF 731
Idaho Natl Eng & Env Laboratory
Scovile Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200420023
Status: Excess
Reason: Secured Area

Illinois

Bldgs. 329, 317B
Argonne Natl Laboratory
Argonne Co: DuPage IL 60439–
Landholding Agency: Energy
Property Number: 41200420024
Status: Excess
Reason: Secured Area

Kentucky

Tract 1379
Barkley Lake & Dam
Eddyville Co: Lyon KY 42038–
Landholding Agency: COE
Property Number: 31200420001
Status: Unutilized
Reason: Landlocked

Tract 4300
Barkley Lake & Dam
Cadiz Co: Trigg KY 42211–
Landholding Agency: COE
Property Number: 31200420002
Status: Unutilized
Reason: Floodway

Tracts 317, 318, 319
Barkley Lake & Dam
Grand Rivers Co: Lyon KY 42045–
Landholding Agency: COE
Property Number: 31200420003
Status: Unutilized
Reason: Floodway

Mississippi

Bldgs. H–1–2004
Naval Air Station
Meridian Co: MS 39309–
Landholding Agency: Navy
Property Number: 77200420053
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Missouri

House
Tract 1105
Thurnau Mitigation Site
Craig Co: Holt MO 64437–
Landholding Agency: COE
Property Number: 31200420005
Status: Unutilized
Reason: Extensive deterioration

30x36 Barn
Tract 1105
Thurnau Mitigation Site
Craig Co: Holt MO 64437–
Landholding Agency: COE
Property Number: 31200420006
Status: Unutilized
Reason: Extensive deterioration

30x26 Barn
Tract 1105
Thurnau Mitigation Site
Craig Co: Holt MO 64437–
Landholding Agency: COE
Property Number: 31200420007
Status: Unutilized
Reason: Extensive deterioration

30x10 Shed
Tract 1105
Thurnau Mitigation Site
Craig Co: Holt MO 64437–
Landholding Agency: COE
Property Number: 31200420008
Status: Unutilized
Reason: Extensive deterioration

30x26 Shed
Tract 1105
Thurnau Mitigation Site
Craig Co: Holt MO 64437–
Landholding Agency: COE
Property Number: 31200420009
Status: Unutilized
Reason: Extensive deterioration

9x9 Shed
Tract 1105
Thurnau Mitigation Site
Craig Co: Holt MO 64437–
Landholding Agency: COE
Property Number: 31200420010
Status: Unutilized
Reason: Extensive deterioration

Tract 1111
Thurnau Mitigation Site
Craig Co: Holt MO 64437–
Landholding Agency: COE
Property Number: 31200420011
Status: Excess
Reason: Extensive deterioration

Shower
Pomme de Terre Lake
Hermitage Co: Polk MO 65668–
Landholding Agency: COE
Property Number: 31200420012
Status: Unutilized
Reason: Extensive deterioration

New York

Army Reserve Center
Corning Co: Steuben NY 14830–2098
Landholding Agency: GSA
Property Number: 54200420017
Status: Excess
Reason: Within 2000 ft. of flammable or explosive material, GSA Number: 1–D–NY–0896

North Carolina

Bldg. #2–17009
Cape Fear River Lock/Dam
Elizabeth Co: Bladen NC 28337–
Landholding Agency: COE
Property Number: 31200420013
Status: Unutilized
Reason: Extensive deterioration

10 Bldgs.
Kerr Scott Project
Wilkesboro Co: Wilkes NC 28697–7462
Location: WKS16334–16335, 17334–17337, 18227–18228, 18864–18865
Landholding Agency: COE
Property Number: 31200420014
Status: Unutilized
Reason: Extensive deterioration

5 Bldgs.
Kerr Scott Project
Wilkesboro Co: Wilkes NC 28697–7462
Location: WKS15830, 17268, 18687, 18875, 26808
Landholding Agency: COE
Property Number: 31200420015
Status: Unutilized
Reason: Extensive deterioration

Bldgs. WKS16426, 16427, 25928
Kerr Scott Project
Wilkesboro Co: Wilkes NC 28697–7462
Landholding Agency: COE
Property Number: 31200420016
Status: Unutilized
Reason: Extensive deterioration

Bldgs. WKS18234, 18337
Kerr Scott Project
Wilkesboro Co: Wilkes NC 28697–7462
Landholding Agency: COE
Property Number: 31200420017
Status: Unutilized
Reason: Extensive deterioration

Bldg. WKS18691
Kerr Scott Project
Wilkesboro Co: Wilkes NC 28697–7462
Landholding Agency: COE
Property Number: 31200420018
Status: Unutilized
Reason: Extensive deterioration

South Carolina

Bldgs. 183–1R, 183–2R
Savannah River Operations
Aiken Co: SC 29802–
Landholding Agency: Energy
Property Number: 41200420025
Status: Unutilized
Reason: Secured Area

Bldg. 186–C
Savannah River Operations
Aiken Co: SC 29802–
Landholding Agency: Energy
Property Number: 41200420026
Status: Unutilized
Reason: Secured Area

Bldgs. 186–K, 186–1K
Savannah River Operations
Aiken Co: SC 29802–
Landholding Agency: Energy
Property Number: 41200420027
Status: Unutilized
Reason: Secured Area

Bldgs. 186–P, 186–1P
Savannah River Operations
Aiken Co: SC 29802–
Landholding Agency: Energy
Property Number: 41200420028
Status: Unutilized
Reason: Secured Area

Bldg. 190–C
Savannah River Operations
Aiken Co: SC 29802–
Landholding Agency: Energy
Property Number: 41200420029

Status: Unutilized
Reason: Secured Area

Bldg. 190–K
Savannah River Operations
Aiken Co: SC 29802–
Landholding Agency: Energy
Property Number: 41200420030
Status: Unutilized
Reason: Secured Area

Bldg. 190–P
Savannah River Operations
Aiken Co: SC 29802–
Landholding Agency: Energy
Property Number: 41200420031
Status: Unutilized
Reason: Secured Area

Tennessee

Comfort Station/Land
Cook Campground
Nashville Co: Davidson TN 37214–
Landholding Agency: COE
Property Number: 31200420024
Status: Unutilized
Reason: Floodway

Texas

Bldg. 1423
Naval Air Station
Ft. Worth Co: Tarant TX
Landholding Agency: Navy
Property Number: 77200420054
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Bldg. 1560
Naval Air Station
Ft. Worth Co: Tarrant TX
Landholding Agency: Navy
Property Number: 77200420055
Status: Unutilized
Reasons: Secured Area; Extensive deterioration

Land (by State)

Tennessee

Tract F–608
Cheatham Lock & Dam
Ashland Co: Cheatham TN 37015–
Landholding Agency: COE
Property Number: 31200420021
Status: Unutilized
Reason: Floodway

Tracts G702–G706
Cheatham Lock & Dam
Ashland Co: Cheatham TN 37015–
Landholding Agency: COE
Property Number: 31200420022
Status: Unutilized
Reason: Floodway

6 Tracts
Shutes Branch Campground
Lakewood Co: Wilson TN
Landholding Agency: COE
Property Number: 31200420023
Status: Unutilized
Reason: Floodway

Washington

900 sq. ft. plot
Naval Submarine Base
Bangor Co: WA
Landholding Agency: Navy
Property Number: 77200420056
Status: Unutilized
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area

[FR Doc. 04–12337 Filed 6–3–04; 8:45 am]

BILLING CODE 4210–29–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4513–N–16]

Credit Watch Termination Initiative

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: This notice advises of the cause and effect of termination of Origination Approval Agreements taken by the HUD's Federal Housing Administration (FHA) against HUD-approved mortgagees through the FHA Credit Watch Termination Initiative. This notice includes a list of mortgagees which have had their Origination Approval Agreements terminated.

FOR FURTHER INFORMATION CONTACT: The Quality Assurance Division, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room B133–P3214, Washington, DC 20410–8000; telephone (202) 708–2830 (this is not a toll free number). Persons with hearing or speech impairments may access that number through TTY by calling the Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: HUD has the authority to address deficiencies in the performance of lenders' loans as provided in HUD's mortgagee approval regulations at 24 CFR 202.3. On May 17, 1999 (64 FR 26769), HUD published a notice on its procedures for terminating Origination Approval Agreements with FHA lenders and placement of FHA lenders on Credit Watch status (an evaluation period). In the May 17, 1999 notice, HUD advised that it would publish in the **Federal Register** a list of mortgagees, which have had their Origination Approval Agreements terminated.

Termination of Origination Approval Agreement: Approval of a mortgagee by HUD/FHA to participate in FHA mortgage insurance programs includes an Origination Approval Agreement (Agreement) between HUD and the mortgagee. Under the Agreement, the mortgagee is authorized to originate single family mortgage loans and submit them to FHA for insurance endorsement. The Agreement may be terminated on the basis of poor performance of FHA-insured mortgage loans originated by the mortgagee. The termination of a mortgagee's Agreement is separate and apart from any action taken by HUD's Mortgagee Review Board under HUD's regulations at 24 CFR part 25.

Cause: HUD's regulations permit HUD to terminate the Agreement with any mortgagee having a default and claim rate for loans endorsed within the preceding 24 months that exceeds 200 percent of the default and claim rate within the geographic area served by a HUD field office, and also exceeds the national default and claim rate. For the 18th review period, HUD is only terminating the Agreement of mortgagees whose default and claim rate exceeds both the national rate and 200 percent of the field office rate.

Effect: Termination of the Agreement precludes that branch(s) of the mortgagee from originating FHA-insured single family mortgages within the area of the HUD field office(s) listed in this notice. Mortgagees authorized to purchase, hold, or service FHA insured mortgages may continue to do so.

Loans that closed or were approved before the termination became effective may be submitted for insurance endorsement. Approved loans are (1) those already underwritten and approved by a Direct Endorsement (DE) underwriter employed by an unconditionally approved DE lender and (2) cases covered by a firm commitment issued by HUD. Cases at earlier stages of processing cannot be submitted for insurance by the terminated branch; however, they may be transferred for completion of processing and underwriting to another mortgagee or branch authorized to originate FHA insured mortgages in that area. Mortgagees are obligated to continue to pay existing insurance premiums and meet all other obligations associated with insured mortgages.

A terminated mortgagee may apply for a new Origination Approval Agreement if the mortgagee continues to be an approved mortgagee meeting the requirements of 24 CFR 202.5, 202.6, 202.7, 202.8 or 202.10 and 202.12, if there has been no Origination Approval Agreement for at least six months, and if the Secretary determines that the underlying causes for termination have been remedied. To enable the Secretary to ascertain whether the underlying causes for termination have been remedied, a mortgagee applying for a new Origination Approval Agreement must obtain an independent review of the terminated office's operations as well as its mortgage production, specifically including the FHA-insured mortgages cited in its termination notice. This independent analysis shall

identify the underlying cause for the mortgagee's high default and claim rate. The review must be conducted and issued by an independent Certified Public Accountant (CPA) qualified to perform audits under Government Auditing Standards as provided by the General Accounting Office. The mortgagee must also submit a written corrective action plan to address each of the issues identified in the CPA's report, along with evidence that the plan has been implemented. The application for a new Agreement should be in the form of a letter, accompanied by the CPA's report and corrective action plan. The request should be sent to the Director, Office of Lender Activities and Program Compliance, 451 Seventh Street, SW., Room B133–P3214, Washington, DC 20410–8000 or by courier to 490 L'Enfant Plaza, East, SW., Suite 3214, Washington, DC 20024.

Action: The following mortgagees have had their Agreements terminated by HUD:

Mortgagee name	Mortgagee branch address	HUD office jurisdictions	Termination effective date	Home ownership centers
Allied Home Mortgage Capital	251 Keisler Drive, Ste 100, Cary, NC 27511.	Greensboro, NC	2/17/2004	Atlanta.
Americap Mortgage Corp	1979 Lakeside Parkway, Ste 450, Tucker, GA 30084.	Atlanta, GA	4/1/2004	Atlanta.
Centurion Mortgage Corp	5402 D Gateway Centre, Flint, MI 48507	Grand Rapids, MI	4/1/2004	Philadelphia.
CH Mortgage Co. I LTD	1100 South Tryon St., Ste 101, Charlotte, NC 28203.	Greensboro, NC	4/1/2004	Atlanta.
Diversifed Mortgage, Inc	26133 U.S. 19 North, Ste 412, Clearwater, FL 33763.	Tampa, FL	4/1/2004	Atlanta.
Equity One, Inc.	301 Lippincott Drive, Marlton, NJ 08053	Philadelphia, PA	4/1/2004	Philadelphia.
First Florida State Mortgage Corp	2090 Sarno Road, Melbourne, FL 32935	Orlando, FL	4/1/2004	Atlanta.
First Rochester Mortgage Corp	2024 W Henrietta Rd., Ste 2A, Rochester, NY 14623.	Buffalo, NY	4/1/2004	Philadelphia.
First City Mortgage, Inc	325 Country Club Drive, Stockbridge, GA 30281.	Atlanta, GA	4/1/2004	Atlanta.
Go Blue, Inc	5583 Davis Blvd., Ste 200, North Richland Hill, TX 76180.	Fort Worth, TX	4/1/2004	Denver.
Homeowners Mortgage of America, Inc	501 Village Trace Bldg., Marietta, GA 30067.	Atlanta, GA	4/1/2004	Atlanta.
Lenders Choice Mortgage Services, Inc	13930 SW 47 St. #203, Miami, FL 33175.	Miami, FL	2/17/2004	Atlanta.
Lodge Mortgage, Inc	19221 I 45 South, Ste 330, Conroe, TX 77385.	Houston, TX	4/1/2004	Denver.
Lone Star Realty Investment, Inc	620 E Southlake Blvd., Southlake, TX 76092.	Fort Worth, TX	4/1/2004	Denver.
McKinley Mortgage LLC	9825 Kenwood Rd., Ste 203, Cincinnati, OH 45242.	Cincinnati, OH	4/1/2004	Philadelphia.
Mortgage Express, Inc	374 Meridian Parke Ln, Ste A, Greenwood, IN 46142.	Indianapolis, IN	4/1/2004	Atlanta.
Sensible Mortgage Solutions, Inc	6112 Arlington Road, Jacksonville, FL 32211.	Jacksonville, FL	2/17/2004	Atlanta.
Tropical Mortgage of North Florida, Inc	2002 Southside Blvd., Ste 100–C, Jacksonville, FL 32216.	Jacksonville, FL	4/1/2004	Atlanta.

Dated: May 21, 2004.

Sean Cassidy,

General Deputy, Assistant Secretary for Housing.

[FR Doc. 04–12649 Filed 6–3–04; 8:45 am]

BILLING CODE 4210–27–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Availability of the Final Environmental Impact Statement/Environmental Impact Report for an Incidental Take Permit for the Multiple Habitat Conservation Program, Carlsbad, CA.

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and receipt of application.

SUMMARY: On December 9, 1999, the City of Carlsbad, California, applied to the U.S. Fish and Wildlife Service (Service) for an incidental take permit pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The Service is requesting public comment on the Carlsbad Subarea Plan/Habitat Management Plan (HMP), draft Urgency Ordinance, and Implementing Agreement. We are also seeking public comments on the final Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the Multiple Habitat Conservation Program for the Cities of Carlsbad, Encinitas, Escondido, Oceanside, San Marcos, Solana Beach, and Vista (MHCP), and are making available for public review the responses to comments on the draft MHCP EIS/EIR. The proposed permit on the HMP would authorize the incidental take of 19 animal species, including 12 unlisted species should any of them become listed, under the Act, during the term of the proposed 50-year permit. The permit is needed to authorize take of listed animal species (including harm, injury and harassment) during public and private development, and during monitoring and management of preserve areas in the approximately 6,786-acre Plan Area in Carlsbad, California. The permit would also include two listed and four unlisted plant species, the take of which is not prohibited under Federal law, in recognition of the conservation benefits provided to these species under the larger seven city MHCP and the Carlsbad HMP.

DATES: We must receive your written comments on or before July 6, 2004.

ADDRESSES: Please send comments to Mr. Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley

Road, Carlsbad, California 92009; facsimile (760) 431–9618.

FOR FURTHER INFORMATION CONTACT: Ms. Therese O'Rourke, Assistant Field Supervisor, Carlsbad Fish and Wildlife Office (*see* **ADDRESSES**), telephone number (760) 431–9440.

SUPPLEMENTARY INFORMATION:

Public Review Process

On June 28, 2000, a notice of receipt of an incidental take permit application and availability of an Environmental Assessment for the HMP was published in the **Federal Register** for a 30-day public comment period (65 FR 39919). We received a total of 32 comment letters on the draft Environmental Assessment. In response to comments received during the 30-day public review period, the Service chose to complete its obligations under the National Environmental Policy Act through the EIS/EIR prepared for the MHCP Plan, in which the City of Carlsbad's HMP is fully analyzed. Notice of availability of the draft EIS/EIR and draft MHCP Plan was published in the **Federal Register** on December 28, 2001 for a 120-day public comment period (66 FR 67292). The draft EIS/EIR analyzed the potential environmental impacts that may result from the Federal action of authorizing incidental take anticipated to occur with implementation of the MHCP, and identified various alternatives. We received a total of 41 comment letters on the draft EIS/EIR. A response to each comment has been included in volume 2 of the final EIS/EIR.

The Carlsbad HMP has been modified by addendum, since the draft EIS/EIR was published, as a result of responding to comments from the California Coastal Commission (CCC) in order to receive a Federal consistency determination from the CCC. All of the changes made to the HMP, as a result of the CCC (included in the addendum), are limited to the coastal zone of the City, and do not substantially change the effects analysis and proposed action in the final EIS/EIR. Thus, no additional NEPA analysis was conducted of these changes.

Due to the amount of time that has passed since the public comment period on the original application for an incidental take permit for the Carlsbad HMP, we are publishing this notice to inform the public of the proposed action and to make available for review the final MHCP EIS/EIR, which includes responses to public comments received on the draft EIS/EIR.

Availability of Documents

Copies of the three volume subregional MHCP Plan, Carlsbad HMP for the proposed permit, Implementing Agreement, draft Urgency Ordinance, and final EIS/EIR are available for review at the following locations in California:

1. City of Carlsbad—1635 Faraday Avenue, Carlsbad, CA 92008.
2. Carlsbad City Hall—1200 Carlsbad Village Drive, Carlsbad, CA 92008.
3. U.S. Fish and Wildlife Service—6010 Hidden Valley Road, Carlsbad, CA 92009.
4. Carlsbad City Library (South)—1775 Dove Lane, Carlsbad, CA 92009.
5. Ceorgina Cole Library (North)—1250 Carlsbad Village Drive, Carlsbad, CA 92009.

The responses to comments on the draft Environmental Assessment for the Carlsbad HMP are available upon request (*see* **FOR FURTHER INFORMATION CONTACT**).

Background

The City of Carlsbad seeks an incidental take permit and assurances for 19 animal species (5 endangered, 2 threatened, and 12 unlisted), and assurances for 6 plant species (1 endangered, 1 threatened, and 4 unlisted). The animal species include 16 bird species (5 endangered, 2 threatened, and 9 unlisted); 2 unlisted insect species; and 1 unlisted reptile species. Collectively the 25 listed and unlisted species are referred to as Covered Species by the HMP.

An additional six plant species (one endangered, one threatened, and four unlisted) are included in the HMP, but coverage would not be granted until the respective other City which has the critical population of the plant receives a permit under section 10(a)1(B) of the Act for their subarea plan/HMP. Please note that two of these plant species (one threatened and one unlisted) also need a commitment of funding for management and monitoring before coverage would be granted. Lastly, 10 plants (3 endangered, 2 threatened, and 5 unlisted) and 2 endangered crustaceans are also included in the HMP, but coverage would not be granted until a funding source (such as regional funding) is available to the City of Carlsbad to fund management and monitoring necessary to adequately protect these species. Please note that even if the City of Carlsbad acquires the necessary funding to receive coverage for the 10 plant species above, one of the unlisted plants would remain not covered until another MHCP City receives a permit under section 10(a)1(B) of the Act. Lastly, six vernal pool species (two endangered plants, two endangered crustaceans, one threatened plant, and one unlisted plant) could not receive coverage until the City of Carlsbad also receives legal control over the protection, management, and monitoring of the vernal pools located adjacent to the Poinsettia Train Station.

The species for which coverage is proposed under the Carlsbad HMP are presently included as exhibit A to the draft Implementing Agreement. It is intended that exhibits A, B, and C to the Implementing Agreement will be added to the Carlsbad HMP, if approved by the Carlsbad City Council. This, if approved, will be reflected in the final documents submitted in application for the section 10(a)(1)(B) permit.

A permit is needed because section 9 of the Act and Federal regulations prohibit the ''take'' of animal species listed as endangered or threatened. Take of listed animal species, as defined under the Act, includes actions that kill, harm, or harass such species. Harm includes significant habitat modification or degradation that actually kills or injures listed animals by significantly impairing essential behavioral patterns, including breeding, feeding, and sheltering [50 CFR 17.3(c)]. Under limited circumstances, the Service may issue permits to authorize incidental take; *i.e.*, take that is incidental to, and not the purpose of, otherwise lawful activity.

The take prohibitions of the Act do not apply to listed plants, although section 9 of the Act does prohibit certain acts, including the removal or destruction of listed plants in violation of State law. Although take of listed plants is not prohibited under the Act, we propose to name one endangered and one threatened plant species on the permit in recognition of the conservation measures and benefits that would be provided to them under the proposed HMP.

Assurances to the City of Carlsbad in case of changed or unforeseen circumstances would be provided as stated in the Service's regulations at 50 CFR 17.22(b)(5), and 17.32(b)(5). Regulations governing incidental take permits for threatened and endangered species are found in 50 CFR 17.32 and 17.22.

Proposed Action

The Service's proposed action is to issue an incidental take permit to the City of Carlsbad. The permit application from the City includes a Subarea Plan/HMP that qualifies as both a Habitat Conservation Plan pursuant to Federal law and a Natural Community Conservation Plan pursuant to State law. On December 10, 1993, we issued a final special rule for the coastal

California gnatcatcher (*Polioptila californica californica*) pursuant to section 4(d) of the Act (58 FR 65088). This rule allows incidental take of the gnatcatcher if such take results from activities conducted under a plan prepared pursuant to the State of California's Natural Community Conservation Planning Act of 1991, its associated Process Guidelines, and the Southern California Coastal Sage Scrub Conservation Guidelines. Consistent with the Conservation Guidelines, while planning for natural communities is underway, the special rule allows interim loss of no more than five percent of the coastal sage scrub habitat in specified areas (subregions).

The MHCP is one of several large, multiple-jurisdictional habitat planning efforts in San Diego County, each of which constitutes a ''subregional'' plan under the State of California's Natural Community Conservation Planning Act of 1991. The MHCP is intended to protect viable populations of native plant and animal species and their habitats in perpetuity through the creation of a preserve system, while accommodating continued economic development, in northwestern San Diego County. The MHCP encompasses 175 square miles comprised of the following seven incorporated cities: Carlsbad, Encinitas, Escondido, Oceanside, San Marcos, Solana Beach, and Vista. The MHCP is designed to be implemented through individual Subarea Plans prepared by participating cities, such as the City of Carlsbad.

The MHCP would create a preserve system that protects, manages, and monitors in perpetuity 67 percent of coastal sage scrub, 70 percent of chaparral, 53 percent of coastal sage/chaparral mix, and 100 percent of riparian and estuarine habitats in the study area. (Please note that the December 28, 2001 **Federal Register** notice requesting public comments on the draft EIS/EIR inaccurately stated the level of preservation for coastal sage/chaparral mix to be 80 percent when the stated amount of this habitat type to be preserved according to the draft EIS/EIR was 50 percent.) A major component of the preserve is the conservation of 400 to 500 acres of contiguous coastal sage scrub centered around the cities of Carlsbad, Encinitas, and the extreme southwest portion of San Marcos, which supports 16 to 23 pairs of the federally threatened coastal California gnatcatcher. In addition, 338 acres of coastal sage scrub would be restored in key locations within the preserve area. Overall, 20,428 acres (68 percent) of the natural habitats found in the total MHCP study area would be conserved.

Activities proposed for coverage in the City of Carlsbad Subarea Plan/HMP, which require discretionary action by a permittee, subject to consistency with the MHCP and HMP policies, include: public and private development projects, including a City Municipal golf course; various infrastructure projects such as roads, recreational trails and facilities; and management of preserve areas.

As described in the subregional MHCP, Subarea Plan/HMP, and EIS/EIR, the City of Carlsbad proposes to create a preserve system to mitigate the impact of public and private development over a 50-year period by protecting 6,786 acres (6,478 acres within the City of Carlsbad and 308 outside the City of Carlsbad) of habitat for the Covered Species. The majority of the preserve (5,928 acres) consists of existing and proposed ''hard-lined'' areas designated for 100 percent conservation. Up to 550 acres would be conserved on lands designated as ''standards'' areas which have established assured levels of conservation through applying biological criteria (rather than delineating the project footprint by a hard-line). An additional 308 acres would be conserved outside of the City of Carlsbad's Subarea for impacts that would occur within the City's Subarea. Total conservation within the MHCP Subregional Preserve as a result of the City of Carlsbad's Subarea Plan/HMP is estimated to be 6,786 acres. The preserve within the City's Subarea would contain, at a minimum, the following habitats: Coastal sage scrub (2,139 acres), chaparral (676 acres), southern maritime chaparral (342 acres), grassland (707 acres), oak woodland (24 acres), eucalyptus woodland (99 acres), marsh (1,252 acres), riparian (494 acres), and other non-habitat lands (745 acres). In addition, the subregional MHCP and Subarea Plan/HMP include measures to avoid and minimize incidental take of the Covered Species, emphasizing project design modifications to protect both habitats and species' individuals. A monitoring and reporting plan would gauge the Plan's success based on achievement of biological species objectives and reserve design criteria, and would ensure that conservation keeps pace with open space conversion. The subregional MHCP and Subarea Plan/HMP also include adaptive management which allows for changes in the conservation program if the biological species objectives are not met, or new information becomes available to improve the efficacy of the MHCP's and HMP's conservation strategy.

If the Service approves the City of Carlsbad's Subarea Plan/HMP, and issues an incidental take permit to the City of Carlsbad, the five percent limit on interim loss of coastal sage scrub, imposed as part of the Natural Community Conservation Planning Program and the special rule for the gnatcatcher, would be replaced by the conditions of the permit and the Implementing Agreement. Carlsbad would then exercise its land-use review and approval powers in accordance with the permit, Subarea Plan/HMP, and Implementing Agreement to implement the City of Carlsbad's Subarea Plan/HMP and assemble its preserve. The City would amend its General Plan to include the Subarea Plan/HMP as part of the Open Space and Conservation Element of the General Plan.

Additionally, the City of Carlsbad would use its local regulatory authority to create or modify ordinances to implement the City's Subarea Plan/HMP. Initially an urgency ordinance would be used to implement the plan, but ultimately a new Habitat Loss and Incidental Take (HLIT) ordinance would be created to implement the conservation and development standards contained in the Subarea Plan/HMP for those development projects outside of Covered Projects (*i.e.*, specific projects identified in the Subarea Plan/HMP that could be covered for incidental take pursuant to the proposed incidental take permit). The HLIT ordinance would also provide local regulations for narrow endemic species and wetlands. The City would also amend its existing Grading ordinance to provide regulations for clearing and grubbing of sensitive habitats and require compliance with the City's Subarea Plan/HMP prior to grading of sensitive habitat. Special standards would be applied to those areas of sensitive habitat within the designated Coastal Zone, pursuant to Carlsbad's certified Local Coastal Program.

Alternatives

The Draft EIS/EIR considered three alternatives in addition to the preferred alternative/proposed project described above: (1) A reduced preservation alternative; (2) an increased preservation alternative; and (3) a no project alternative.

Under the reduced preservation alternative, the preserve system would be similar to the proposed project; however, the preserve system would not include: Preservation of the 400 to 500 acres of contiguous coastal sage scrub in the coastal California gnatcatcher core area and the restoration of 338 acres of coastal sage scrub habitat throughout

the MHCP planning area. Overall, 19,928 acres (67 percent) of the habitat in the total MHCP study area would be conserved under this alternative.

Under the increased preservation alternative, all large contiguous areas of habitat, all areas supporting major and critical species populations or habitat areas, and all important functional linkages and movement corridors between them would be conserved. Approximately 83 percent of coastal sage scrub, 93 percent of chaparral, 95 percent of coastal sage/chaparral mix, and 100 percent of riparian and estuarine habitats would be conserved in the total MHCP study area. Overall, 24,565 acres (82 percent) of the habitat in the study area would be conserved under this alternative.

Under the no project alternative, only listed species and habitat occupied by such species would receive protection. It was estimated that conservation levels would include 19 percent of coastal sage scrub, 31 percent of chaparral, and 18 percent of coastal sage/chaparral mix within the MHCP study area. Overall, 8,989 acres (30 percent) of natural habitats in the study area would be conserved under this alternative.

Purpose of Final EIS/EIR

The analysis provided in the final EIS/EIR is intended to accomplish the following: Inform the public of the Service's proposed action; address public comments received on the draft MHCP EIS/EIR; disclose the direct, indirect, and cumulative environmental effects of our proposed action; and indicate any irreversible commitment of resources that would result from implementation of the proposed action. This notice is provided pursuant to section 10 of the Act and National Environmental Policy Act (1972) regulations (40 CFR 1506.6).

Decision

We will consider all comments received during the comment period. We also will evaluate the permit application and associated documents to determine whether the application meets the requirements of section 10(a) of the Act. If we determine that the requirements are met, we will issue an incidental take permit to the City of Carlsbad. Subsequent to this decision, we will publish a separate notice of the availability of our Record of Decision and other decision documents.

D. Kenneth McDermond,

Deputy Manager, Region 1, California/Nevada Operations Office, Sacramento, California.

[FR Doc. 04–11875 Filed 6–3–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Outer Continental Shelf (OCS), Central Planning Area, Oil and Gas Lease Sale 194 (2005)

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Preparation of an environmental assessment.

SUMMARY: The MMS is beginning preparation of an environmental assessment (EA) for proposed Lease Sale 194 (scheduled for March 2005) in the Central Planning Area (CPA) of the Gulf of Mexico (GOM). The preparation of this EA is the first step in the decision process for Lease Sale 194. The proposal and alternatives for Lease Sale 194 were identified by the MMS Director in January 2002 following the Call for Information and Nominations/Notice of Intent to Prepare an Environmental Impact Statement (EIS) and were analyzed in the Final Environmental Impact Statement for Proposed Central Gulf of Mexico OCS Oil and Gas Lease Sales 185, 190, 194, 198, and 201, and Proposed Western Gulf of Mexico OCS Oil and Gas Lease Sales 187, 192, 196, and 200 (Final EIS). A CPA proposed action analyzed in the Final EIS was the offering of all available unleased acreage in the CPA. Three alternatives were analyzed: exclude blocks within 15 miles of Baldwin County, Alabama, coast; exclude blocks near biologically sensitive topographic features; and cancel the lease sale. The analysis in the EA will reexamine the potential environmental effects of the proposed action and its alternatives based on any new information regarding potential impacts and issues that were not available at the time the Final EIS was prepared.

FOR FURTHER INFORMATION CONTACT: Mr. Dennis Chew, Minerals Management Service, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394. You may also contact Mr. Chew by telephone at (504) 736–2793.

SUPPLEMENTARY INFORMATION: In November 2002, MMS prepared a Final EIS that addressed nine proposed Federal actions that offer for lease areas on the GOM OCS that may contain economically recoverable oil and gas resources. Federal regulations allow for several related or similar proposals to be analyzed in one EIS (40 CFR 1502.4). Since each proposed lease sale and its projected activities are very similar each year for each planning area, a single EIS was prepared for the nine CPA and Western Planning Area (WPA) lease sales scheduled in the Outer Continental Shelf Oil and Gas Leasing Program: 2002–2007 (the 5-Year Program). Under the 5-Year Program, five annual areawide lease sales are scheduled for the CPA (Lease Sales 185, 190, 194, 198, and 201) and five annual areawide lease sales are scheduled for the WPA (Lease Sales 184, 187, 192, 196, and 200). Lease Sale 184 was not addressed in the Final EIS; a separate EA was prepared for that proposal. The Final EIS addressed CPA Lease Sales 185, 190, 194, 198, and 201 scheduled for 2003, 2004, 2005, 2006, and 2007, respectively, and WPA Lease Sales 187, 192, 196, and 200 scheduled for 2003, 2004, 2005, and 2006, respectively. Although the Final EIS addresses nine proposed lease sales, at the completion of the EIS process, decisions were made only for proposed CPA Lease Sale 185 and proposed WPA Lease Sale 187. In the year prior to each subsequent proposed lease sale, an additional National Environmental Policy Act review will be conducted to address any new information relevant to that proposed action. After completion of the EA, MMS will determine whether to prepare a Finding of No New Significant Impact (FONNSI) or a Supplemental EIS. The MMS will then prepare and send Consistency Determinations (CD's) to the affected States to determine whether Lease Sale 194 is consistent with their federally-approved State coastal zone management programs. Finally, MMS will solicit comments via the Proposed Notice of Sale (PNOS) from the governors of the affected States on the size, timing, and location of Lease Sale 194. The tentative schedule for the pre-lease decision process for Lease Sale 194 is as follows: EA FONNSI or Supplemental EIS decision, October 2004; CD's sent to affected States, October 2004; PNOS sent to governors of the affected States, October 2004; Final Notice of Sale published in the **Federal Register**, February 2005; and Lease Sale 194, March 2005.

Public Comments: Federal, State, and local governmental agencies, and other interested parties are requested to send within 30 days of this Notice's publication comments regarding any new information or issues that should be addressed in the EA to the Regional Supervisor, Leasing and Environment (MS 5410), Gulf of Mexico OCS Region, Minerals Management Service, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394. Comments should be enclosed in an envelope labeled ''Comments on CPA Lease Sale 194 EA.'' You may also send comments

to the MMS e-mail address: *environment@mms.gov.* Comments, including the names and home addresses of respondents, will be made available for public review during regular business hours. You may request that your name, home address, or both be withheld from the public record by stating so at the beginning of your submission. The MMS will honor such a request to the extent allowable by law. All comments submitted by organizations and businesses or by individuals identifying themselves as representatives of organizations and businesses will be made available for inspection in their entirety. Anonymous comments will not be considered. To obtain single copies of the Final EIS, you may contact the Minerals Management Service, Gulf of Mexico OCS Region, Attention: Public Information Office (MS 5034), 1201 Elmwood Park Boulevard, Room 114, New Orleans, Louisiana 70123–2394 (1–800–200–GULF). You may also view the Final EIS or check the list of libraries that have copies of the Final EIS and their locations on the MMS Web site at *http://www.gomr.mms.gov.*

Dated: April 19, 2004.

Chris C. Oynes,

Regional Director, Gulf of Mexico OCS Region.

[FR Doc. 04–12285 Filed 6–3–04; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Outer Continental Shelf (OCS), Eastern Planning Area, Oil and Gas Lease Sale 197 (2005)

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Preparation of an environmental assessment.

SUMMARY: The MMS is beginning preparation of an environmental assessment (EA) for proposed Lease Sale 197 (scheduled for March 2005) in the Eastern Planning Area (EPA) of the Gulf of Mexico (GOM). The geographic area for proposed Lease Sale 197 is shown on the map published with this Notice; it is the same area that was offered in Lease Sale 181 held in December 2001 and Lease Sale 189 in December 2003. The preparation of this EA is the first step in the decision process for Lease Sale 197. The proposal and alternative for Lease Sale 197 were identified by the MMS Director in February 2002 following the Call for Information and Nominations/Notice of Intent to Prepare an Environmental Impact Statement (EIS) and were analyzed in the Final Environmental Impact Statement for Gulf of Mexico OCS Oil and Gas Lease Sales: 2003 and 2005; Eastern Planning Area Sales 189 and 197 (Final EIS). A proposed action offering all available unleased acreage in the EPA and the No Action alternative were analyzed in the Final EIS. The analysis in the EA will reexamine the potential environmental effects of the proposed action and its alternative based on any new information regarding potential impacts and issues that were not available at the time the Final EIS was prepared.

FOR FURTHER INFORMATION CONTACT: Mr. Dennis Chew, Minerals Management Service, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394. You may also contact Mr. Chew by telephone at (504) 736–2793.

SUPPLEMENTARY INFORMATION: In May 2003, MMS prepared a Final EIS that addressed two proposed Federal actions that offer for lease areas on the Eastern GOM OCS that may contain economically recoverable oil and gas resources. Federal regulations allow for several related or similar proposals to be analyzed in one EIS (40 CFR 1502.4). Since each proposed lease sale and its projected activities are very similar, a single EIS was prepared for the two EPA lease sales scheduled in the Outer Continental Shelf Oil and Gas Leasing Program: 2002–2007 (the 5-Year Program). Under the 5-Year Program, proposed Lease Sale 189 was held in 2003, while proposed Lease Sale 197 is scheduled for 2005. An additional National Environmental Policy Act review will be conducted to address any new information relevant to proposed Lease Sale 197. After completion of the EA, MMS will determine whether to prepare a Finding of No New Significant Impact (FONNSI) or a Supplemental EIS. The MMS will then prepare and send Consistency Determinations (CD's) to the affected States to determine whether Lease Sale 197 is consistent with their federally-approved State coastal zone management programs. Finally, MMS will solicit comments via the Proposed Notice of Sale (PNOS) from the governors of the affected States on the size, timing, and location of Lease Sale 197. The tentative schedule for the prelease decision process for Lease Sale 197 is as follows: EA FONNSI or Supplemental EIS decision, October 2004; CD's sent to the affected States, October 2004; PNOS sent to governors of affected States, October 2004; Final Notice of Sale published in the **Federal Register**, February 2005; and Lease Sale 197, March 2005.

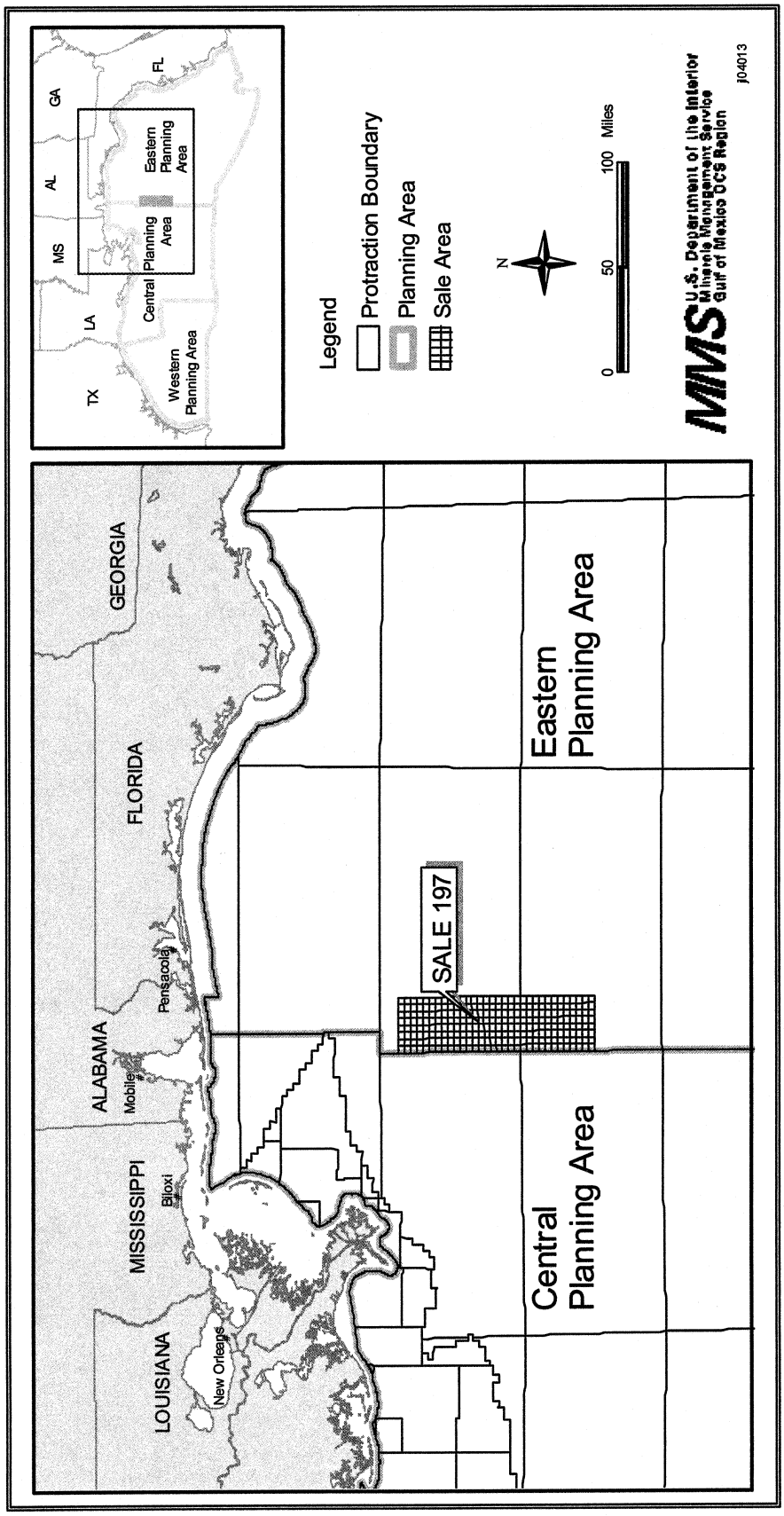
Public Comments: Federal, State, and local governmental agencies, and other interested parties are requested to send within 30 days of this Notice's publication comments regarding any new information or issues that should be addressed in the EA to the Regional Supervisor, Leasing and Environment (MS 5410), Gulf of Mexico OCS Region, Minerals Management Service, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394. Comments should be enclosed in an envelope labeled ''Comments on EPA Lease Sale 197 EA.'' You may also send comments to the MMS email address: *environment@mms.gov.* Comments, including the names and home addresses of respondents, will be made available for public review during regular business hours. You may request that your name, home address, or both be withheld from the public record by stating so at the beginning of your submission. The MMS will honor such a request to the extent allowable by law. All comments submitted by organizations and businesses or by individuals identifying themselves as representatives of organizations and businesses will be made available for inspection in their entirety. Anonymous comments will not be considered. To obtain single copies of the Final EIS, you may contact the Minerals Management Service, Gulf of Mexico OCS Region, Attention: Public Information Office (MS 5034), 1201 Elmwood Park Boulevard, Room 114, New Orleans, Louisiana 70123–2394 (1–800–200–GULF). You may also view the Final EIS or check the list of libraries that have copies of the Final EIS and their locations on the MMS Web site at *http://www.gomr.mms.gov.*

Dated: April 22, 2004.

Chris C. Oynes,

Regional Director, Gulf of Mexico OCS Region.

BILLING CODE 4310–MR–P



Geographic Location of Proposed Eastern Planning Area Sale 197

[FR Doc. 04–12286 Filed 6–3–04; 8:45 am]

BILLING CODE 4310–MR–C

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–492]

In the Matter of Certain Plastic Grocery and Retail Bags; Notice of Commission Determination Not To Review an Initial Determination Finding a Violation of Section 337; Schedule for Written Submissions on Remedy, the Public Interest, and Bonding

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the final initial determination (ID) issued by the presiding administrative law judge (ALJ) in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Andrea Casson, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3105. Copies of all nonconfidential documents filed in connection with this investigation are or 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 instituted this investigation on May 2, 2003, based on a complaint filed by Superbag Corp. (''Superbag'') of Houston, Texas, against four respondents. 68 FR 24755 (May 8, 2003). Superbag's complaint alleges violations of section 337 of the Tariff Act of 1930 in the importation into the United States, sale for importation, and/or sale within the United States after importation of certain T-styled plastic grocery and retail bags that infringe one or more of claims 1–8 and 15–19 of Superbag's U.S. Patent No. 5,188,235. On March 30, 2004, the ALJ issued his final ID and recommended determination on remedy and bonding, finding that there is a violation of section 337 and recommending that the Commission issue a general exclusion order. He also recommended that the bond permitted temporary importation during the Presidential review period be set at 80 percent of the entered value. No party petitioned for review of the ID.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or issue one or more cease and desist orders that could result in respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, it should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337–TA–360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider in this investigation include the effect that an exclusion order would have on (1) The public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the President has 60 days to approve or disapprove the Commission's action. During this period, the subject articles would be entitled to enter the United States under a bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed.

Written Submissions: The parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on remedy, the public interest, and bonding. Such submissions should address the March 30, 2004, recommended determination by the ALJ on remedy and bonding. Complainant and the Commission investigative attorney are also requested to submit proposed orders for the Commission's consideration. The written submissions and proposed orders must be filed no later than close of business on June 21, 2004. Reply submissions, if any, must be filed no later than the close of business on June 28, 2004. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file with the Office of the Secretary the original document and 14 true copies thereof on or before the deadlines stated above. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See section 201.6 of the Commission's Rules of Practice and Procedure, 19 CFR 201.6. Documents for which confidential treatment by the Commission is 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, 19 U.S.C. 1337, and sections 210.42 of the Commission's Rules of Practice and Procedure, 19 CFR 210.42.

Issued: May 28, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–12650 Filed 6–3–04; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

Under section 122(d)(2) of CERCLA, 42 U.S.C. 9622(d)(2), and 28 CFR 50.7, notice is hereby given that on May 26, 2004, a proposed Consent Decree in *United States* v. *Ralph Bello, et. al.,*

Civil Action No. 3:01 CV 1568 (SRU), was lodged with the United States District court for the District of Connecticut.

In this action, the United States sought recovery of response costs incurred by the United States Environmental Protection Agency in conducting a soil cleanup removal action at the National Oil Service Superfund Site in West Haven, Connecticut. The United States filed its complaint pursuant to section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act (''CERCLA''), 42 U.S.C. 9607(a), seeking recovery of response costs incurred at the Site. The complaint named five defendants, four of which are participating in the proposed settlement: Ralph Bello, Vera Bello, Vera Associates Limited Partnership, and the real property address at 16–20 Elm Street, West Haven, Connecticut (collectively ''the Owner/Operator Defendants''). The proposed Consent Decree resolves the United States' cost recovery claims against each of the Owner/Operator Defendants or Settling Defendants. Under the proposed Decree, the Settling Defendants collectively agree to pay $150,000 in partial reimbursement of the United States' response costs.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Ralph Bello, et.al.,* D.J. Ref. 90–11–3–07333/1.

The proposed Consent Decree may be examined at the Office of the United States Attorney, Connecticut Financial Center, New Haven, CT, and at U.S. EPA Region 1, One Congress Street, Boston, MA. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web-site, *http://www.usdoj.gov/enrd/open.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 no. (202) 514–1547. For a copy of the proposed Consent Decree including the signature pages and attachments, please enclose a check in the amount of $4.25 (25 cents per page reproduction cost) payable to ''U.S. Treasury.''

Ronald Gluck,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 04–12621 Filed 6–3–04; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Water Act and Oil Pollution Act

Pursuant to 28 CFR 50.7, notice is hereby given that on May 24, 2004, a proposed Consent Decree (''Decree'') in *United States* v. *GC Quality Lubricants, Inc., Georgia-Carolina Oil Company, Bay Street Corporation, and John Paul Jones, Jr.,* Civil Action No. 5:01cv03233HL (M.D. Ga.), was lodged with the United States District Court for the Middle District of Georgia.

In this action the United States sought Clean Water Act (''CWA'') penalties, compliance with CWA oil pollution prevention regulations, and cost recovery under the Oil Pollution Act (''OPA'') for the United States' response costs for the removal conducted at the GC Quality Lubricants, Inc. (''GC'') petroleum-based lubricants facility in Macon, Georgia (''Facility''). The Decree provides for GC to consent to an allowed general unsecured claim of $3,000,000 for the cost recovery claim against GC, and to an allowed general unsecured claim of $325,000 for the penalty claim against GC, both subject to approval by the United States Bankruptcy Court for the Middle District of Georgia in *In re GC Quality Lubricants, Inc.,* No. 01–54952 RFH (Bankr. M.D. Ga.). The Decree also provides for a penalty of $75,000 against Settling Defendant Mr. Jones, and for Mr. Jones to consent to an allowed general unsecured claim of $3,000,000 for the cost recovery claim against him, subject to approval by the United States Bankruptcy Court for the Middle District of Georgia in *In re John Paul Jones, Jr.,* No. 01–55087–RFH (Bankr. M.D. Ga.). The Decree further provides for injunctive relief, specifically, compliance at the Facility with oil pollution prevention regulations.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Decree. Comments should be addressed to the Assistant Attorney General, Environmental and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *GC Quality Lubricants, Inc., Georgia-Carolina Oil Company, Bay Street Corporation, and John Paul Jones, Jr.,* Civil Action No. 5:01cv03233HL (M.D. Ga.), D.J. Ref. 90–5–1–1–07033.

The Decree may be examined at the Office of the United States Attorney, Middle District of Georgia, 433 Cherry Street, Macon, Georgia 31201, and at U.S. EPA Region 4, Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303–3104. During the public comment period, the Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $8.75 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Ellen M. Mahan,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 04–12622 Filed 6–3–04; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Settlement Agreement Under the Comprehensive Environmental Response, Compensation and Liability Act

Under 28 CFR 50.7, notice is hereby given that on May 14, 2004, a proposed Settlement Agreement for *In Re Lockwood Corporation,* BK 93–80133, was lodged with the United States Bankruptcy Court for the District of Nebraska.

In this action the United States sought reimbursement of response costs and protection of the environment relating to the continued maintenance of a hazardous waste management unit located at 220759 Highway 92 in Gering, Nebraska. The Settlement Agreement is between the Lockwood Corporation Bankruptcy Trustee, Agromac International Inc., and the United States. The Agreement provides for (i) the hazardous waste management unit to be transferred from Lockwood to Agromac, and (ii) transfer of the remaining funds in the bankruptcy estate, net of $52,000 in reimbursement of monitoring expenditures and fees, to an escrow account for use in cleaning up the

property in accordance with a companion Administration Order on Consent entered into between Agromac and the United States pursuant to section 122(h) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (''CERCLA''). In return for the commitments by the Trustee, the United grants Lockwood a covenant not to sue under sections 106 and 107 of CERCLA, 42 U.S.C. 9606 and 9607, and section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. 6973, relating to the Lockwood Site.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Settlement Agreement. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *In re: Lockwood Corporation,* D.J. Ref. 90–11–2–06924. Commenters may request an opportunity for a public meeting in the affected area, in accordance with section 7003(d) of RCRA, 42 U.S.C. 6973(d).

The Agreement and AOC may be examined at the Office of the United States Attorney, 1620 Dodge Street, Suite 1400, Omaha, NE 68102–1506, at U.S. EPA Region VII, 901 N. 5th Street, Kansas City, Kansas 66101, and on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/open.html.* A copy of the Agreement and AOC 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 a request to Tonia Fleetwood, fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy, please enclose a check in the amount of $3.75 for the Agreement, and/or $19.50 for the AOC (25 cents per page reproduction cost) payable to the U.S. Treasury.

Robert E. Maher, Jr.,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 04–12624 Filed 6–03–04; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act (''CERCLA'')

Pursuant to section 122(d)(2) of CERCLA, 42 U.S.C. 9622(d)(2), notice is hereby given that on May 24, 2004, a proposed Consent Decree in *United States* v. *Weyerhaeuser Company,* Civil Action No. 4:04–CV–77–FL(1) was lodged with the United States District Court for the Eastern District of North Carolina.

In this action the United States sought to require the Defendant Weyerhaeuser Company to conduct remedial design and remedial action to address releases and threatened releases of hazardous substances at the Weyerhaeuser Company Plymouth Wood Treating Plant Superfund Site (''Site'') near the town of Plymouth in Martin County, North Carolina. The United States also sought to recover certain past and future costs incurred by the Environmental Protection Agency (EPA) during the performance of response actions at the Site.

Under the Consent Decree, the Defendant will perform the remedial design and remedial action at Operable Unit #3, a former chlorine plant and surrounding areas at the Site, pursuant to the September 29, 2003, Record of Decision (ROD). The Defendant will also reimburse the Hazardous Substance Superfund for EPA's response costs incurred after June 24, 2003, at or in connection with Operable Unit 3.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Weyerhaeuser Company, 4:04–CV–77–FL(10 (E.D.N.C.), DOJ Ref. 90–11–3–07838/1.*

The Consent Decree may be examined at the Office of the United States Attorney, Eastern District of North Carolina, 310 New Bern Avenue, Suite 800, Raleigh, North Carolina 27601, and at EPA Region 4, Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/open.htm.* A copy of the 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 refer to *United States* v. *Weyerhaeuser Company* (E.D.N.C.), DOJ Ref. 90–11–3–07838, and enclose a check in the amount of $40.50 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Ellen M. Mahan,

Assistant Section Chief, Environmental Enforcement Section, Environment & Natural Resources Division.

[FR Doc. 04–12623 Filed 6–3–04; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Emergency Review; Comment Request

May 28, 2004.

The Department of Labor has submitted the following (see below) information collection requests (ICR), utilizing emergency review procedures, to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). OMB approval has been requested by June 15, 2004. A copy of this ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor Departmental Clearance Officer, Ira L. Mills ((202) 693–4122).

Comments and questions about the ICR listed below should be forwarded to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Employment and Training Administration, Room 10235, Washington, DC 20503. Comments are requested 10 days from the publication date of this notice. DOL has requested an OMB Emergency Review and approval by June 15, 2004.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the 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 submissions of responses.

Agency: Employment and Training Administration.

Title: Non Production Questionnaire.

Type of Review: New collection.

OMB Number: 1205–ONEW.

Affected Public:: Individuals or households; State, local or tribal governments.

Frequency: On occasion.

Number of Respondents: 810.

Number of Annual Responses: 810.

Estimated Time Per Responses: 3.5 hours.

Estimated Burden: 2,835.

Total annualized capital/startup costs: $0.

Total annual costs (operating/maintaining systems or purchasing services: $0.

Description: Sections 222, 223 and 249 of the Trade Act of 1974, as amended, require the Secretary of Labor to issue a determination for groups of workers as to their eligibility to apply for Trade Adjustment Assistance (TAA). After reviewing all of the information obtained for each petition for trade adjustment assistance filed with the Department, a determination is issued as to whether the statutory criteria for certification are met.

The information collected in ETA Form 9118 will be used by the Secretary to specifically determine whether petitioning worker groups that perform a service are related to production of articles. If worker groups are related to production of articles, the form will request contact information so that sufficient article production and sales data may be collected from the appropriate contact to assess whether the production that service workers support is adversely affected by trade, and to adequately assess whether the group eligibility requirements detailed in section 223 of the Trade Act of 1974, as amended, have been met.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 04–12672 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,814, et al.]

Alyeska Pipeline Service Company: Anchorage Support Personnel, Anchorage, AK, et al.; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on April 30, 2004, in response to a worker petition filed by a company official on behalf of workers at Alyeska Pipeline Service Company, Anchorage Support Personnel, Anchorage, Alaska (TA–W–54,814); Alyeska Pipeline Service Company, Fairbanks Support Personnel, Fairbanks, Alaska (TA–W–54,814A); and Alyeska Pipeline Service Company, Pipeline Operations Personnel, Fairbanks, Alaska (TA–W–54,814B).

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 17th day of May, 2004.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12632 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,837]

American Meter Company, Calexico, CA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on May 4, 2004 in response to a worker petition which was filed on behalf of workers at American Meter Company, Calexico, California.

An active certification covering the petitioning group of workers is already in effect (TA–W–54,669A, as amended). Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 11th day of May 2004.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12630 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W 54,592]

Anderson Products Worcester, MA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 25, 2004, in response to a petition filed by a company official on behalf of workers at Anderson Products, Worcester, Massachusetts.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC this 26th day of April, 2004.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12642 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,673]

Baronet Litho, Inc., Johnstown, NY; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on April 6, 2004, in response to a worker petition which was filed on behalf of workers at Baronet Litho, Inc., Johnstown, New York (TA-W–54,673).

The petitioners have requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 5th day of May, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12639 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,741]

Bacon Felt Company, Inc., Taunton, MA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an

investigation was initiated on April 19, 2004, in response to a worker petition filed by a company official on behalf of workers at Bacon Felt Company, Inc., Taunton, Massachusetts.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 19th day of May, 2004.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12636 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,885]

Dekko Technology, Inc., Claypool, IN; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on May 11, 2004 in response to a petition filed on behalf of workers at Dekko Technology, Inc., Claypool, Indiana. The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC this 18th day of May 2004.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12628 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,714 and TA–W–53,714A]

Facemate Corporation, Chicopee, MA and Facemate Corporation, Sales Office, New York, NY; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on February 3, 2004, applicable to workers of Facemate Corporation, Chicopee, Massachusetts. The notice was published in the **Federal Register** on March 12, 2004 (69 FR 11889).

At the request of a State agency, the Department reviewed the certification for workers of the subject firm. The workers were engaged in the production of textile interlinings.

Information shows that worker separations occurred at the New York, New York location of the subject firm. The workers provided sales and marketing functions for the subject firm's production facility located in Chicopee, Massachusetts.

Accordingly, the Department is amending the certification to include workers of Facemate Corporation, Sales Office, New York, New York.

The intent of the Department's certification is to include all workers of Facemate Corporation who were adversely affected by increased imports.

The amended notice applicable to TA-W–53,714 is hereby issued as follows:

All workers of Facemate Corporation, Chicopee, Massachusetts (TA–W–53,714) and Facemate Corporation, Sales Office, New York, New York (TA–W–54,714A), who became totally or partially separated from employment on or after December 1, 2002, through February 3, 2006, are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974.

Signed in Washington, DC this 25th day of May, 2004.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12646 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,827]

Harris Fresh LLC, Coalinga, CA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on April 30, 2004 in response to a petition filed by a company official on behalf of workers at Harris Fresh LLC, Coalinga, California.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 10th day of May, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12631 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,665]

Iomega Corp., Roy, UT; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on April 5, 2004, in response to a worker petition filed by a company official on behalf of workers at Iomega Corp., Roy, Utah.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 28th day of April, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12640 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,861]

J.S. Technos Corporation, a Subsidiary of Robert Bosch Corporation, Including Workers of Quality Personnel, Russellville, KY; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on May 6, 2004 in response to a petition filed on behalf of workers at J.S. Technos Corporation, a subsidiary of Robert Bosch Corporation, Russellville, Kentucky. The workers were engaged in producing master cylinders.

The subject firm also leased some production workers from Quality Personnel.

The Department of Labor issued a negative determination applicable to the petitioning group of workers on March 2, 2004 (TA–W–54,217). No new information or change in circumstances is evident which would result in a reversal of the Department's previous determination. Consequently, further investigation would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 14th day of May, 2004.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12629 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,597]

Panacea Products Inc., Dallas, NC; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 26, 2004, in response to a petition filed by a company official on behalf of workers at Panacea Products Inc, Dallas, North Carolina.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 14th day of May, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12637 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,807]

Robert Bosch Corp., Gallatin, TN; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on April 29, 2004, in response to a petition filed by on behalf of workers at Robert Bosch Corporation, Gallatin, Tennessee.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 10th day of May, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12633 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,518]

Select Machinery Sales, Sparta, TN; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 16, 2004 in response to a petition filed by a company official on behalf of workers of Select Machinery Sales, Sparta, Tennessee.

The investigation revealed that the subject firm did not separate or threaten to separate a significant number or proportion of workers as required by section 222 of the Trade Act of 1974. Significant number or proportion of the workers means that at least three workers in a firm with a workforce of fewer than 50 workers would have to be affected. Separations by the subject firm did not meet this threshold level; consequently the investigation has been terminated.

Signed at Washington, DC this 27th day of April 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12645 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,750]

Stearns Technical, Cincinnati, OH; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on April 20, 2004, in response to a worker petition which was filed by the UNITE! Union on behalf of workers at Stearns Technical, Cincinnati, Ohio.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC, this 19th day of May, 2004.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12635 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,774]

T & W Tool and Die Corp., Oak Park, MI; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on April 23, 2004, in response to a petition filed by a company official on behalf of workers at T & W Tool and Die Corporation, Oak Park, Michigan.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 17th day of May, 2004.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12634 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W 54,613]

TI Group Automotive Systems LLC, Greenville, TN; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 29, 2004, in response to a petition filed by a company official on behalf of workers at TI Group Automotive Systems LLC, Greenville, Tennessee.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC this 26th day of April, 2004.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12641 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,555]

Time Square Development Corporation, D/B/A Time Square Clothing, Los Angeles, CA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 22, 2004 in response to a petition filed by a One Stop Coordinator on behalf of the workers of Time Square Development Corporation, d/b/a Time Square Clothing, Los Angeles, California

The investigation revealed that the subject facility did not separate or threaten to separate a significant number or proportion of workers as required by section 222 of the Trade Act of 1974. Significant number or

proportion of the workers means that at least three workers in a firm with a workforce of fewer than 50 workers would have to be affected. Separations by the subject firm did not meet this threshold level; consequently the investigation has been terminated.

Signed at Washington, DC this 10th day of May 2004.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12644 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,735]

Trent Tube, a Division of Crucible Materials Corp., Carrollton, GA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on April 16, 2004, in response to a worker petition filed by the company on behalf of workers at Trent Tube, a division of Crucible Materials Corp., Carrollton, Georgia.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 28th day of April, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12638 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,566]

Vantico, Leased Worker at Honeywell Printed Circuits, Minneapolis, MN; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 23, 2004 in response to a petition filed by a state agency representative on behalf of workers of Vantico, Leased worker at Honeywell, Minneapolis, Minnesota.

The investigation revealed that the subject firm did not separate or threaten to separate a significant number or proportion of workers as required by section 222 of the Trade Act of 1974. Significant number or proportion of the workers means that at least three workers in a firm with a workforce of fewer than 50 workers would have to be affected. Separations by the subject firm did not meet this threshold level; consequently the investigation has been terminated.

Signed at Washington, DC, this 5th day of May 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12643 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA—05620]

E–M Solutions, Also Known as Sherwood Acquisition; Sanmina TX LP, Sanmina Corporation, Longmont, CO; Amended Certification Regarding Eligibility To Apply for NAFTA-Transitional Adjustment Assistance

In accordance with section 250(A), subchapter D, chapter 2, title II, of the Trade Act of 1974 (19 U.S.C. 2273), the Department of Labor issued a Certification for NAFTA Transitional Adjustment Assistance on April 17, 2002, applicable to workers of E–M Solutions, Longmont, Colorado. The notice published in the **Federal Register** on May 2, 2002 (67 FR 22115).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers were engaged in the production of electronic wire and cable assemblies.

New information received from the state shows that the subject firm was also known as several other company entities: Sherwood Acquisition, Sanmina Texas LP and Sanmina Corporation before the company closed in June 2002. Information also shows that workers separated from employment at the subject firm had their wages reported under separate unemployment insurance (UI) tax accounts for Sherwood Acquisition, Sanmina Texas LP and Sanmina Corporation.

Accordingly, the Department is amending the certification determination to properly reflect this matter.

The intent of the Department's certification is to include all workers of E–M Solutions, also known as Sherwood Acquisition, Sanmina Texas LP and Sanmina Corporation, who were adversely affected by a shift in production of electronic wire and cable assemblies to Mexico.

The amended notice applicable to NAFTA—05620 is hereby issued as follows:

All workers of E–M Solutions, also known as Sherwood Acquisition, Sanmina Texas LP and Sanmina Corporation, Longmont, Colorado, who became totally or partially separated from employment on or after December 5, 2000, through April 17, 2004, are eligible to apply for NAFTA–TAA under Section 250 of the Trade Act of 1974.

Signed at Washington, DC, this 25th day of May 2004.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–12647 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment Standards Administration

Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment Standards Administration is soliciting comments concerning the proposed collection: Application for Approval of a Representative's Fee in Black Lung Claim Proceedings Conducted by the U.S. Department of Labor (CM–972). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before August 3, 2004.

ADDRESSES: Ms. Hazel M. Bell, U.S. Department of Labor, 200 Constitution Ave., NW., Room S–3201, Washington, DC 20210, telephone (202) 693–0418,

fax (202) 693–1451, *E-mail bell.hazel@dol.gov.* Please use only one method of transmission for comments (mail, fax, or E-mail).

SUPPLEMENTARY INFORMATION:

I. Background

Individuals filing with the U.S. Department of Labor, Office of Workers' Compensation Programs (OWCP), Division of Coal Mine Workers' Compensation (DCMWC) for benefits under the Black Lung Benefits Act (BLBA) may elect to be represented or assisted by an attorney or other representative. For those cases that are approved, 30 U.S.C. 901 of the Black Lung Benefits Act and 20 CFR 725.365–6 established standards for the information and documentation that must be submitted to the Program for review to approve a fee for services. The CM–972 is used to collect the pertinent data to determine if the representative's services and amounts charged can be paid under the Black Lung Act. This information collection is currently approved for use through November 30, 2004.

II. Review Focus

The Department of Labor is particularly interested in comments which:

- 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 submissions of responses.

III. Current Actions

The Department of Labor seeks the approval of this information in order to evaluate applications to approve fees for services rendered.

Type of Review: Extension.

Agency: Employment Standards Administration.

Title: Application for Approval of a Representative's Fee in a Black Lung Claim Proceedings Conducted by the U.S. Department of Labor.

OMB Number: 1215–0171.

Agency Number: CM–972.

Affected Public: Business or other for-profit.

Total Respondents: 255.

Total Annual responses: 255.

Average Time per Response: 42 minutes.

Estimated Total Burden Hours: 179.

Frequency: On occasion.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: May 28, 2004.

Bruce Bohanon,

Chief, Branch of Management Review and Internal Control, Division of Financial Management, Office of Management, Administration and Planning, Employment Standards Administration.

[FR Doc. 04–12627 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–CK–P

DEPARTMENT OF LABOR

Employment Standards Administration

Wage and Hour Division; Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under The Davis-Bacon And Related Acts,'' shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefits information for consideration by the Department.

Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S–3014, Washington, DC 20210.

Modification to General Wage Determination Decisions

The number of the decisions listed to the Government Printing Office document entitled ''General Wage Determinations Issued Under the Davis-Bacon and related Acts'' being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

Connecticut
CT030001 (Jun. 13, 2003)
CT030002 (Jun. 13, 2003)
CT030003 (Jun. 13, 2003)
CT030004 (Jun. 13, 2003)
CT030005 (Jun. 13, 2003)
CT030006 (Jun. 13, 2003)
New Jersey
NJ030002 (Jun. 13, 2003)
NJ030003 (Jun. 13, 2003)
New York
NY030010 (Jun. 13, 2003)

Volume II

Maryland
MD030021 (Jun. 13, 2003)
MD030050 (Jun. 13, 2003)
MD030056 (Jun. 13, 2003)
MD030057 (Jun. 13, 2003)

Volume III

None

Volume IV

Illinois
IL030001 (Jun. 13, 2003)
IL030002 (Jun. 13, 2003)
IL030005 (Jun. 13, 2003)
IL030008 (Jun. 13, 2003)
IL030011 (Jun. 13, 2003)
IL030013 (Jun. 13, 2003)
IL030015 (Jun. 13, 2003)
IL030016 (Jun. 13, 2003)
IL030023 (Jun. 13, 2003)
IL030024 (Jun. 13, 2003)
IL030026 (Jun. 13, 2003)
IL030027 (Jun. 13, 2003)
IL030032 (Jun. 13, 2003)
IL030037 (Jun. 13, 2003)
IL030045 (Jun. 13, 2003)
IL030046 (Jun. 13, 2003)
IL030050 (Jun. 13, 2003)
IL030051 (Jun. 13, 2003)
IL030054 (Jun. 13, 2003)
IL030066 (Jun. 13, 2003)
IL030070 (Jun. 13, 2003)
Minnesota
MN030061 (Jun. 13, 2003)
Wisconsin
WI030017 (Jun. 13, 2003)

Volume V

Kansas
KS030001 (Jun. 13, 2003)
KS030006 (Jun. 13, 2003)
KS030008 (Jun. 13, 2003)
KS030009 (Jun. 13, 2003)
KS030011 (Jun. 13, 2003)
KS030012 (Jun. 13, 2003)
KS030015 (Jun. 13, 2003)
KS030016 (Jun. 13, 2003)
KS030026 (Jun. 13, 2003)
Missouri
MO030001 (Jun. 13, 2003)
MO030002 (Jun. 13, 2003)
MO030004 (Jun. 13, 2003)
MO030009 (Jun. 13, 2003)
MO030011 (Jun. 13, 2003)
MO030013 (Jun. 13, 2003)
MO030014 (Jun. 13, 2003)
MO030015 (Jun. 13, 2003)
MO030042 (Jun. 13, 2003)
MO030049 (Jun. 13, 2003)
MO030050 (Jun. 13, 2003)
MO030054 (Jun. 13, 2003)
MO030058 (Jun. 13, 2003)
MO030060 (Jun. 13, 2003)

Volume VI

North Dakota
ND030001 (Jun. 13, 2003)
ND030004 (Jun. 13, 2003)
ND030005 (Jun. 13, 2003)
ND030006 (Jun. 13, 2003)
ND030007 (Jun. 13, 2003)
ND030008 (Jun. 13, 2003)
ND030017 (Jun. 13, 2003)
ND030018 (Jun. 13, 2003)
ND030019 (Jun. 13, 2003)

Volume VII

California
CA030009 (Jun. 13, 2003)
CA030023 (Jun. 13, 2003)

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled entitled ''General Wage Determinations Issued Under the Davis-Bacon And Related Acts''. This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

General wage determinations issued under the Davis-Bacon and related Acts are available electronically at no cost on the Government Printing Office site at *www.access.gpo.gov/davisbacon*. They are also available electronically by subscription to the Davis-Bacon Online Service (*http://davisbacon.fedworld.gov*) of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at 1–800–363–2068. This subscription offers value-added features such as electronic delivery of modified wage decisions directly to the user's desktop, the ability to access prior wage decisions issued during the year, extensive help desk support, etc.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 512–1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the six separate Volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC, this 27th day of May, 2004.

John Frank,

Acting Chief, Branch of Construction Wage Determinations.

[FR Doc. 04–12413 Filed 6–3–04; 8:45 am]

BILLING CODE 4510–27–M

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: U. S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to OMB and solicitation of public comment.

SUMMARY: The NRC is preparing a submittal to OMB for review of continued approval of information collections 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 70—Domestic Licensing of Special Nuclear Material.

2. *Current OMB approval number:* 3150–0009.

3. *How often the collection is required:* Required reports are collected and evaluated on a continuing basis as events occur. Applications for new licenses and amendments may be submitted at any time. Generally, renewal applications are submitted every ten years and for major fuel cycle facilities updates of the safety demonstration section are submitted every two years. Nuclear material control and accounting information is submitted in accordance with specified instructions.

4. *Who is required or asked to report:* Applicants for and holders of specific NRC licenses to receive title to, own, acquire, deliver, receive, possess, use, or initially transfer special nuclear material.

5. *The estimated number of annual respondents:* 372.

6. *The number of hours needed annually to complete the requirement or request:* 89,465 (81,765 reporting hours + 7,700 recordkeeping hours) or an average of 125 hours per response (81,765 reporting burden hours/655 responses) and an average of 13 hours per recordkeeper (7,700 recordkeeping burden hours/601 recordkeepers).

7. *Abstract:* Part 70 establishes requirements for licenses to own,

acquire, receive, possess, use, and transfer special nuclear material. The information in the applications, reports, and records is used by NRC to make licensing and other regulatory determinations concerning the use of special nuclear material. The revised estimate of burden reflects the addition of requirements for documentation for termination or transfer of licensed activities, and modifying licenses.

Submit, by August 3, 2004, 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?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 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 and questions about the information collection requirements may be directed to the NRC Clearance Officer, Brenda Jo. Shelton, U.S. Nuclear Regulatory Commission, T–5 F52, Washington, DC 20555–0001, by telephone at 301–415–7233, or by Internet electronic mail to *infocollects@nrc.gov.*

Dated at Rockville, Maryland, this 27th day of May 2004.

For the Nuclear Regulatory Commission.

Brenda Jo. Shelton,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 04–12670 Filed 6–3–04; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Sunshine Act Meeting

DATE AND TIMES: Tuesday, June 15, 2004; 10 a.m. and 3 p.m.

PLACE: Washington, DC, at U.S. Postal Service Headquarters, 475 L'Enfant Plaza, SW., in the Benjamin Franklin Room.

STATUS: June 15—10 a.m. (Closed); 3 p.m. (Open)

MATTERS TO BE CONSIDERED:

Tuesday, June 15—10 a.m. (Closed)

1. Financial Update
2. Rate Case Planning
3. Strategic Planning
4. Personnel Matters and Compensation Issues

Tuesday, June 15—3 p.m. (Open)

1. Minutes of the Previous Meeting, May 11 and 12, 2004
2. Remarks of the Postmaster General and CEO
3. Committee Reports
4. Consideration of Amendment to Board of Governors Bylaws
5. Capital Investments
   a. Surface Visibility—Surface-Air Support System (SASS), Phase III
   b. Arlington, Virginia, Main Post Office
   c. Chicago, Illinois, Busse Surface HUB
   d. 1,587 Additional DBCS Stacker Modules
   e. Airline Receiving Concourse and Trayline System—New York International Service Center
6. Management Recruitment and Development
7. Tentative Agenda for the July 19–20, 2004, meeting in San Francisco, California

FOR FURTHER INFORMATION CONTACT: William T. Johnstone, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza, SW., Washington, DC 20260–1000. Telephone (202) 268–4800.

William T. Johnstone,

Secretary.

[FR Doc. 04–12837 Filed 6–2–04; 8:45 am]

BILLING CODE 7710–12–M

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Regulation 12B, OMB Control No. 3235–0062, SEC File No. 270–70.

Form 15, OMB Control No. 3235–0167, SEC File No. 270–170.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''Commission'') is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget for extension and approval.

Regulation 12B (OMB Control No. 3235–0062; SEC File No. 270–70) includes rules governing all registration statements pursuant to Sections 12(b) and 12(g) of the Securities Exchange Act of 1934 (''Exchange Act''), including all amendments to such statements and reports. The purpose of the regulation is to set forth guidelines for the uniform preparation of Exchange Act documents. Regulation 12B is assigned one burden hour for administrative convenience because the regulation simply prescribes the disclosure that must appear in other filings under the federal securities laws.

Form 15 (OMB Control No. 3235–0167; SEC File No. 270–170) is a certification of termination of a class of security under Section 12(g) or notice of suspension of duty to file reports pursuant to Sections 13 and 15(d) of the Securities Exchange Act of 1934. Approximately 2,000 issuers file Form 15 annually and it takes approximately a total of 1.5 hours per response for a total of 3,000 annual burden hours.

Written comments are invited on: (a) Whether these proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

Dated: May 27, 2004.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–12690 Filed 6–3–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–26459]

Notice of Applications for Deregistration under Section 8(f) of the Investment Company Act of 1940

May 28, 2004.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of May, 2004. A copy of each application may be obtained for a fee at the SEC's Public Reference Branch, 450 Fifth St., NW., Washington, DC 20549–0102 (tel. 202–942–8090). An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on June 22, 2004, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549–0609. For Further Information Contact: Diane L. Titus at (202) 942–0564, SEC, Division of Investment Management, Office of Investment Company Regulation, 450 Fifth Street, NW., Washington, DC 20549–0504.

Millennium Income Trust [File No. 811–8816]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On April 30, 2004, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $15,500 incurred in connection with the liquidation were paid by SBK-Brooks Investment Corp., applicant's principal underwriter. Applicant has retained $17,735 in cash to cover outstanding liabilities and miscellaneous expenses.

Filing Dates: The application was filed on May 5, 2004, and amended on May 24, 2004.

Applicant's Address: 135 Merchant St., Suite 230, Cincinnati, OH 45246.

Southeast Interactive Technology Fund I, LLC [File No. 811–9052]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On January 28, 2000, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of approximately $16,000 incurred in connection with the liquidation were paid by applicant.

Filing Dates: The application was filed on March 9, 2004, and amended on May 19, 2004.

Applicant's Address: 630 Davis Dr., Suite 220, Morrisville, NC 27560.

The Dresher Family of Funds [File No. 811–8177]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On December 15, 2003, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $10,000 incurred in connection with the liquidation were paid by National Financial Advisors, Inc., applicant's investment adviser, or its parent company.

Filing Dates: The application was filed on December 30, 2003, and amended on May 6, 2004 and May 19, 2004.

Applicant's Address: 715 Twining Rd., Suite 202, Dresher, PA 19025.

The InvestBio Opportunity Fund [File No. 811–10605]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On January 21, 2004, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $21,500 incurred in connection with the liquidation were paid by DBGI Advisors, Inc., applicant's investment advisor.

Filing Date: The application was filed on April 26, 2004.

Applicant's Address: 500 Fifth Ave., 56th Floor, New York, NY 10110.

CDC Nvest Tax Exempt Money Market Trust [File No. 811–3658]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On November 14, 2003, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $46,000 incurred in connection with the liquidation were paid by CDC IXIS Asset Management Services, Inc.

Filing Date: The application was filed on May 7, 2004.

Applicant's Address: 399 Boylston St., Boston, MA 02116.

Nuveen Tax-Deferred Investment Trust [File No. 811–8695]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

Filing Dates: The application was filed on March 17, 2004, and amended on May 14, 2004.

Applicant's Address: 333 West Wacker Dr., Chicago, IL 60606.

Oak Ridge Funds, Inc. [File No. 811–8088]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On February 13, 2004, applicant transferred its assets to Pioneer Oak Ridge Small Cap Growth Fund and Pioneer Oak Ridge Large Cap Growth Fund, each a series of Pioneer Series Trust I, based on net asset value. Expenses of $69,664 incurred in connection with the reorganization were paid by Oak Ridge Investments, LLC, applicant's investment adviser, and Pioneer Investment Management, Inc., investment adviser for the acquiring fund.

Filing Dates: The application was filed on April 1, 2004, and amended on May 11, 2004.

Applicant's Address: 10 S. LaSalle St., Suite 1050, Chicago, IL 60603.

J.P. Morgan Hedge Fund Series/alpha, L.L.C. [File No. 811–9881]

J.P. Morgan Hedge Fund Series/core, L.L.C. [File No. 811–9883]

Summary: Each applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicants have never made a public offering of their securities and do not propose to make a public offering or engage in business of any kind.

Filing Dates: The applications were filed on February 19, 2004, and amended on May 3, 2004.

Applicants' Address: c/o J.P. Morgan Investment Management Inc., 522 Fifth Ave., New York, NY 10036.

The FBR Rushmore Fund, Inc. [File No. 811–4369]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On November 28, 2003, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $9,134 incurred in connection with the liquidation were paid by FBR National Trust Company, applicant's administrator.

Filing Dates: The application was filed on April 7, 2004, and amended on April 30, 2004.

Applicant's Address: 4922 Fairmont Ave., Bethesda, MD 20814.

Investors Life Separate Account B [File No. 811–8478]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. As of January 1, 1997, Applicant was merged into Separate Account A of Midland National Life Insurance Company (''Midland''). All expenses incurred in connection with the merger were paid by Midland.

Filing Dates: The application was filed on December 31, 2003, and amended on April 2, 2004 and May 27, 2004.

Applicant's Address: Midland National Life Insurance Company, One Midland Plaza, Sioux Falls, South Dakota 57193.

Investors Life Separate Account D [File No. 811–7864]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. As of January 1, 1997, Applicant was merged into Separate Account C of Midland National Life Insurance Company (''Midland''). All expenses incurred in connection with the merger were paid by Midland.

Filing Dates: The application was filed on December 31, 2003 and amended on April 2, 2004 and May 27, 2004.

Applicant's Address: Midland National Life Insurance Company, One Midland Plaza, Sioux Falls, South Dakota 57193.

Exeter Insurance Fund, Inc. [File No. 811–7439]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On December 31, 2003, applicant made a liquidating distribution, based on net asset value, after the Fund's directors determined there were no longer any assets other than seed money. Manning & Napier Advisors, Inc., applicant's investment adviser, paid all expenses incurred in connection with the liquidation.

Filing Dates: The application was filed on December 16, 2003 and amended on March 25, 2004.

Applicant's Address: 1100 Chase Square, Rochester, New York 14604.

Glenbrook Life Variable Account B [File No. 811–8235]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On March 12, 2004 the Board of Directors voted to liquidate the applicant. All previously issued contracts had been surrendered and there were no current contractholders. Expenses of $1500 incurred in connection with the liquidation were paid by the depositor, Glenbrook Life and Annuity Company.

Filing Date: The application was filed on April 6, 2004.

Applicant's Address: 3100 Sanders Road, Northbrook, Illinois 60062.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–12691 Filed 6–3–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49669A; File No. S7–24–89]

Joint Industry Plan; Notice of Filing and Summary Effectiveness of Amendment No.13C to the Reporting Plan for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis; Submitted by the National Association of Securities Dealers, Inc., the Boston Stock Exchange, Inc., the Chicago Stock Exchange, Inc., the Cincinnati Stock Exchange, Inc., the Pacific Exchange, Inc., the American Stock Exchange LLC, and the Philadelphia Stock Exchange, Inc.

May 28, 2004.

Correction

In FR Document No. 04–11177 beginning on page 28182 for Tuesday, May 18, 2004, footnote 6 on page 28183 was incorrectly stated. The footnote should read as follows:

[6] Archipelago Exchange (ArcaEx), a wholly-owned subsidiary of Archipelago Holdings, L.L.C. and the equities trading facility of PCX Equities, Inc. and PCX were elected co-chairs of the Operating Committee for the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis (''Nasdaq UTP Plan'' or ''Plan'') by the Participants.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[1]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–12689 Filed 6–3–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meetings during the week of June 7, 2004:

A Closed Commission Meeting will be held on Tuesday, June 8, 2004 at 2 p.m., and an Open Meeting will be held on Wednesday, June 9, 2004 at 10 a.m. in Room 1C30, the William O. Douglas Room.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (9)(A), (9)(B), and (10) and 17 CFR 200.402(a)(3), (5), (6), (7), 9(i), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Glassman, as duty officer, voted to consider the items listed for the closed meeting in closed session, and determined that no earlier notice thereof was possible.

The subject matter for the Closed Meeting scheduled for Tuesday, June 8, 2004 will be:

Formal orders of investigation;

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings of an enforcement nature; and a

Litigation matter.

The subject matter of the Open Meeting scheduled for Wednesday, June 9, 2004 will be:

1. The Commission will consider whether to adopt amendments to short sale regulation under new Regulation SHO, and revisions to Rule 105 of Regulation M (short selling in connection with a public offering), both

[1] 17 CFR 200.30–3(a)(27).

under the Securities Exchange Act of 1934.

For further information please contact Kevin Campion, Lillian Hagen, or Alexandra Albright at (202) 942–0772.

2. The Commission will consider whether to adopt amendments to Schedule 14A under the Securities Exchange Act of 1934, and to Forms N–1A, N–2, and N–3 under the Securities Act of 1933 and the Investment Company Act of 1940. The amendments would require a registered management investment company to provide disclosure in its reports to shareholders regarding the basis for the board of directors' approval of an investment advisory contract. They would also enhance existing disclosure requirements in proxy statements regarding the basis for the board's recommendation that shareholders approve an advisory contract.

For further information, please contact Deborah D. Skeens at (202) 942–0562.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 942–7070.

Dated: June 2, 2004.

Jonathan G. Katz,

Secretary.

[FR Doc. 04–12844 Filed 6–2–04; 4:00 pm]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49783: File No. SR–NASD–2004–065]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Regarding the Nasdaq Closing Cross

May 27, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 19, 2004, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would amend NASD Rule 4709 governing the NASDAQ Closing Cross. Specifically, Nasdaq is proposing to clarify that market participants would not be able to cancel Imbalance Only orders (''IOs''), Market on Close orders (''MOC''), or Limit on Close orders (''LOC'') after 3:50 p.m. EST except to correct a legitimate error, including side, size, symbol, price or duplication of an order. The text of the proposed rule change is set forth below. Proposed new language is in *italics;* proposed deletions are in [brackets].

* * * * *

4709. Nasdaq Closing Cross

(a) Definitions. For the purposes of this rule the term:

(1) No Change.

(2) ''Imbalance Only Order'' or ''IO'' shall mean an order to buy or sell at a specified price or better that may be executed only during the Nasdaq Closing Cross and only against MOC or LOC orders. IO orders can be entered between 3:30 p.m. and 3:59:59 p.m., but they cannot be [cancelled or] modified after 3:50:00 except to increase the number of shares or to increase (decrease) the buy (sell) limit price. *IO orders can be cancelled between 3:50:00 p.m. and 3:55:00 p.m. only by requesting Nasdaq to correct a legitimate error (e.g., side, size, symbol, price or duplication of an order). IO orders cannot be cancelled after 3:55:00 p.m. for any reason.* IO sell (buy) orders will only execute at or above (below) the 4:00:00 SuperMontage offer (bid). All IO orders must be available for automatic execution.

(3) ''Limit On Close Order'' or ''LOC'' shall mean an order to buy or sell at a specified price or better that is to be executed only during the Nasdaq Closing Cross. LOC orders can be entered, cancelled, and corrected between 9:30:01 a.m. and 3:50:00 p.m. LOC orders can be cancelled between 3:50:00 p.m. and 3:55:00 p.m. only by requesting Nasdaq to correct a legitimate error (e.g., side, size, symbol, price or duplication of an order). LOC orders cannot be cancelled after 3:55:00 p.m. for any reason. LOC Orders will execute only at the price determined by the Nasdaq Closing Cross. All LOC orders must be available for automatic execution.

(4) ''Market on Close Order'' shall mean an order to buy or sell at the market that is to be executed only during the Nasdaq Closing Cross. MOC orders can be entered, cancelled, and corrected between 9:30:01 a.m. and 3:50:00 p.m. *MOC orders can be cancelled between 3:50:00 p.m. and 3:55:00 p.m. only by requesting Nasdaq to correct a legitimate error (e.g., side, size, symbol, price or duplication of an order). MOC orders cannot be cancelled after 3:55:00 p.m. for any reason.* MOC orders will execute only at the price determined by the Nasdaq Closing Cross. All MOC orders must be available for automatic execution.

(5) No Change.

(6) No Change.

(b) No Change.

(c)No Change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is proposing to amend NASD Rule 4709 governing the NASDAQ Closing Cross to provide that market participants would be able to cancel IO, MOC, or LOC orders between 3:50 p.m. EST and 3:55 p.m. only by requesting Nasdaq to correct a legitimate error, including side, size, symbol, price or duplication of an order. Market participants would not be permitted to cancel IO, MOC, or LOC orders after 3:55 p.m. for any reason.

Nasdaq believes that providing the ability to cancel orders that contain legitimate errors would protect the marketplace from the potential distortions that inadvertent errors might cause during the Nasdaq Closing Cross. Other markets permit similar types of corrections to take place in advance of the actual close. For example, the New York Stock Exchange provides similar protection for on close orders. NYSE Rule 123C provides that ''[b]etween 3:40

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

p.m. and 3:50 p.m., MOC orders are irrevocable, except to correct a legitimate error (*e.g.*, side, size, symbol, price or duplication of an order).''

Nasdaq Regulation staff in the TradeWatch section of MarketWatch (''MW'') would perform the correction of legitimate errors based upon members'' requests. The cancellation of IO, LOC, and MOC orders would be limited to circumstances where a firm could clearly demonstrate that it made a legitimate error. Because of the time constraints in operation at the end of the trading day, Nasdaq's staff would not be able to engage in a review of whether an the order entry was in fact erroneous.

Accordingly, the criteria that Nasdaq would use to determine whether an entry is a legitimate error would include:

Size of Order: If an order were to be entered with the wrong size and such erroneous size was greater than 1000 shares and the mistake in size was greater than 20% from the correct size, MW would cancel the order. Orders entered not exceeding the threshold factors would not be corrected.

Price of Order: If a LOC were to be entered at a price different from that intended by 10% or more, MW would cancel the order. If error were to be less than 10%, or if an order were to be entered as an MOC instead of LOC, MW would not take action.

Symbol: If a market participant were able to show it made a mistake in entering an order in the wrong stock by identifying the symbol for which it meant to enter an order, MW would cancel the incorrect order. Nasdaq would not make an entry for the firm for the intended symbol.

Side of Order: If the order were to be entered as a buy (sell) order when it should have been a sell (buy) order, MW would cancel the order.

Duplication of Order: If a firm were to duplicate an order, MW would cancel the duplicate order.

In all of the above instances, time permitting, TradeWatch would use its best efforts to cancel MOC, LOC, or IO orders that contain a legitimate error. The firm making the error would be required to contact TradeWatch by telephone in a timely manner and, during that communication, would be required to provide all necessary details regarding the specific order(s) entered in error to be cancelled. Failure to provide the necessary details in a timely manner would result in no cancellation. The firm seeking cancellation of an order would be required to provide objective proof that a mistake was made. Submission by e-mail or fax of an order ticket or other proof of the error would be required to be made as soon as practicable and no later than 5:00:00 p.m. on the day of the cancellation. Failure to provide satisfactory information regarding the basis of the error would be a *per se* violation of the rule.

Because of the impact on price formation in the closing seconds of the trading day that cancellations could cause, Nasdaq staff would not attempt to cancel any orders after 3:55:00 p.m. All efforts by Nasdaq to act on cancellation requests would be made on a best efforts basis and might not be successful prior to 3:55:00 p.m. For example, firms that enter orders for a basket of stocks must understand that if the basket is large and involves a number of erroneous entries, Nasdaq may be unable to cancel all of the orders entered prior to 3:55:00 p.m.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[3] in general, and with section 15A(b)(6) of the Act,[4] in particular, in that Section 15A(b)(6) requires the NASD's rules to be designed, among other things, to protect investors and the public interest. Nasdaq's believes that its current proposal is consistent with the NASD's obligations under these provisions of the Act because it would result in the public dissemination of information that more accurately reflects the trading in a particular security at the close. Furthermore, to the extent a security is a component of an index, Nasdaq believes the index would more accurately reflect the value of the market, or segment of the market, the index is designed to measure. Nasdaq believes the corresponding result should be trades, or other actions, executed at prices more reflective of the current market.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

[3] 15 U.S.C. 78o–3.

[4] 15 U.S.C. 78o–3(b)(6).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASD–2004–065 on the subject line.

Paper Comments

Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NASD–2004–065. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such

filing also will be available for inspection and copying at the principal office of the NASD. 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–NASD–2004–065 and should be submitted on or before June 25, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–12688 Filed 6–3–04; 8:45 am]

BILLING CODE 8010–01–P

[5] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINSTRATION

Small Business & Agriculture Regulatory Enforcement Ombudsman; Office of the National Ombudsman; Regulatory Enforcement Fairness Program; Public Federal Regulatory Enforcement Fairness Hearing; Region V Regulatory Fairness Board

The Small Business Administration Region V Regulatory Fairness Board and the SBA Office of the National Ombudsman will hold a Public Hearing on Tuesday, June 22, 2004, at 8:30 a.m. at the Business Technology Center, 1275 Kinnear Road, Columbus, OH 43212–1155, to receive comments and testimony from small business owners, small government entities, and small non-profit organizations concerning regulatory enforcement and compliance actions taken by federal agencies.

Anyone wishing to attend or to make a presentation must contact Shannon Feucht in writing or by fax, in order to be put on the agenda. Shannon Feucht, Paralegal Specialist, SBA Columbus District Office, 280 N. High Street, Suite 1400, Columbus, Ohio 43215, phone (614) 469–6860 ext. 244, fax (614) 469–2391, e-mail: *Shannon.feucht@sba.gov.*

For more information, see our Web site at *www.sba.gov/ombudsman.*

Dated: May 27, 2004.

Peter Sorum,

Senior Advisor, Office of the National Ombudsman.

[FR Doc. 04–12652 Filed 6–3–04; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Small Business & Agriculture Regulatory Enforcement Ombudsman; Office of the National Ombudsman; Regulatory Enforcement Fairness Program; Public Federal Regulatory Enforcement Fairness Hearing; Region V Regulatory Fairness Board

The Small Business Administration Region V Regulatory Fairness Board and the SBA Office of the National Ombudsman will hold a Public Hearing on Thursday, June 10, 2004, at 9:30 a.m. at the Rochester Community and Technical College, Heintz Center, Room 114–116, 1926 College View Road, SE., Rochester, MN 55904, to receive comments and testimony from small business owners, small government entities, and small non-profit organizations concerning regulatory enforcement and compliance actions taken by federal agencies.

Anyone wishing to attend or to make a presentation must contact Michael Lyons in writing or by fax, in order to be put on the agenda. Michael Lyons, Economic Development Specialist, SBA Minnesota District Office, 100 N. 6th Street, Suite 210–C, Minneapolis, MN 55403, phone (612) 370–2343, fax (202) 481–4556, e-mail: *Michael.lyons@sba.gov.*

For more information, see our Web site at *www.sba.gov/ombudsman.*

Dated: May 27, 2004.

Peter Sorum,

Senior Advisor, Office of the National Ombudsman.

[FR Doc. 04–12653 Filed 6–3–04; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 4731]

Bureau of Political-Military Affairs: Directorate of Defense Trade Controls; Notifications to the Congress of Proposed Commercial Export Licenses

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Department of State has forwarded the attached Notifications of Proposed Export Licenses to the Congress on the dates shown on the attachments pursuant to sections 36(c) and 36(d) and in compliance with section 36(f) of the Arms Export Control Act (22 U.S.C. 2776).

EFFECTIVE DATE: As shown on each of the sixteen letters.

FOR FURTHER INFORMATION CONTACT: Mr. Peter J. Berry, Director, Office of Defense Trade Controls Licensing, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, Department of State (202 663–2700).

SUPPLEMENTARY INFORMATION: Section 36(f) of the Arms Export Control Act mandates that notifications to the Congress pursuant to sections 36(c) and 36(d) must be published in the **Federal Register** when they are transmitted to Congress or as soon thereafter as practicable.

Dated: May 26, 2004.

Peter J. Berry,

Director, Office of Defense Trade Controls Licensing, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, Department of State.

Hon. J. Dennis Hastert,
Speaker of the House of Representatives.
March 29, 2004.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles sold commercially in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export to the Government of Australia of MK48ADCAP/CBASS ACP Torpedoes, associated equipment and technical data.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Paul V. Kelly,
Assistant Secretary, Legislative Affairs.

Enclosure: Transmittal No. DDTC 008–04.

Hon. J. Dennis Hastert,
Speaker of the House of Representatives.
March 30, 2004.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $50,000,000 or more.

The transactions contained in the attached certification concern future commercial activities with Russia, Ukraine and Norway related to the launch of commercial satellites from the Pacific Ocean utilizing a modified oil platform beyond the period specified in DTC 015–04; DTC 023–03 dated February 28, 2003, DTC 002–03 dated January 24, 2003; DTC 148–02 dated July 26, 2002; DTC 123–02 dated May 22, 2002; DTC 023–02 dated May 1, 2002; DTC 048–01 dated April 30, 2001; DTC 026–00 dated May 19, 2000; DTC

124–99 dated November 10, 1999; DTC 006–99 dated April 16, 1999; and DTC 016–97 dated July 25, 1997.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Paul V. Kelly,
Assistant Secretary, Legislative Affairs.

Enclosure: Transmittal No. DDTC 018–04.

Hon. J. Dennis Hastert,
Speaker of the House of Representatives.
March 30, 2004.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $50,000,000 or more.

The transactions contained in the attached certification concern future commercial activities with Russia and Kazakhstan related to the Proton Space Launch Vehicle beyond those specified in DTC 016–04 dated March 30, 2004; DTC 022–03 dated February 28, 2003; DTC 001–03 dated January 24, 2003; DTC 147–02 dated July 26, 2002; DTC 182–02 dated June 27, 2002; DTC 124–02 dated May 22, 2002; DTC 022–02 dated May 1, 2002; DTC 038–01 dated April 30, 2001; DTC 034–01 dated March 1, 2001; DTC 014–01 dated March 7, 2000; DTC 098–99 dated August 5, 1999; and DTC 039–98 dated March 19, 1998.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Paul V. Kelly,
Assistant Secretary, Legislative Affairs.

Enclosure: Transmittal No. DDTC 019–04.

Hon. J. Dennis Hastert,
Speaker of the House of Representatives.
March 30, 2004.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification concerns exports of technical data and defense services for cooperation in the co-development of Japan's Galaxy Express (formerly J–1) space launch vehicle program beyond the period specified in DDTC 017–04.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Paul V. Kelly,
Assistant Secretary, Legislative Affairs.

Enclosure: Transmittal No. DDTC 020–04.

Hon. J. Dennis Hastert,
Speaker of the House of Representatives.
April 7, 2004.

Dear Mr. Speaker: Pursuant to Section 36(c) and (d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement for the manufacture of significant military equipment abroad and the export of defense articles or defense services in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of technical data, defense services and defense articles to Canada and Australia to support the manufacture, procurement, assembly, and testing of new components necessary to upgrade Light Armored Vehicle (LAV–25) turrets for end-use in Canada, Australia, New Zealand and the United States.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Paul V. Kelly,
Assistant Secretary, Legislative Affairs.

Enclosure: Transmittal No. DDTC 003–04.

Hon. J. Dennis Hastert,
Speaker of the House of Representatives.
April 7, 2004.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of technical data and defense services to Italy related to the manufacture of parts for T700 and CT7–6 Engines and assembly of the engines for the Italian and Japanese EH–101 Helicopter Programs.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Paul V. Kelly,
Assistant Secretary, Legislative Affairs.

Enclosure: Transmittal No. DDTC 010–04.

Hon. J. Dennis Hastert,
Speaker of the House of Representatives.
April 20, 2004.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of major defense equipment sold commercially under a contract in the amount of $14,000,000 or more.

The transaction contained in the attached certification involves the export to Israel of technical data and defense services to upgrade sixty-two (62) M106A2 self-propelled 107mm Mortars to the M1064A3 configuration.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

James P. Terry,
Acting Assistant Secretary, Legislative Affairs.

Enclosure: Transmittal No. DDTC 001–04.

Hon. J. Dennis Hastert,
Speaker of the House of Representatives.
April 20, 2004.

Dear Mr. Speaker: Pursuant to Section 36(c) and (d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement for the manufacture of significant military equipment abroad and the export of defense articles or defense services sold commercially under a contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of defense services, technical data and defense articles for the manufacture in Japan of the AN/APG–63 (V) 1 Radar System Retrofit Kits.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause

competitive harm to the United States firm concerned.

Sincerely,

James P. Terry,
Acting Assistant Secretary, Legislative Affairs.

Enclosure: Transmittal No. DTC 009–04.

Hon. J. Dennis Hastert,
Speaker of the House of Representatives.
April 21, 2004.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for export of defense articles or defense services sold commercially under a contract in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export of defense services, technical data and defense articles to the Republic of Korea. This agreement supports the manufacture, assembly and repair of fuselages and fuselage components for the AH–64D Apache Helicopter.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

James P. Terry,
Acting Assistant Secretary, Legislative Affairs.

Enclosure: Transmittal No. DTC 011–04.

Hon. J. Dennis Hastert,
Speaker of the House of Representatives.
April 29, 2004.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export of technical data and defense services to South Korea for the manufacture of X1100–5A3 transmissions for the Korean K95 Mobile Howitzer and K1A1 Main Battle Tank for end-use in South Korea, Turkey, Spain, Saudi Arabia and Chile.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Paul V. Kelly,
Assistant Secretary, Legislative Affairs.

Enclosure: Transmittal No. DDTC 007–04.

Hon. J. Dennis Hastert,
Speaker of the House of Representatives.
April 29, 2004.

Dear Mr. Speaker: Pursuant to Section 36(c) and (d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement for the manufacture of significant military equipment abroad and the export of defense articles or defense services sold commercially under a contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of technical data and defense services to the United Kingdom to support the manufacture, test, re-design, re-engineering, marketing, sales and support of marine gas turbine engines.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Paul V. Kelly,
Assistant Secretary, Legislative Affairs.

Enclosure: Transmittal No. DDTC 013–04.

Hon. J. Dennis Hastert,
Speaker of the House of Representatives.
April 29, 2004.

Dear Mr. Speaker: Pursuant to Sections 36(c) and (d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for export of defense articles or defense services sold commercially under a contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of defense services, technical data and defense articles to Japan to support the manufacture and assembly of T53 series gas turbine engines and components.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Paul V. Kelly,
Assistant Secretary, Legislative Affairs.

Enclosure: Transmittal No. DDTC 021–04.

Hon. J. Dennis Hastert,
Speaker of the House of Representatives.
April 29, 2004.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for export of defense articles or defense services sold commercially under a contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of defense services, technical data and defense articles to Canada and the United Kingdom supporting Management Data Terminals for the BOWMAN communications system for ultimate end-use by the United Kingdom Ministry of Defence.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Paul V. Kelly,
Assistant Secretary, Legislative Affairs.

Enclosure: Transmittal No. DDTC 022–04.

Hon. J. Dennis Hastert,
Speaker of the House of Representatives.
April 29, 2004.

Dear Mr. Speaker: Pursuant to Section 36(c) and (d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed amendment to a manufacturing license agreement for the export of defense articles or defense services in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of defense services, technical data and defense articles for the assembly and test, in Japan, of the AN/ALQ–131 Electronic Countermeasures System.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Paul V. Kelly,
Assistant Secretary, Legislative Affairs.

Enclosure: Transmittal No. DDTC 029–04

Hon. J. Dennis Hastert,
Speaker of the House of Representatives.
May 5, 2004.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification concerns the export of technical data and defense services for sale, delivery, and support of fifty-four F100–PW–229 Aircraft Engines in the form of kits to support

the Foreign Military Sale of forty-eight F–16 Fighter Aircraft to Poland for end-use by the Government of Poland.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Paul V. Kelly,

Assistant Secretary, Legislative Affairs.

Enclosure: Transmittal No. DDTC 005–04.

Hon. J. Dennis Hastert,

Speaker of the House of Representatives.

May 5, 2004.

Dear Mr. Speaker: Pursuant to Section 36(c) and (d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for export of defense articles or defense services sold commercially under a contract in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export of defense services, technical data and defense articles to Israel. This agreement supports the manufacture and assembly of various components for the Israeli indigenous anti-ballistic missile weapons—the Arrow Weapons System (AWS)—Arrow Interceptor.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Paul V. Kelly,

Assistant Secretary, Legislative Affairs.

Enclosure:

Transmittal No. DDTC 026–04.

[FR Doc. 04–12699 Filed 6–3–04; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Maritime Security Act of 2003, Subtitle D—National Defense Tank Vessel Construction Assistance

AGENCY: Maritime Administration, DOT.

ACTION: Supplemental notice of information regarding MARAD's request for competitive proposals for construction of new product tank vessels.

SUMMARY: The purpose of this supplemental notice is to advise interested parties to monitor the Maritime Administration's Web site for periodic changes and clarifications related to the Request for Competitive Proposals (RFP) for the construction of up to five new tank vessels. The RFP is available on the Internet at *http://www.fedbizopps.gov* and *http://www.marad.dot.gov* and hard copies of the RFP are available in the Office of the Secretary, Maritime Administration.

FOR FURTHER INFORMATION CONTACT: Gregory V. Sparkman, Office of Insurance and Shipping Analysis, Maritime Administration, Room 8117, 400 Seventh Street, SW., Washington, DC 20590; Telephone: (202) 366–2400; Fax: (202) 366–7901.

SUPPLEMENTARY INFORMATION: This supplemental notice announces that updates and clarifications of the subject RFP will be posted on MARAD's Web site. The Web site has recently been modified to add new information regarding U.S. content requirements, the Capital Construction Fund and technical requirements. Additional technical information is expected to be included on the Web site soon. Periodic monitoring of the Web site is recommended.

Authority: 49 CFR 1.66.

Dated: May 25, 2004.

By Order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 04–12200 Filed 6–3–04; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–6 (Sub-No. 419X)]

The Burlington Northern and Santa Fe Railway Company—Abandonment Exemption—in Griggs and Barnes Counties, ND

The Burlington Northern and Santa Fe Railway Company (BNSF) has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon and discontinue service over a 4.69-mile line of railroad between milepost 22.00 near Walum, and milepost 17.31 near Dazey, in Griggs and Barnes Counties, ND. The line traverses United States Postal Service ZIP Codes 58429 and 58448.

BNSF has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic to be rerouted; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment and discontinuance shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on July 6, 2004, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27©)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29[3] must be filed by June 14, 2004. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by June 24, 2004, with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to BNSF's representative: Michael Smith, Freeborn & Peters, 311 S. Wacker Dr., Suite 3000, Chicago, IL 60606–6677.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

BNSF has filed an environmental report which addresses the effects, if any, of the abandonment and discontinuance on the environment and historic resources. SEA will issue an

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each offer of financial assistance must be accompanied by the filing fee, which currently is set at $1,100. *See* 49 CFR 1002.2(f)(25).

[3] Each trail use request must be accompanied by the filing fee, which is set at $200.00. *See* 49 CFR 1002.2(f)(27)

environmental assessment (EA) by June 11, 2004. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), BNSF shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned its line. If consummation has not been effected by BNSF's filing of a notice of consummation by June 4, 2005, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *www.stb.dot.gov*.

Decided: May 25, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–12246 Filed 6–3–04; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–6 (Sub–No. 420X)]

The Burlington Northern and Santa Fe Railway Company—Abandonment Exemption—in Mercer County, ND

The Burlington Northern and Santa Fe Railway Company (BNSF) has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon and discontinue service over a 3.36-mile line of railroad between milepost 77.14 near Antelope Valley Station, and milepost 80.50, near Zap in Mercer County, ND. The line traverses United States Postal Service Zip Codes 58580 and 58523.

BNSF has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic to be rerouted; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication) and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on July 6, 2004, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by June 14, 2004. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by June 24, 2004, with: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.[3]

A copy of any petition filed with the Board should be sent to the applicant's representative: Michael Smith, Freeborn & Peters, 311 S. Wacker Dr., Suite 3000, Chicago, IL 60606–6677.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

BNSF has filed an environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. SEA will issue an environmental assessment (EA) by June 11, 2004. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), BNSF shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by BNSF's filing of a notice of consummation by June 4, 2005, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: May 26, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–12423 Filed 6–3–04; 8:45 am]

BILLING CODE 4915–01–P

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each OFA must be accompanied by the filing fee, which currently is set at $1,100. *See* 49 CFR 1102.2(f)(25).

[3] Each trail use request must be accompanied by the filing fee, which is set at $200. *See* 49 CFR 1002.2(f)(27).

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Ad Hoc Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Ad Hoc Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel (TAP) will be discussing issues on IRS Customer Service.

DATES: The meeting will be held Tuesday, July 6, 2004.

FOR FURTHER INFORMATION CONTACT: Judi Nicholas at 1–888–912–1227, or (206) 220–6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Ad Hoc Committee of the Taxpayer Advocacy

Panel will be held Tuesday, July 6th 2004 from 8 a.m. Pacific Time to 9 a.m. Pacific Time via a telephone conference call. The public is invited to make oral comments. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or (206) 220–6096, or write to Judi Nicholas, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Judi Nicholas. Ms. Nicholas can be reached at 1–888–912–1227 or (206) 220–6096.

The agenda will include the following: Various IRS issues.

Dated: June 1, 2004.

Bernard Coston,

Director, Taxpayer Advocacy Panel.

[FR Doc. 04–12715 Filed 6–3–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Enhanced-Use Lease of Property at the Department of Veterans Affairs Medical Center, Minneapolis, MN

AGENCY: Department of Veterans Affairs.

ACTION: Notice of intent to designate.

SUMMARY: The Secretary of the Department of Veterans Affairs (VA) intends to designate 3.58 acres of land at the Department of Veterans Affairs Medical Center in Minneapolis, Minnesota, to be leased under an enhanced-use lease. The Department intends to enter into a 60-year lease of real property with a selected lessee/developer, who would be responsible for all costs and risks associated with the design, construction, renovation, operation, maintenance, and provision of services to manage an affordable housing facility consisting of 166 units for veterans and non-veterans.

FOR FURTHER INFORMATION CONTACT: Vanessa Chambers, Capital Asset Management and Planning Service (182C), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 565–6554.

SUPPLEMENTARY INFORMATION: 38 U.S.C. 8161, *et seq.* specifically provides that the Secretary may enter into an enhanced-use lease if he determines that at least part of the use of the property under the lease will be to provide appropriate space for an activity contributing to the mission of the Department; the lease will not be inconsistent with and will not adversely affect the mission of the Department; and the lease will enhance the property or result in improved services to veterans. This project meets these requirements.

Approved: May 21, 2004.

Anthony J. Principi,

Secretary of Veterans Affairs.

[FR Doc. 04–12626 Filed 6–3–04; 8:45 am]

BILLING CODE 8320–01–P

Corrections

Federal Register

Vol. 69, No. 108

Friday, June 4, 2004

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2004–CE–05–AD]

RIN 2120–AA64

Airworthiness Directives; Air Tractor, Inc. Models AT–401, AT–401B, AT–402, AT–402A, AT–402B, AT–501, AT–502, AT–502A, AT–502B, AT–503A, AT–602, AT–802, and AT–802A Airplanes

Correction

In proposed rule document 04–8056 beginning on page 18848 in the issue of April 9, 2004, make the following corrections:

§39.13 [Corrected]

1. On page 18850, in §39.13, in paragraph (e), in the table, under the heading ''Procedures'' in the second entry, in the second line, ''#218A'' should read ''#195B''.

2. On the same page, in the same section, in the same paragraph, in the same table, under the same heading, in the fourth entry, in the second to last line, ''#218B, dated'' should read ''#213B, revised''.

3. On page 18851, in the same section, in the same paragraph, in the same table, under the same heading, in the seventh entry, in the second to last line, ''dated'' should read ''revised''.

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21 CFR Parts 1, 10, and 16

Administrative Detention of Food for Human or Animal Consumption Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 1, 10, and 16

[Docket No. 2002N–0275]

RIN 0910–AC38

Administrative Detention of Food for Human or Animal Consumption Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing a final regulation that provides procedures for the detention of an article of food, if an officer or qualified employee of FDA has credible evidence or information indicating that such article presents a threat of serious adverse health consequences or death to humans or animals (''administrative detention''). The final rule implements the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act), which authorizes the use of administrative detention and requires regulations establishing procedures for instituting on an expedited basis certain enforcement actions against perishable food subject to a detention order.

DATES: This rule is effective July 6, 2004.

FOR FURTHER INFORMATION CONTACT: Kelli Giannattasio, Center for Food Safety and Applied Nutrition (HFS–007), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1432.

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I. Background and Legal Authority

On May 9, 2003 (68 FR 25242), FDA issued a proposed rule providing procedures for the detention of an article of food, if an officer or qualified employee of FDA has credible evidence or information indicating that such article presents a threat of serious adverse health consequences or death to humans or animals. The events of September 11, 2001, had highlighted the need to enhance the security of the United States' food supply. Congress responded by enacting the Bioterrorism Act (Public Law 107–188), which was signed into law on June 12, 2002. Section 303 of the Bioterrorism Act amends section 304 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 334) by adding paragraph (h) to provide that an officer or qualified employee of FDA may order the detention of any article of food that is found during an inspection, examination, or investigation under the act if the officer of qualified employee has credible evidence or information indicating that the article of food presents a threat of serious adverse health consequences or death to humans or animals. This provision also requires the Secretary of Health and Human Services (the Secretary) to provide by regulation procedures for instituting seizure or injunction actions against perishable food subject to a detention order on an expedited basis. Section 303 of the Bioterrorism Act also amends the FD&C Act by adding a new prohibited act as paragraph (bb) to section 301 of the FD&C Act (21 U.S.C. 331).

The major components of section 303 of the Bioterrorism Act are as follows:

- *Criteria used to trigger an administrative detention:* Amends section 304 of the FD&C Act to authorize an officer or qualified employee of FDA to order the detention of any article of food that is found during an inspection, examination, or investigation under the FD&C Act, if the officer or qualified employee has credible evidence or information indicating such article presents a threat of serious adverse health consequences or death to humans or animals.
- *Approval required:* The Secretary, or an official designated by the Secretary, must approve the detention order. An ''official designated by the Secretary'' means the District Director of the district where the detained article of food is located, or an FDA official senior to such director.
- *Period of detention:* The detention period will be for a reasonable period, not to exceed 20 calendar days, unless a greater period, not to exceed 30 calendar days, is necessary to enable the Secretary to institute a seizure or injunction action.
- *Required rulemaking:* The Secretary must, by regulation, provide for procedures for instituting certain enforcement actions on an expedited basis with respect to perishable food subject to a detention order.
- *Security of detained article of food:* The detention order may require that the detained article of food be labeled or marked as detained. The order must require the removal of the detained article of food to a secure facility, as appropriate.
- *Appeal procedure:* Any person who would be entitled to claim the detained article of food if such article were seized may appeal the detention order to the Secretary. Within 5 calendar days after

such appeal is filed, after providing opportunity for an informal hearing, the Secretary must confirm or terminate the detention order. The appeal process terminates if the Secretary institutes an action for seizure or injunction regarding the article of food involved. Confirmation of a detention order is considered a final agency action.

• *Prohibited act:* Amends section 301 of the FD&C Act making it a prohibited act to transfer a detained article of food in violation of a detention order, or to remove or alter any mark or label required by the detention order to identify the article of food as detained.

• Section 303 of the Bioterrorism Act also includes a provision authorizing temporary holds at ports of entry that will not be addressed in this final regulation. The temporary hold provision authorizes FDA to ask the Secretary of the Treasury to institute a temporary hold for up to 24 hours on an article of food offered for import at a U.S. port of entry if FDA has credible evidence or information indicating that an article of food presents a threat of serious adverse health consequences or death to humans or animals, and FDA is unable immediately to inspect, examine, or investigate such article. FDA has received comments on the temporary hold provision in the public docket (Docket No. 2002N–0275). FDA plans to consider these comments as we develop our approach on how best to implement this provision of the Bioterrorism Act.

Under the Homeland Security Act of 2002 (Public Law 107–296), the responsibilities and functions of the Secretary of the Treasury for all relevant Customs authorities have been transferred to the Secretary of Homeland Security, who has in turn delegated them to the Commissioner of the Bureau of Customs and Border Protection (CBP). Thus, wherever section 303 of the Bioterrorism Act refers to the Secretary of Treasury, we will refer to the Secretary of Homeland Security.

In addition to amending title 21 of the Code of Federal Regulations (21 CFR) by establishing a new subpart to part 1 (21 CFR part 1) consisting of subpart K entitled, ''Administrative Detention of Food for Human or Animal Consumption,'' this final rule also makes conforming amendments to part 16 (21 CFR part 16) entitled ''Regulatory Hearing Before the Food and Drug Administration'' and part 10 (21 CFR part 10) entitled ''Administrative Practices and Procedures.''

Although the statutory requirements in section 303 of the Bioterrorism Act are self-executing and are currently in effect, FDA is issuing this regulation to further refine aspects of the administrative detention requirements. Section 303 of the Bioterrorism Act requires FDA only to issue regulations establishing procedures for instituting on an expedited basis certain enforcement actions against perishable food subject to a detention order; however, FDA also is describing in this regulation the procedures for how we will detain both perishable and nonperishable articles of food and the process for appealing a detention order. FDA established requirements for the process for appealing a detention order in this final rule to ensure that we meet section 303's timing requirements and to define certain terms used in the Bioterrorism Act (*e.g.*, perishable food).

This final rule is not related to, and does not implement, section 801(a) of the FD&C Act (21 U.S.C. 381), even though it uses the term ''detention.'' This final rule implements section 303 of the Bioterrorism Act, which amends the seizure provision at section 304 of the FD&C Act by adding paragraph (h) to that section. This amendment grants FDA the authority to detain (*i.e.*, prevent the further movement of) any article of food that is found during an inspection, examination, or investigation if FDA has credible evidence or information indicating that such article presents a threat of serious adverse health consequences or death to humans or animals.

Some of the comments that we received continue to reflect some confusion of our authority to detain food administratively under section 304(h) of the FD&C Act (as added by the Bioterrorism Act) with our authority to refuse admission of imported food under section 801(a) of that act, despite our explanation of this issue in the proposed rule. (See 68 FR 25242.) The following discussion provides additional explanation of FDA's authority under each of these provisions so as to make clear that our authority to detain food administratively under section 304(h) of the FD&C Act is separate and distinct from our authority to refuse admission of imported food under section 801(a) of the FD&C Act.

Section 801 of the FD&C Act sets out standards and procedures for FDA review of imports under its jurisdiction. Generally, when an FDA-regulated product is imported, customs brokers submit entry information to CBP on behalf of the importers of record. CBP then provides entry information to FDA to enable admissibility decisions to be made. If FDA determines that refusal under section 801(a) FD&C Act appears appropriate, FDA, as set out in its regulations, gives written notice to the owner or consignee. (See § 1.90(a).) In guidance dating back many years, FDA refers to this written notice as the notice of detention and hearing.

FDA's evaluation of imported foods under section 801(a) of the FD&C Act largely focuses on whether the article of food appears to have been safely produced, packed, and held; contains no contaminants or illegal additives or residues; and is properly labeled. Section 801(a) of the FD&C Act provides that an article of food is subject to refusal of admission if it ''appears, from physical examination or otherwise'': (1) To have been manufactured, processed, or packed under insanitary conditions; (2) to be forbidden or restricted in sale in the country in which it was produced or from which it was exported; or (3) to be adulterated or misbranded. The food adulteration and misbranding provisions (sections 402 and 403 of the FD&C Act (21 U.S.C. 342 and 21 U.S.C. 343)) set out most of the FD&C Act's requirements for foods.

In section 304(h) of the FD&C Act, Congress gave FDA the authority to detain food administratively where we have credible evidence or information that the article of food presents a threat of serious adverse health consequences or death to humans or animals so that we can bring such food under FDA control. Historically, FDA has had the authority to seize misbranded or adulterated food in domestic commerce; however, adulterated food could enter commerce and put consumers at risk during the time that it takes to file a seizure action. In some instances, FDA has been able to partner with State authorities to have such food embargoed by the State where the food is located so that it is under their control while the seizure action is being prepared and filed, until the court issues the warrant, and until the U.S. marshal can seize the food. However, this process is not always possible.

We do not, at this time, foresee frequently using administrative detention under section 304(h) of the FD&C Act to control the movement of imported food subject to section 801 of the FD&C Act. When FDA determines it is appropriate to bring imported food under FDA control using the authority under section 304(h) of the FD&C Act, the standard for administrative detention will be the same as it is for other products, *i.e.*, we must have credible evidence or information that the article of food presents a threat of serious adverse health consequences or death to humans or animals.

This final rule implements the administrative detention requirements in section 303 of the Bioterrorism Act.

This final rule, published today, as well as the interim final rules that FDA and CBP published on October 10, 2003, to implement section 307, prior notice of imported food shipments (68 FR 58974), and section 305, registration of food facilities (68 FR 58893), of the Bioterrorism Act, along with the final rule implementing section 306 of the Bioterrorism Act (maintenance and inspection of records for food), which will be published in the **Federal Register** in the near future, will help FDA act quickly when responding to a threatened or actual bioterrorist attack on the U.S. food supply or to other food-related emergencies. Administrative detention will provide FDA with an added measure to help ensure the safety of the nation's food supply. In establishing and implementing this final rule, FDA believes it has complied fully with the United States' international trade obligations, including the applicable World Trade Organization (WTO) agreements and the North American Free Trade Agreement (NAFTA).

In addition to section 303 of the Bioterrorism Act, which amends the FD&C Act as described previously in this document, FDA is relying on section 701(a) of the FD&C Act (21 U.S.C. 371(a)) in issuing this final rule. Section 701(a) authorizes the agency to issue regulations for the efficient enforcement of the FD&C Act.

II. Highlights of the Final Rule

The key features of this final rule are as follows:

- An officer or qualified employee of FDA may order the detention of food for up to 30 calendar days if FDA has credible evidence or information that the food presents a threat of serious adverse health consequences or death to humans or animals.
- FDA's District Director in the district in which the article of food is located, or an FDA official senior to such director, must approve a detention order.
- FDA may require that the detained article of food be labeled or marked as detained with official FDA tags or labels. FDA's tag or label will include, among other information, a statement that the article of food must not be consumed, moved, altered, or tampered with in any manner for the period shown, without the written permission of an authorized FDA representative.
- A violation of a detention order or the removal or alteration of the tag or label is a prohibited act.
- FDA will state in the detention order the location and any applicable conditions under which the food is to be held.
- If FDA determines that removal to a secure facility is appropriate, the article of food must be removed to a secure facility. An article of food moved to a secure facility remains under detention before, during, and after such movement.
- FDA may approve a request for modification of a detention order to permit movement of a detained article of food for purposes of destruction, movement to a secure facility, preservation of the detained article of food, or any other purpose that FDA believes is appropriate. In any of these circumstances, an article of food may be transferred but remains under detention before, during, and after the transfer.
- Any transfer of a detained article of food in violation of a detention order is a prohibited act.
- Any person who would be entitled to be a claimant for the article of food, if seized, may appeal a detention order and, as part of that appeals process, may request an informal hearing. If a hearing is granted, an FDA Regional Food and Drug Director (RFDD) or another official senior to an FDA District Director will serve as the presiding officer of the hearing.
- This rule includes appeal and hearing timeframes for both perishable and nonperishable detained articles of food.
- *Perishable food:*
- An appeal must be filed within 2 calendar days of receipt of the detention order.
- If a hearing is requested in the appeal and FDA grants the request, the hearing will be held within 2 calendar days after the date the appeal is filed.
- FDA's decision on appeal will be issued 5 calendar days after the appeal is filed.
- *Nonperishable food:*
- A notice of intent to file an appeal and to request a hearing must be filed within 4 calendar days of receipt of the detention order.
- An appeal must be filed within 10 calendar days of receipt of the detention order.
- If a hearing is requested in the notice of intent and the appeal and FDA grants the request, the hearing will be held within 2 calendar days after the appeal is filed.
- FDA's decision on appeal will be issued 5 calendar days after the appeal is filed.
- The expedited procedures for initiating certain enforcement actions with respect to perishable foods require FDA to submit a seizure recommendation to the Department of Justice (DOJ) within 4 calendar days after the detention order is issued, unless extenuating circumstances exist.
- Confirmation of a detention order by FDA's presiding officer is considered final agency action.

In response to comments that were received, FDA has made two changes to the proposed rule. First, the required information in the detention order did not include the name of the authorized FDA representative who approved the detention order. This is required information in this final rule (§ 1.393(b)(14)). Second, the proposed rule stated that, if a hearing is requested in the appeal, and FDA grants the request, the hearing will be held within 2 calendar days after the date the appeal has been filed for perishable food, and within 3 calendar days after the date the appeal has been filed for nonperishable food (§ 1.402(d)). This section III.I.2 of this final rule is revised to state that the hearing will be held within 2 calendar days after the date the appeal is filed for both perishable and nonperishable foods. In addition, FDA has also made clarifying revisions to the procedures that apply to an informal hearing on an administrative detention. Revised. §§ 1.403(h) and 1.405(a) provide that the presiding officer must issue a written report of the hearing, including a proposed decision with a statement of reasons. The hearing participant may review this report and suggest changes within 4 hours of the issuance of the report. The presiding officer will then issue the final agency decision. In addition, FDA has added § 1.403(i) and (k) to clarify the components of the administrative record and the record of the administrative proceeding. We have also included clarifying comments in the preamble to this final rule.

We have made two other changes to the proposed rule in order to avoid confusion with CBP terminology and requirements. First, the proposed rule used the term ''limited conditional release'' to refer to the process whereby FDA grants a request to modify a detention order to permit movement of a detained article of food. The term ''limited conditional release'' has a different meaning as used by CBP. In order to avoid confusion, we have therefore changed applicable sections of the codified in this final rule to eliminate the use of this term, and instead use the term ''request for modification of a detention order.''

Second, § 1.381(a) in the proposed rule prohibited delivery of a detained article of food ''to another entity under the execution of a bond.'' This section could have been misinterpreted to prohibit delivery of an article to a

storage facility just because it is under a customs bond (as opposed to a penal bond), thereby potentially slowing the flow of trade. In the final rule, § 1.381(a) has been revised to make clear that the existence of an appropriate customs bond required by Customs law and regulation does not prohibit movement of a detained article at FDA's direction.

As noted in the proposed rule, FDA intends to define ''serious adverse health consequences'' in a separate rulemaking.

III. Comments on the Final Regulation

FDA received approximately 100 submissions in response to the proposed rule, and each of them raised one or more comments. To make it easier to identify comments and FDA's responses to the comments, the word ''Comment'' will appear in parentheses before the description of the comment, and the word ''Response'' will appear in parentheses before FDA's response. FDA also has numbered the sets of comments to make it easier to identify a particular issue. The number assigned to each set of comments is purely for organizational purposes and does not signify the comment's value or importance or the order in which it was submitted to FDA's docket.

A. General Comments

(Comment 1) Many comments state that administrative detention should be limited to use only when there is intentional adulteration (bioterrorism) against the food supply. One comment indicates that administrative detentions should be imposed only when there are no other means to prevent the product from moving in commerce, *e.g.*, when a responsible company will not recall or hold the product. Some comments argue specifically that we should continue to request Class I recalls in situations involving unintentional adulteration. One comment argues that we should not use administrative detention to deal with imported food containing undeclared allergens.

(Response) The Bioterrorism Act gives FDA the authority and flexibility to detain administratively articles of food for which FDA has credible evidence or information indicating that such article presents a threat of serious adverse health consequences or death to humans or animals. The Bioterrorism Act does not limit FDA's administrative detention authority to only those situations involving intentional adulteration. Unintentional adulteration can pose the same threats of serious adverse health consequences or death. Therefore, the agency has not changed the final rule as requested by comment 1 in section III A. of this document.

In response to the comment that FDA should only employ an administrative detention when voluntary cooperation is not available, FDA believes that a detention may not be necessary if a firm takes prompt and complete voluntary action, *e.g.*, in a Class I recall situation. However, FDA may nonetheless choose to detain administratively an article of food that has been recalled. Circumstances under which FDA may choose to do so include, but are not limited to, when there is concern that the food may reenter commerce. Thus, FDA will not limit its authority to detain an article of food that presents a threat of serious adverse health consequences or death to humans or animals.

(Comment 2) FDA sought comments on whether its conclusion that it has authority to detain food in intrastate commerce administratively is correct, and if so, whether the agency should use that authority. A few comments agree with FDA's conclusion that it has authority to impose an administrative detention on articles of food that are only in intrastate commerce. One comment is concerned about the broader jurisdictional implications of FDA not meeting the interstate commerce criterion. Another comment argues that FDA's conclusion that it has authority to detain food administratively that does not enter interstate commerce is inconsistent with limitations imposed by the commerce clause of the U.S. Constitution. In response to FDA's assertion that Congress, in the Bioterrorism Act, gave the agency authority to detain food administratively in intrastate commerce, this comment states that the commerce clause generally restricts Congress' power to regulate purely intrastate commerce, and that Congress cannot delegate power to FDA that it does not possess. The comment argues that FDA should have assumed that Congress did not intend to violate the Constitution, and that FDA should amend the administrative detention provisions accordingly.

Another comment argues that the agency's use of administrative detention authority on articles of food that are engaged only in intrastate commerce challenges long established federal and state jurisdictional boundaries. This comment further states that, under these new regulations, FDA is moving into areas delegated to state control under the enabling statute and the 10th Amendment to the U.S. Constitution, and that by proposing this regulatory scheme, the agency can avoid and circumvent the very safeguards established to provide against rampant unauthorized expansion of federal authority.

(Response) In the preamble to the proposed rule, FDA tentatively concluded that all food would be subject to administrative detention under section 303 of the Bioterrorism Act if the agency has credible evidence or information that the food presents a threat of serious adverse health consequences or death to humans or animals, whether or not the food enters interstate commerce. FDA is mindful that our interpretation of the Bioterrorism Act should not cast doubt on the constitutionality of the statute. (See *Solid Waste Agency of Northern Cook County* v. *U.S.,* 531 U.S. 159 (2001).) The agency has considered the relevant provisions of the Bioterrorism Act, the comments submitted on this issue, FDA's responsibilities in implementing the Bioterrorism Act, and the law interpreting the commerce clause of the Constitution (Art. I, section 8). Based on these considerations, FDA does not change its conclusion that it has the authority to detain food administratively that does not enter interstate commerce.

Section 304(h) of the FD&C Act, as added by section 303 of the Bioterrorism Act, provides that:

> An officer or qualified employee of the Food and Drug Administration may order the detention, in accordance with this subsection, of any article of food that is found during an inspection, examination, or investigation under this Act conducted by such officer or qualified employee, if the officer or qualified employee has credible evidence or information indicating that such article presents a threat of serious adverse health consequences or death to humans or animals.

This language does not include a limitation similar to that in section 304(g) of the FD&C Act providing for administrative detentions of devices during inspections conducted under section 704 of that act (21 U.S.C. 374), a provision that has an interstate commerce component. In addition, the prohibited act related to administrative detention of food, section 301(bb) of the FD&C Act, unlike some other prohibited acts in section 301, does not include an interstate commerce component. Accordingly, FDA concludes that the Bioterrorism Act does not limit administrative detention only to those foods that enter interstate commerce.

Congress's constitutional power to legislate under the commerce clause is very broad. However, such power is not without limits, see, *e.g, United States* v. *Lopez,* 514 U.S. 549, 567 (1995); *U.S.* v.

Morrison, 529 U.S. 598, 618 (2000), and these limits have been construed in light of relevant and enduring precedents. In particular, in *Lopez, supra,* the Supreme Court acknowledged the continuing vitality of *Wickard* v. *Filburn,* 317 U.S. 111 (1942), noting that, ''although Filburn's own contribution to the demand for wheat may have been trivial by itself, that was not 'enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.' '' 514 U.S. at 556. This principle applies to the administrative detention provision of the Bioterrorism Act. Administrative detention prevents the movement of food where there is credible evidence or information that the food presents a threat of serious adverse health consequences or death. Even if that food is so-called ''intrastate'' food, the collective impact of that food on interstate commerce is such that FDA believes Congress acted within its power under the commerce clause when it enacted legislation subjecting that food to administrative detention.

FDA's conclusion is also consistent with section 709 of the FD&C Act, which states that, in any action to enforce the FD&C Act's requirements respecting foods, drugs, devices, and cosmetics, any necessary connection with interstate commerce is presumed. Likewise, this outcome is consistent with Congress' goal in enacting the Bioterrorism Act because the potential harm from bioterrorist attacks or other food emergencies can be great, whether or not the food moves from one state to another. The usefulness of the administrative detention authority also can be significant in food emergencies where interstate shipment has not occurred. As a practical matter, FDA believes that this decision should have little if any impact on whether a given food is subject to administrative detention because virtually all food manufactured, processed, packed, transported, distributed, received, held, or imported, moves, or is considered to move, in interstate commerce. Accordingly, FDA is retaining its conclusion that it has the authority to detain any food administratively when the agency has credible evidence or information that the food presents a threat of serious adverse health consequences or death to humans or animals, regardless of whether that food enters interstate commerce.

(Comment 3) A few comments state that FDA should make clear that the detention of cargo always should be managed so as to minimize delay or interference with the orderly movement of an oceangoing vessel or other conveyance. They note that this clarification will be consistent with the intent of the Bioterrorism Act and FDA's relationship with CBP. These comments state that the Bioterrorism Act grants FDA limited detention authority, which should not be interpreted as expanding the agency's authority to inspect and detain imported food on a vessel at a port of entry when this authority belongs, in the first instance, to CBP. These comments note FDA's acknowledgment in our proposal that it intends, primarily, to continue to regulate imported food in conjunction with CBP and under section 801(a) of the FD&C Act. They also note that the provision in section 303(c) of the Bioterrorism Act, which allows an officer of qualified employee of FDA to ''* * * request the Secretary of Treasury to hold the food at the port of entry for a reasonable period of time, not to exceed 24 hours, for the purpose of enabling the Secretary to inspect, examine, or investigate the article as appropriate'' further confirms that the authority to detain cargo on board a vessel remains primarily with the CBP service and not FDA.

(Response) As stated in the background section I. of this rule, because of the authorities available to FDA and CBP to control the movement of imported food under section 801(a) of the FD&C Act and various provisions of title 19 of the U.S. Code, FDA does not foresee frequently using administrative detention under section 303 of the Bioterrorism Act to control the movement of imported food subject to those authorities. However, it is within FDA's authority to detain food under section 303 of the Bioterrorism Act that has been offered for import into the United States upon credible evidence or information that the article of food presents a threat of serious adverse health consequences or death to humans or animals. Consequently, FDA may detain imported food cargo on a conveyance under section 303 of the Bioterrorism Act. If FDA detains imported articles of food on a conveyance, we will consult with CBP to minimize the disruption of the conveyance movement in trade.

(Comment 4) One comment indicates that most tank truckloads of food are sealed at all openings and that these seals will be broken by FDA inspectors who investigate a suspected problem load. They state that, in the bulk food trucking industry, ''a broken seal equals a rejected load.'' The comment requests that FDA develop a process whereby an FDA representative who breaks a seal to gain access to a load that is found not to present a problem would then reseal the load with an FDA seal and so indicate it on an official FDA document. While not required to, a receiver may be more inclined to accept the load.

(Response) FDA agrees in part with this comment, but is not sure what is meant by an official document upon resealing. Under current practice, which will be continued after the effective date of this rule, whenever FDA reseals a conveyance (*e.g.*, a truckload of goods) after an FDA investigator has broken the seal to examine the goods, the FDA investigator reseals the conveyance with an official FDA metal seal. An FDA document does not accompany the metal seal because the FDA seal is the official indication that FDA has opened and resealed the conveyance. Our internal practice is to record the number of the seal in the investigator's official notes.

(Comment 5) A couple of comments suggest that FDA should avoid implementing a ''one size fits all'' rule for transportation providers to accommodate the operational differences within the transportation industry. These comments suggest that, instead, FDA should examine the operational capabilities and realities of the differing transport modes to formulate mode-specific rules, as is currently being done by CBP for the Trade Act of 2002 (Trade Act). These comments further suggest that the agency work closely with CBP to ensure that any rules for importation and exportation of food do not conflict with CBP requirements. The comments suggest that FDA work with CBP to take advantage of the cross-border supply chain security program already in place, to avoid burdensome duplication of effort.

(Response) FDA does not agree that it is necessary to adopt different administrative detention requirements for different modes of transport. The Trade Act deals with advance notice of items arriving in the United States, not with detention of potentially unsafe food to ensure it does not move into distribution pending the filing of a court action. Congress specifically directed CBP to consider different advance notice timeframes for items arriving on different modes of transport (*e.g.*, truck, air, vessel, rail). This Congressional directive did not extend to actions taken by FDA to implement section 303 of the Bioterrorism Act. In the implementation of section 303, different transport modes are irrelevant because food subject to administrative detention will either be detained in place or detained by offloading it from the transport mode

and transferring it to another facility. This is true regardless of whether the mode of transport is truck, air, vessel, or rail. FDA will continue to work with CBP to coordinate actions at the border.

(Comment 6) One comment states that bulk transportation of food products in tank trailers and dry bulk trailers is significantly different from packaged or prepared food transportation. This comment urges FDA to recognize these differences either in the language of the regulation, or by a separate section strictly dealing with bulk transportation.

(Response) Section 1.393(b)(8) states that FDA must include in the detention order any applicable conditions of transportation of the detained article of food. FDA will take into consideration the mode of transportation being used for the detained product, and the form in which the article of food is being transported, *e.g.*, packaged or dry bulk, when setting forth these conditions.

(Comment 7) With respect to detained shipments of imported food, one comment believes that FDA should work with CBP to immediately control these foods, and to program CBP's Automatic Commercial System (ACS) and Automated Broker Interface (ABI) to not issue a CBP release for any such shipment.

(Response) When imported food at the border is found to warrant administrative detention under section 304(h) of the FD&C Act, FDA will continue to work with CBP as the agency currently does with respect to section 801(a) of the FD&C Act. FDA will issue a detention order under §§ 1.392 and 1.393, which will specify the terms of the detention. Under § 1.393(b)(9), the order will include a statement that ''the article of food is not to be consumed, moved, altered, or tampered with in any manner during the detention period, unless the detention order is first modified under § 1.381.'' Accordingly, FDA does not believe it is necessary to communicate detentions through ACS or ABI.

(Comment 8) One comment is concerned about where imported food will be detained. The comment describes FDA's current procedures of only detaining imported food at the port where the consumption entry is filed with CBP, which may not be the port of arrival. Currently, imported food is detained at the port where the consumption entry is filed after FDA receives the declaration and the Operational and Administrative System Import Support declaration is made. The comment wants this procedure to continue unchanged.

(Response) In this comment, the person is describing FDA's current procedures for refusing admission under section 801(a) of the FD&C Act. In the event that imported food is detained administratively under section 303 of the Bioterrorism Act, the product would be detained as soon as FDA had credible evidence or information that the food product posed a threat of serious adverse health consequences or death. This could presumably occur while the product was still at the port of entry where the goods arrived in the United States. Thus, it is conceivable that FDA could administratively detain a food product at the port of entry where arrival took place, the port of destination, or any location in between. This is consistent with the purpose of administrative detention, which is to hold in place, and protect against any movement that could lead to further distribution of, the food that poses the threat of serious adverse health consequences or death to humans or animals. Under § 1.393(b)(7), the detention order will specify the address and location where the article of food is to be detained and the appropriate storage conditions.

(Comment 9) One comment suggests that their written comments can at best only highlight some of the issues and implications raised by FDA's proposal. The comment further states that the best way to address these subjects is through a working group that brings together members of the trading community with officials from FDA and CBP. If a meeting is not possible, the comment requests to schedule a meeting at FDA's earliest convenience to further discuss the matter.

(Response) FDA conducted extensive outreach on the proposed administrative detention rule, including attending international and domestic meetings to ensure that affected parties were aware of the Bioterrorism Act administrative detention requirements and understood the proposed requirements so that they could provide meaningful comments. On May 7, 2003, FDA held a public meeting (via satellite downlink) to discuss both the administrative detention and recordkeeping proposed rules. (See 68 FR 16998, April 8, 2003 or *http://www.accessdata.fda.gov/scripts/oc/ohrms/advdisplay.cfm*.) The live broadcast was available to participants in North America, Central America, and South America, and the Caribbean. The meeting was later rebroadcast to Europe, Southern Africa, Asia, and the Pacific. FDA also has posted transcripts of the broadcast in English, French, and Spanish (the three official WTO languages) on the agency's Web site.

(Comment 10) One comment is concerned that pet products will be administratively detained due to unwarranted association with countries or geographic areas that may face animal health or food safety emergencies. Another comment questions whether FDA's administrative detention authority applies to transit shipments in the United States, *i.e.*, goods in transit through the United States that are not declared for U.S. consumption. Another comment asks what relationship or obligation has been established between the Bioterrorism Act and hazard analysis and critical control points (HACCP) and good manufacturing practices (GMPs).

(Response) FDA can detain an article of food administratively only if FDA has credible evidence or information indicating that such article presents a threat of serious adverse health consequences or death to humans or animals. That is the standard that must be met for administrative detention of all food, including pet food. FDA also has authority to detain administratively any food in the United States that meets the standard for administrative detention, including transit shipments of food. Finally, it is not clear what is meant by the terms ''relationship'' and ''obligation'' with respect to the Bioterrorism Act and HACCP and GMPs. FDA has authority to detain food administratively when that food meets the standard for administrative detention, regardless of how the food comes to meet that standard, *e.g.*, by failure to follow GMPs, as the result of an act of bioterrorism, etc. FDA's decision to employ administrative detention or other applicable authorities under the FD&C Act will be made on a case-by-case basis depending on the facts of each particular case.

(Comment 11) One comment asks if FDA is suggesting that carriers, warehouses and others in the supply chain process must adhere to specific security standards, and if so, suggests that such standards be clearly identified.

(Response) This final rule does not establish general requirements or guidance relating to specific security standards or practices for carriers, warehouses and others in the supply chain. However, FDA recently published several guidance documents concerning preventative food safety measures that individual firms may wish to consider as they develop their own security measures. FDA's guidance documents can be found on the agency's Web site. (See *http://www.cfsan.fda.gov/~dms/fsterr.html*.) If FDA does issue a detention order, the order would

contain the address and location where the article of food is to be detained, and the appropriate storage conditions.

(Comment 12) One comment indicates that if an officer detains a product in temporary hold for 24 hours, then the total time invested in the appeal and hearing process will exceed the timeframe for perishable foods. This comment asks FDA to specify 7 days for the detention process from the formal detention until the final resolution or termination based on the definition for perishable food, which is that the quality of the product is adversely affected after 7 days of storage. The comment states that a product that has been under a temporary hold and detained for 7 days will exceed the useful time of a perishable food.

Another comment states that FDA must take into account the 24-hour period of the temporary hold in the detention time of 30 days. Another comment states that they do not challenge the right of FDA to inspect food products at the border, but that, in their view, the 24 hour temporary hold is an unreasonable time to force a truck and driver to wait for FDA to conduct an inspection and issue a decision. This comment indicates that the proposed recordkeeping rule will require companies to turn over records to FDA within 4 hours during normal business hours, and 8 hours on evenings and weekends, and suggests that, if FDA is willing to impose such short timeframes on industry, then it should also be required to adhere to them in the conduct of its own operations.

Another comment suggests that the guidance on temporary holds should be made available as soon as possible because there is no explanation about why FDA must ask specifically the ''Secretary of Treasury'' to institute the temporary hold. This comment states that it is not clear if the alternative exists for the ''Secretary of Treasury'' to designate or to enable someone with proper skills to replace him when he is not available. A few comments state that the proposed provision for the temporary holding of imports for 24 hours is open to abuse. They indicate that not only is there no comparable provision for domestic products, but there is a real risk that the provision could amount to a ''holding bay'' for import inspections while FDA resources are used to deal with domestic alerts elsewhere.

(Response) As indicated in the background section I. of this rule, the temporary hold provisions authorized in section 303 of the Bioterrorism Act are outside the scope of this rulemaking. FDA plans to consider these comments as we develop our approach on how best to implement this provision of the Bioterrorism Act.

FDA notes, however, that the period of detention for administrative detention under section 303 of the Bioterrorism Act does not begin until the detention order is issued.

(Comment 13) Several comments ask that the implementation date of these regulations be pushed back because the new authorities are extensive and the timeframe for implementation is unusually quick for such a sweeping change. Furthermore, the comments state that the proposed timeframes are not sufficient for producers in exporting countries to adapt their products to the requirements of the Bioterrorism Act, and will result in unnecessary costs and delays.

(Response) Even if FDA delayed implementation of the regulations, the authority for administrative detention is self-executing and currently in effect. In addition, FDA believes that it is in the public's interest to implement these regulations as soon as possible to facilitate the resolution of administrative detentions.

(Comment 14) One comment indicates that the new regulations are burdensome and overlap with current requirements under parts 7, 110, 123, and 1240 (21 CFR parts 7, 110, 123, and 1240). This comment states that if these provisions were properly implemented, they would be more than adequate to address concerns FDA may have with rapid location of affected product and ingredient traceability that are the major concerns with this new provision. Another comment states that FDA's Investigations Operations Manual (IOM), subchapter 750, describes the procedure that FDA must follow currently for detention activities and that the new regulations do not appear substantially different. Another comment questions the need for this rulemaking because it appears that FDA considers the threshold for detention to be equivalent to the standard for initiating a Class I recall.

(Response) FDA disagrees with these comments. The regulations in parts 7, 110, 123, and 1240, and subchapter 750 of the IOM, do not address administrative detentions of food under section 303 of the Bioterrorism Act. Further, the regulations cited in the comment are not based on the substantive standard for administrative detention under section 303 of the Bioterrorism Act, which is that the detained article of food presents a threat of serious adverse health consequences or death to humans or animals.

(Comment 15) Numerous comments ask that FDA provide compensation for losses incurred as a result of a detention. Some comments refer to detentions where the product is eventually released, but is no longer marketable. Other comments want compensation for detentions in which damages are incurred as a result of any detention, *i.e.*, including detentions where the product is confirmed to present a threat of serious adverse health consequences or death to humans or animals. Another comment states that the regulation does not adequately address the legal and financial responsibility for the disposal of food as a result of the threat it presents. This comment suggests that an entity with a vested interest in the product, *e.g.*, the owner, would bear the responsibility, and that failure on the part of the food product owner to pay storage, handling and related costs should be considered a violation of the FD&C Act. One comment argues that, rather than adding to industry's burden for food security, we should provide government funding to help industry institute measures to improve food security.

(Response) Neither the FD&C Act nor the Bioterrorism Act provides for damages or other costs associated with administrative detention. In addition, the failure to pay storage, handling, and related costs is not a violation of the FD&C Act. With respect to the comment that FDA should provide government funding to help industry institute measures to improve food security, that issue is beyond the scope of this rulemaking and would require statutory authorization and appropriations.

(Comment 16) A few comments suggest that the rule should require that FDA determine the party actually responsible for the threat against the food and define their responsibility. One comment indicates that FDA must consider that the party responsible for the threat could be a third party, *i.e.*, a party not included in the importation or distribution of the product. Another comment asks who will be held responsible in the case where a product is packaged in bulk in one country and repackaged in another country for export to the United States. One comment asks how FDA will differentiate between an actual threat and a hoax and if it will matter. Another comment asks what penalty exists for the supplier of suspect shipments. Another comment requests that FDA provide the owner of the food with information about the threat even if the credible evidence is classified information.

(Response) The Bioterrorism Act allows FDA to detain articles of food for which the agency has credible evidence or information that the food presents a threat of serious adverse health consequences or death to humans or animals. It does not require FDA to determine who is responsible for the threat in order to detain the product. Whether the person responsible for that threat or the person responsible for supplying the suspect article of food may be held liable or subject to criminal prosecution under other statutory provisions is beyond the scope of this rulemaking.

The purpose of any FDA investigation is to determine and document facts concerning a particular issue so that the agency can make informed and sound decisions. FDA cannot rule out the possibility that a hoax could give rise to an administrative detention and, in evaluating the evidence or information to determine whether it is credible, FDA will be mindful of the fact that hoaxes do occur.

In response to the comment that FDA provide the owner of the food with information about the threat even if the credible evidence is classified information, we will provide a statement of the reasons for a detention in the detention order, but we will not divulge classified information to those without the proper security clearance.

(Comment 17) Many comments state that industry is motivated to cooperate with FDA to protect consumers and maintain national security interests in the event of a real threat. They indicate that it is imperative that FDA and industry work together as a team to quickly address such occurrences. These comments state that FDA must devise a clear communications strategy and that the agency should test such plans to make sure that they will work seamlessly.

(Response) These comments are outside the scope of this rulemaking. We agree that it is imperative that FDA and industry work together to protect the U.S. food supply. The agency recognizes the cooperation and effort that the industry has already shown in the area of food safety and security. One such example of industry and FDA partnering to protect the U.S. food supply was in the development of a Food Security Guidance that food producers can use if they choose to improve the protection of their products against tampering or terrorist actions. (See *http://www.cfsan.fda.gov/~dms/fsterr.html*.) FDA also agrees that it is imperative to have clear communication strategies in place and to test such plans to ensure that they will be effective in the event of a bioterrorism or other food-related emergency. We have been developing plans in this area and continue to examine other possible ways to better manage food emergencies and consult with industry on this.

(Comment 18) One comment states that development of reasonable preventative measures and appropriate responses, including rational governmental activities that are effective within every facet of the food system, are critical to protecting public safety. This comment asserts that, to be effective, these measures must be driven by the public and the food industry, not by regulation.

(Response) This comment is outside of the scope of this rulemaking. As stated in FDA's response to the previous comments, the agency recognizes the outside cooperation and effort that have already been shown in the area of food safety and security. However, FDA also believes that it is important for the agency to implement the statutory provisions on food safety and to fulfill its statutory mandates concerning food safety. FDA will provide ongoing opportunities for consumers, industry, state and local governments, and other constituents to keep informed of, and involved in, the agency's activities related to the development of preventative measures and responding to a threatened or actual bioterrorist attack on the U.S. food supply or to other food-related emergencies. Before issuing the proposed rules concerning sections 303, 305, 306, and 307 of the Bioterrorism Act, the agency provided an opportunity for constituents to identify concerns and suggest ways to address them. It is imperative that FDA and its constituents work together to protect the U.S. food supply.

(Comment 19) Some comments assert that the regulation is burdensome, costly, discriminatory, and will have a negative impact on foreign trade. One comment states that this negative impact will likely result in negative ramifications for U.S. food exports because the future may well find retaliatory trade restrictions placed upon U.S. exports as a direct result of the regulatory requirements generated from the Bioterrorism Act.

(Response) In drafting the final rule, FDA structured the rule to be consistent with the statutory mandates of the Bioterrorism Act. FDA carefully considered comments received regarding the burden imposed by this rule, including its impact on international trade.

(Comment 20) Several comments ask that FDA provide clear guidance and training to industry personnel at all levels and agency field personnel about the procedures for implementing the regulation. A few comments suggest that an easy to follow guide for the appeal process would be desirable. A few comments request that FDA establish consultation services at U.S. embassies staffed with speakers of various different foreign languages, such as Japanese and Spanish, and that the Bioterrorism Act and all documents associated with the detention be accompanied by official translations to facilitate comprehension and proper use. The comments suggest that we disseminate the translated material on our Web site and by other means.

(Response) FDA conducted extensive outreach on the proposed administrative detention rule, including attending international and domestic meetings, to ensure that affected parties were aware of the Bioterrorism Act administrative detention requirements.

FDA plans similar future outreach efforts. More specifics regarding our outreach activities will be included on FDA's Web site at *http://www.fda.gov.*

FDA also plans training for its field personnel on the administrative detention procedures.

FDA does not have the resources to establish consultation services at U.S. embassies staffed with speakers of foreign languages, or to provide official translations of all documents associated with a detention and the Bioterrorism Act.

(Comment 21) One comment asks whether the United States has developed biosecurity and sophisticated devices to test and control dangerous biological agents and toxins, including those that present a threat to plants or animals. This comment also asks if the United States has developed new methods to detect contaminated foods, to work with state food safety regulators, and to protect crops and livestock.

(Response) The issues described in these comments are outside the scope of this final rule. However, we are sensitive to these concerns and wish to assure the comments that the agency is doing a number of things to increase our ability to detect the presence of agents that may present a threat to foods for human and animal consumption. We do not believe it is appropriate to discuss these activities in this final rule; however, more information can be obtained on FDA's Web site. (See ''Hot Topics'' on the Web site at: *http://www.fda.gov*.)

(Comment 22) Two comments state that every effort should be made to ensure that information regarding the detention of a product is accurate and publicized only when necessary in an

effort to protect public health. The comments state that such publicity should be transmitted in a clear, unemotional, and factual manner without unduly or inaccurately raising public concern. The comments also indicate that the agency should be aware that if the public is told a product has been detained and it is later found to be nonviolative, the reputation of the company likely will be damaged due to the public perception that the product was somehow unsafe because it had been detained. The comment is concerned that information that a detained product has been released seldom reaches the public. One of these comments states that to minimize these losses, the detention order should become a part of the public record only if FDA determines that the product presents a threat of serious adverse health consequences or death to humans or animals.

(Response) FDA has no plans to routinely publicize the issuance of detention orders. However, in the event of a public health emergency, FDA may issue a Talk Paper or Press Release with information regarding a detained article of food that presents a threat of serious adverse health consequences or death to humans or animals. In such an emergency, FDA may also inform other departments, agencies or governments. In addition, administrative detentions can be precursors to enforcement action in Federal court, particularly seizures, which are public filings in the courts. Information regarding a detention could be included in the complaint for forfeiture. Information regarding administrative detentions also may be released under a Freedom of Information Act (FOIA) request after FDA has removed any information that is protected from disclosure to the public.

(Comment 23) Several comments request clarity concerning which rule will be applied to imports and under what circumstances. These comments indicate that FDA's regulatory framework for imports is more stringent than that applied to domestic products. One of these comments suggests that an administrative detention mechanism that allows FDA to take action against domestic foods that appear to be adulterated or misbranded is needed. Another of these comments indicates that historically, detention orders have not been delivered directly to the owners or importer of record in a timely fashion. This comment further indicates that, because detention orders have historically covered future shipments of the product and included nonrelated growers, FDA should consider removing the time limit to file appeals regarding detention orders.

Another comment argues that the proposed rule would give a competitive advantage to domestic food over imported food because domestic food would be subject only to administrative detention, while imported food would be subject to both administrative detention and ''normal'' import detention.

(Response) The issues concerning how FDA has implemented section 801 of the FD&C Act are outside the scope of this regulation. FDA reiterates that this final rule does not implement section 801 of the FD&C Act, despite its use of the term ''detention.'' This final rule implements section 303 of the Bioterrorism Act, which amends section 304 of the FD&C Act, by adding paragraph (h) to that section.

Section 304(h) of the FD&C Act applies the same standard to domestic and imported food. The criteria for administrative detention under section 304(h) of the FD&C Act are credible evidence or information that an article of food presents a threat of severe adverse health consequences or death to humans or animals. The procedures for administrative detention under section 304(h) of the FD&C Act are described in this rule and will be applied in the same way to both imported and domestic food that is detained administratively under section 304(h).

FDA disagrees that domestic food has a competitive advantage over imported food. FDA investigators and inspectors are authorized under the FD&C Act to inspect domestic food manufacturers, packers, and distributors to determine their compliance with the FD&C Act and its implementing regulations. As part of its vigorous domestic enforcement program, FDA inspects domestic food facilities and collects domestic food product samples for examination by FDA scientists or for label checks. When warranted, judicial enforcement actions are brought against violative articles of food and their manufacturers and distributors.

B. Comments on Foreign Trade Issues

(Comment 24) Some comments question the consistency of the regulation with U.S. obligations under the NAFTA and various WTO agreements.

(Response) FDA is aware of the international trade obligations of the United States and has considered these obligations throughout the rulemaking process for this regulation. FDA believes that these regulations are consistent with these international trade obligations. In addition, and as discussed elsewhere in this preamble, FDA does not foresee frequently using administrative detention under section 304(h) of the FD&C Act to control the movement of imported food subject to section 801 of the FD&C Act.

(Comment 25) Some comments assert that the regulation is burdensome, costly, discriminatory, and will have a negative impact on foreign trade.

(Response) In drafting the final rule, FDA structured the rule to be consistent with the statutory mandates of the Bioterrorism Act and, at the same time, to reduce the costs associated with compliance. FDA carefully considered comments received regarding the burden imposed by this rule, including its impact on international trade.

C. Comments on What Definitions Apply to This Subpart? (Proposed § 1.377)

1. Definition of ''The Act''

(Comment 26) FDA did not receive comments on the definition of ''the act.''

(Response) We did not change the definition in the final rule.

2. Definition of ''Authorized FDA Representative''

(Comment 27) Several comments state that based on the serious nature of administrative detentions, decisions to detain products administratively should be made by an official at the regional FDA director level or higher because of the cost implications and serious business impact such an action would cause. In addition, some comments state that approval at the FDA District Director level allows too much discretion, and that a higher level of approval is necessary to ensure some level of uniformity.

(Response) Permitting approval of an administrative detention at the FDA District Director level is consistent with section 303 of the Bioterrorism Act, which allows such approval at the FDA district level, or above. As required by § 1.391, all detention orders must be approved by an authorized FDA representative. FDA defines authorized FDA representative for the purpose of this final regulation as an FDA District Director in whose district the detained article of food is located or an FDA official senior to such director. For example, an RFDD is an FDA official senior to an FDA District Director.

(Comment 28) A couple of comments state that defining ''qualified employee'' at even the District Director level is problematic because of what the comments characterize as FDA's erroneous decisions in the past regarding ''tainted foods'' (*e.g.*, fish,

fruits, vegetables). They note that these industries have fallen victim to otherwise ''qualified'' federal and state employees who have wrongly accused many commodities of potential contamination.

(Response) Although a comment alleged that FDA has made wrong decisions in the past, they did not identify any particular wrong decision.

FDA is not limiting ''officer or qualified employee'' to the District Director level or higher. The officers or qualified employees of FDA who may order a detention include, but are not limited to, FDA field investigators; FDA employees who have security clearance to receive national security information; and health, food, or drug officers or employees of any State, Territory, or political subdivision thereof, duly commissioned by FDA as officers of the Department under section 702(a) of the FD&C Act (21 U.S.C. 372). Only an authorized FDA representative, however, can approve a detention order. FDA is defining an ''authorized FDA representative'' as an FDA District Director in whose district the detained article of food is located, or an FDA official senior to an FDA District Director. This language is drawn from section 303 of the Bioterrorism Act. Clearly, Congress envisioned that only FDA officials with a given level of seniority would have authority to approve a detention order.

(Comment 29) One comment questions how the owner/carrier will know that FDA's personnel are authorized to detain their product.

(Response) Section 1.391 states that an authorized FDA representative, *i.e.*, the FDA's District Director in whose district the article of food is involved is located or an FDA official senior to such director, must approve the detention order. If prior written approval is not feasible, prior oral approval must be obtained and confirmed in writing as soon as possible. Consequently, all FDA personnel issuing a detention must be authorized in advance to issue the detention order. Under § 1.393(b)(13), the detention order must indicate the manner in which approval of the detention order was obtained, *i.e.*, verbally or in writing.

We have revised the final rule to include § 1.393(b)(14), which requires that the name and title of the authorized FDA representative who approved the detention order be included in the detention order.

Section 1.392(a) of the final rule requires FDA to issue the detention order to the owner, operator, or agent in charge of the place where the article of food is located. If the owner of the article of food is different from the owner, operator, or agent in charge of the place where the article is detained, FDA must provide a copy of the detention order to the owner of the article of food if the owner's identity can be determined readily. Under § 1.392(b), if FDA issues a detention order for an article of food located in a vehicle or other carrier used to transport the detained article of food, we also must provide a copy of the detention order to the shipper of record and the owner and operator of the vehicle or other carrier, if their identities can be determined readily. Thus, the owner and carrier will know from the detention order how the approval was obtained and the name and title of the authorized FDA representative who approved the detention order.

(Comment 30) One comment notes that FDA must employ strict internal procedural requirements for FDA officers and employees and our agents that are involved in determination of potential adulteration or intentional contamination.

(Response) FDA officers, employees, and agents authorized to carry out an administrative detention will be fully trained.

3. Definition of ''Calendar Day''

(Comment 31) FDA did not receive comments on the definition of ''calendar day.''

(Response) We did not change the definition in the final rule.

4. Definition of ''Food''

(Comment 32) A few comments state that alcoholic beverages should not be covered under this provision because they are regulated by the Alcohol and Tobacco Tax and Trade Bureau (TTB), as well as by individual states. One of these comments suggests that FDA should revise the rule to specify that TTB officials are responsible for ordering any administrative detentions of alcoholic beverages. Another comment states that FDA should secure a legislative amendment to the Bioterrorism Act that exempts wines and spirits and other alcoholic beverages under the jurisdiction of TTB from its application, in the same way as meat, poultry, and egg products under the jurisdiction of the U.S. Department of Agriculture (USDA) are excluded from its scope. This comment indicates that the inconsistency does not appear to be founded on any objective criteria such as risk analysis.

(Response) This rule complies with section 315 of the Bioterrorism Act, ''Rule of Construction,'' which states that nothing in Title III of the Bioterrorism Act, or an amendment made by Title III, shall be construed to alter the jurisdiction between USDA and the U.S. Department of Health and Human Services (HHS) under applicable statutes and regulations. Accordingly, this final rule does not apply to food regulated exclusively by USDA under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), or the Egg Products Inspection Act (21 U.S.C. 1031 *et seq.*).

Unlike USDA, there are no provisions in section 303 of the Bioterrorism Act that specifically address the jurisdiction of TTB. Under existing law, TTB does not have exclusive jurisdiction over alcoholic beverages. TTB establishes tariffs and licensure requirements, and has primary jurisdiction over the labeling of alcoholic beverages. However, FDA exercises jurisdiction over alcoholic beverages as ''food'' for the purposes of the adulteration and other provisions of the FD&C Act.

FDA recognizes that working in conjunction with TTB and individual states is an important tool we have in the event of a threat to the nation's food supply. However, alcoholic beverages are covered under the administrative detention regulation because alcohol is food, as that term is defined in section 201(f) of the FD&C Act (21 U.S.C. 321(f)). As stated in the proposed rule, and discussed in detail in the following paragraphs, the term ''food'' as used in section 303 of the Bioterrorism Act has the meaning given in section 201(f) of the FD&C Act.

FDA reiterates that, under this final rule, any administrative detention ordered by an officer or qualified employee must be approved by an authorizing official.

Comments suggesting that FDA should request a legislative amendment to the Bioterrorism Act are outside the scope of this rulemaking.

(Comment 33) A few comments state that indirect food additives, such as color pigments for packaging, packaging polymers, and coatings should be exempt from coverage under section 303 of the Bioterrorism Act because, by definition as a food additive, the manufacturer must demonstrate under FDA's food additive regulations that they are safe and stable. One comment suggests that we exempt raw materials and formulated products that are used as components in the manufacture of food contact articles, such as conveyor belts, oven gaskets, coatings for film, paper, and metal substrates, adhesives, antifoam agents, antioxidants, polymeric resins, polymer emulsions, colorants for polymers, rubber articles,

release coatings, and the like. Another comment suggests that tableware, including ceramic and lead crystal, also should be exempt from coverage under this provision of the Bioterrorism Act because Congress did not intend such a broad scope. This comment states that contaminated food products present an immediate risk to public health, whereas adulterated food contact articles present a risk only once they have contact with food, and only if the poisonous or deleterious substance actually migrates into the food. The comment further states that the lack of immediacy means that there is a significant potential for intervening actions; for example, washing purchased tableware items before using them for the first time to reduce or eliminate any risks posed by a bioterrorist act aimed at food contact articles.

Two comments state the belief that live food animals, pet food, and animal feed, including fertilizers that end up in animal feed, should not be covered by this rule because Congress did not intend such a broad scope. Another comment states that any material that might end up in food, but that has nonfood uses, should be exempt from coverage under section 303 of the Bioterrorism Act unless the manufacturer knows the material will be consumed in the United States as food. One comment states that food that will be used in trade shows should be exempt from coverage under this provision because the trade shows have their own self-regulation and because FDA could visit the trade shows and easily inspect the products. Another comment states that technical samples of food, *e.g.* less than 100 grams (g) of a product, should be exempt from coverage under this rule.

(Response) FDA disagrees with these comments and is finalizing the definition of ''food'' as proposed. FDA is not excluding food contact materials, live animals, alcoholic beverages, or other articles of food from coverage under this regulation.

These comments raise the question of what Congress intended ''food'' to mean for purposes of administrative detention. In construing the administrative detention provision of the Bioterrorism Act, FDA is confronted with two questions. First, has Congress directly spoken to the precise question presented (''*Chevron* step one'') *Chevron, U.S.A., Inc.* v. *NRDC, Inc.,* 467 U.S. 837, 842 (1984). To find no ambiguity, Congress must have focused directly on the question presented and have articulated clearly its intention. *Young* v. *Community Nutrition Institute,* 476 U.S. 974, 980 (1986). If Congress has spoken directly and plainly, the agency must implement Congress's unambiguously expressed intent. *Chevron,* 467 U.S. at 842–843. If, however, the Bioterrorism Act is silent or ambiguous as to the meaning of ''food,'' FDA may define ''food'' in a reasonable fashion (''*Chevron* step two''). *Chevron,* 467 U.S. at 842–843; *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132 (2000).

The agency has determined that, in enacting section 303, Congress did not speak directly and precisely to the meaning of ''food.'' As noted, the FD&C Act has a definition of ''food'' in section 201(f) of the FD&C Act. It is a reasonable assumption that, when the term ''food'' is used in the FD&C Act, section 201(f) applies. However, although there may be ''a natural presumption that identical words used in different parts of the same act are intended to have the same meaning [citation omitted], * * * the presumption is not rigid. * * *'' *Atlantic Cleaners & Dyers, Inc.* v. *U.S.,* 286 U.S. 427, 433 (1932). *Accord: U.S.* v. *Cleveland Indians Baseball Co.,* 532 U.S. 200, 213 (2000). Thus, the same word may be given different meanings, even in the same statute, if different interpretations are what Congress intended. (*Atlantic Cleaners & Dryers, Inc., supra.*)

Even before the Bioterrorism Act amendments, the term ''food'' was not given an identical meaning throughout the FD&C Act. For example, in construing the parenthetical ''(other than food)'' in section 201(g)(1)(C) of the FD&C Act, the Seventh Circuit noted that Congress meant to exclude only ''articles used by people in the ordinary way that most people use food—primarily for taste, aroma, or nutritive value'' and not all substances defined as food by section 201(f) of the FD&C Act. *Nutrilab, Inc.* v. *Schweiker,* 713 F.2d 335, 338 (7th Cir. 1983). Similarly, section 409(h)(6) of the FD&C Act (21 U.S.C. 348(h)(6) defines a food contact substance as ''any substance intended for use as a component of materials used in manufacturing, packing, packaging, transporting, or holding food if such use is not intended to have any technical effect in such food (emphasis added).'' This definition makes sense only if ''food'' in that section is interpreted to exclude materials that contact food because components of food contact materials are plainly intended to have a technical effect in such materials.[1]

Thus, in this larger statutory context, FDA has evaluated section 303 of the Bioterrorism Act to determine whether the meaning of the word ''food'' is ambiguous. In conducting this *Chevron* step one analysis, all of the traditional tools of statutory interpretation are available to determine whether Congress's intent is ambiguous. *Pharmaceutical Research & Manufacturers of America* v. *Thompson,* 251 F. 3d 219, 224 (D.C. Cir. 2001). Beginning with the language of the statute, in section 303 of the Bioterrorism Act, ''food'' is used to describe which subset of FDA-regulated articles are subject to administrative detention: An officer or qualified employee of the Food and Drug Administration may order the detention, in accordance with this section, of any article of food that is found during an inspection, examination, or investigation under the Bioterrorism Act conducted by such officer or qualified employee, if the officer or qualified employee has credible evidence or information indicating that such article presents a threat of serious adverse health consequences or death to humans or animals (emphasis added).

The Bioterrorism Act is silent as to the meaning of ''food.'' Congress did not specify whether it intended the definition in section 201(f) of the FD&C Act to apply, one of the other possibilities noted previously, or another meaning. Where, as here, the statutory language on its face does not clearly establish Congressional intent, it is appropriate to consider not only the particular statutory language at issue, but also the language and design of the statute as a whole. *Martini* v. *Federal Nat'l Mortgage Association,* 178 F. 3d 1336, 1345 (D.C. Cir. 1999), citing *K Mart Corp.* v. *Cartier, Inc.,* 486 U.S. 281 (1988). Indeed, the analysis should not be confined to the specific provision in isolation, because the meaning or ambiguity of a term may be evident only when considered in a larger context. *FDA* v. *Brown & Williamson Tobacco Corp., supra* at 132 (2000).

FDA has considered other sections of the Bioterrorism Act and has concluded that the meaning of ''food'' in the Bioterrorism Act is ambiguous. FDA previously considered the meaning of

[1] FDA's long-standing interpretation of the act's definition of color additive, section 201(t) of the FD&C Act (21 U.S.C. 201(t)), is an additional example of where ''food'' is used more narrowly than as defined in section 201(f). A color additive is defined in section 201(t) of the FD&C Act as a substance that ''when applied to a food * * * is capable * * * of imparting color thereto * * *'' The agency's food additive regulations distinguish between color additives and ''colorants,'' the latter being used to impart color to a food-contact material. (21 CFR 178.3297(a), see also 21 CFR 70.3 (f).) Thus, ''food'' as it appears in the statutory definition of color additive, necessarily excludes food contact materials.

''food'' in section 305 of the Bioterrorism Act, governing registration of food facilities, and concluded that it is ambiguous (68 FR 58894). Section 305 of the Bioterrorism Act amends the FD&C Act by adding section 415 to that act. In section 415(a)(1) of the FD&C Act, the word ''food'' is modified by the phrase ''for consumption in the United States.'' It's not clear whether this modifying phrase limits the definition of ''food'' to food that is ingested—a narrower definition of ''food'' than that in section 201(f) of the FD&C Act. In addition, the definition of ''facility'' in section 415(b)(1) of the FD&C Act exempts ''farms; restaurants; other retail establishments.'' It's not clear whether the phrase ''other retail establishments'' includes retailers of food contact materials; the legislative history indicates that it does not, thereby giving rise to additional ambiguity about which definition of ''food'' applies to section 415 of the FD&C Act.

FDA also considered the meaning of ''food'' in section 307 of the Bioterrorism Act, governing prior notice of imported food shipments, and concluded that it is ambiguous (68 FR 58974). Section 307 of the Bioterrorism Act amends the FD&C Act by adding section 801(m) to that act. Section 801(m) of the FD&C Act refers to an ''article of food.'' However, the legislative history of section 307 of the Bioterrorism Act indicates that packaging materials are not subject to section 307, and can be read to imply that Congress was not relying on the definition of food in section 201(f) of the FD&C Act, thereby giving rise to ambiguity about which definition of ''food'' applies to section 307 of the Bioterrorism Act.

Finally, FDA considered the meaning of ''food'' in developing a final rule to implement section 306 of the Bioterrorism Act, governing maintenance and inspection of records for foods, which will be published in this issue of the **Federal Register** in the near future. ''. . . which will be published in the **Federal Register** in the near future. Section 306 of the Bioterrorism Act amends the FD&C Act by adding section 414 to that act. Section 414(a) of the FD&C Act, which covers inspection of records, refers to ''an article of food,'' and ''food.'' But section 414(b) of the FD&C Act, which covers establishment and maintenance of records, refers to ''food, including its packaging.'' Elsewhere in the record provisions, section 414 of the FD&C Act refers to ''food safety,'' ''a food to the extent it is within the exclusive jurisdiction of [USDA],'' and ''recipes for food.'' There is, thus, ambiguity about which definition of ''food'' applies to section 306 of the Bioterrorism Act.

The ambiguity surrounding Congress's use of ''food'' in sections 303, 305, 306, and 307 of the Bioterrorism Act, coupled with the lack of a definition of the term in that act, support a conclusion that the meaning of ''food'' in the Bioterrorism Act is ambiguous.

Having concluded that the meaning of ''food'' in the Bioterrorism Act and in section 303 of that act is ambiguous, FDA has considered how to define the term to achieve a ''permissible construction'' of the administrative detention provision. *Chevron, USA, Inc.* v. *NRDC, Inc., supra* at 843. In conducting this *Chevron* step two analysis, the agency has considered the same information evaluated at step one of the analysis. *Bell Atlantic Telephone Co.* v. *FCC,* 131 F. 3d 1044, 1049 (D.C. Cir. 1997); *Chevron U.S.A., Inc.* v. *FERC,* 193 F. Supp. 2d 54, 68 (D.D.C. 2002). FDA has determined that it is permissible, for purposes of the administrative detention provision, to use the definition of ''food'' in section 201(f) of the FD&C Act.[2]

Use of the definition of food in section 201(f) of the FD&C Act is consistent with the language of section 303 of the Bioterrorism Act. Section 303 of the Bioterrorism Act repeatedly uses the term ''food'' without adjectives. There is only one instance in which section 303 uses an adjective with the term ''food,'' and that is in section 304(h)(2) of the FD&C Act, which directs the Secretary to provide for procedures for instituting certain judicial enforcement actions on an expedited basis with respect to ''perishable foods.'' Use of the adjective ''perishable'' in this context does not limit the reach of section 303 of the Bioterrorism Act to a subset of ''food'' as defined in section 201(f) of the FD&C Act. Rather, the adjective ''perishable'' serves to distinguish perishable from nonperishable food for purposes of deciding what type of food is subject to the procedures mandated by section 304(h)(2) of the FD&C Act. Nonperishable food, though not necessarily subject to the procedures mandated by section 304(h)(2) of the FD&C Act, is nonetheless subject to administrative detention.

Use of the definition of ''food'' in section 201(f) of the FD&C Act is also consistent with the fact the judicial enforcement actions that may be instituted under administrative detention have been consistently interpreted to use that same definition. Section 304(a)(1) of the FD&C Act authorizes seizure of any ''article of food'' that is adulterated or misbranded under specified conditions. In applying section 304(a)(1) of the FD&C Act, FDA and the federal courts use the definition of ''food'' in section 201(f) of the FD&C Act. *See, e.g., Natick Paperboard Corp.* v. *Weinberger,* 525 F.2d 1103 (1st Cir. 1975); *U.S. v. An Article of Food*, 752 F.2d 11 (1st Cir. 1985). Section 302 of the FD&C Act authorizes injunction to restrain violation of certain provisions of section 301 of that act, which repeatedly uses the term ''food.'' In applying section 302 of the FD&C Act (21 U.S.C. 332), FDA and the federal courts use the definition of ''food'' in section 201(f) of the FD&C Act. *See, e.g., U.S.* v. *Blue Ribbon Smoked Fish, Inc.,* 179 F.Supp.2d 30 (E.D.N.Y. 2001).

FDA is therefore retaining its interpretation of ''food'' in section 303 of the Bioterrorism Act to mean ''food'' as defined in section 201(f) of the FD&C Act. Food subject to section 303 of the Bioterrorism Act thus includes, but is not limited to, fruits, vegetables, fish, dairy products, eggs, raw agricultural commodities for use as food or components of food, animal feed, including pet food, food and feed ingredients and additives, including substances that migrate into food from food packaging and other articles that contact food, dietary supplements and dietary ingredients; infant formula, beverages, including alcoholic beverages and bottled water, live food animals (such as hogs and elk), bakery goods, snack foods, candy, and canned foods.[3]

The standard for administrative detention-credible evidence or information indicating that an article of food presents a threat of serious adverse health consequences or death to humans or animals is a high threshold. Where this threshold is met for any article of food, it is appropriate for FDA to use the full authority provided by the Bioterrorism Act and thereby protect public health to the fullest extent possible.

[2] Alternatively, it may be argued that the meaning of ''food'' in section 303 of the Bioterrorism Act is not ambiguous, and that the *Chevron* analysis stops at step one. Under either approach, the definition of ''food'' in section 201(f) of the FD&C Act applies to section 303 of the Bioterrorism Act.

[3] The agency notes that the scope of the definition of ''food'' in the regulations implementing section 303 of the Bioterrorism Act (administrative detention) is broader than the scope of the definition of ''food'' in the regulations implementing sections 305 (registration) and 307 (prior notice) (68 FR 58894, October 10, 2003, and 68 FR 58974, respectively).

5. Definition of ''Perishable Food''

(Comment 34) FDA sought comments and supporting data on how to best define ''perishable food'' for purposes of this rule. Several comments state that the definition for ''perishable food'' should be revised to mean foods with a shelf life of 90 days from the date of packaging, including products that are thermally processed or treated to extend the shelf life to 90 days from the date of packaging. Another comment states that FDA should use the definitions in the National Institute of Standards and Technology (NIST) handbook, which are: Perishable, 60-day shelf life from date of packaging; semiperishable, 60 days to 6 months shelf life from the date of packaging; and long shelf life, greater than 6 months shelf life from the date of packaging. Yet another comment suggests that we use the definition for perishable foods as it is described in the Perishable Commodities Act. One comment states that live animals should be considered perishable food items because they must be fed, watered, and possibly medicated to stay alive. That comment asks who will be responsible for feeding, watering, and medicating the animals if they are detained. A few comments state that the definitions should consider loss of marketability, and not just loss of physical and biological properties. These comments indicate that many products have optimum release dates, such as seasonal items (Valentine's candy), special release items (wines), and strict stock rotational items (snack foods, baked goods, and tortillas) that would quickly lose their marketability. Many comments suggest that the definition for ''perishable food'' should be revised to include foods that have 120 days of shelf life because products with older ''sell by'' dates lose their marketability. One comment asks whether products in bulk form that are intended for further processing and have a short shelf life are covered under the definition of ''perishable food.''

(Response) FDA disagrees with these comments and is finalizing the proposed definition for ''perishable food'' without any revisions. The context in which the term ''perishable food'' appears in section 303 of the Bioterrorism Act indicates that, at least with respect to administrative detention, Congress was concerned with articles of food that would spoil relatively quickly. It is unlikely that Congress would have mandated expedited procedures for instituting certain enforcement actions against foods that have a shelf life of up to 90 days, given that the statute only allows FDA to detain foods for a maximum of 30 days while it seeks to initiate certain judicial enforcement actions.

The definition of ''perishable food'' in this final rule has been modeled after the current Regulatory Procedures Manual (RPM) definition of ''perishable commodity.'' We decided to use the RPM definition of ''perishable commodity'' as the basis for the definition of ''perishable food'' because the RPM definition is commonly used and understood by both industry and FDA. Furthermore, we believe this definition is appropriate in light of the 5-calendar day (maximum) deadline for FDA to issue a decision on an appeal of a detention order. Under the deadline for appeals involving the detention of a perishable food, FDA would issue a decision on an appeal before the expiration of the 7-calendar day period. FDA believes that this timeframe offers the best protection to appellants and products. FDA notes that a claimant for any nonperishable detained product may file for an appeal within the first 2 calendar days after receipt of a detention order, similar to the procedures set forth in § 1.402(a)(1) for perishable foods.

FDA will determine the conditions for holding detained food, including live animals, on a case-by-case basis based upon the totality of information available to us about the article of food. If necessary, FDA may consult with the owner of the food, if readily known, about appropriate storage conditions. The business arrangements for storing detained food, including live animals, are a private matter between the recipient of the detention order and the facility where the food will be stored. The recipient of the detention order is responsible for making these arrangements.

6. Definition of ''We''

(Comment 35) FDA did not receive comments on the definition of ''we.''

(Response) We did not change the definition in the final rule.

7. Definition of ''Working Day''

(Comment 36) FDA did not receive comments on the definition of ''working day.''

(Response) We did not change the definition in the final rule.

8. Definition of ''You''

(Comment 37) FDA did not receive comments on the definition of ''you.''

(Response) We did not change the definition in the final rule.

D. Comments on What Criteria Does FDA Use To Order a Detention? (Proposed § 1.378)

(Comment 38) One comment agrees that FDA should not define the term ''credible evidence or information'' and should evaluate such decisions on a case-by-case basis, given that a bioterrorism event may arise in an unanticipated scenario. This comment agrees that FDA should not bind its discretion by identifying the types of evidence that it ultimately may need to rely upon to support a detention order.

The majority of comments request that FDA define by regulation or guidance clear evidentiary standards and procedures for the determination of ''credible evidence or information.'' These comments state that the term should be defined to ensure that the Bioterrorism Act is not interpreted more broadly than Congress intended and to ensure that affected persons have some protection against arbitrary or unsupported detentions. A few comments state that as long as the factors on which a detention decision is based are not known, there is no possibility to assess and evaluate the legitimacy of the decision. These comments request that FDA publish guidance on how the credible evidence or information standard will be documented (*e.g.*, name all sources of information that may be considered ''reliable,'' describe the requirements with respect to accuracy of the information, etc.). Another comment suggests that guidance should indicate the authorities that FDA might rely upon to determine whether information it receives is credible, such as health authorities (*i.e.*, Centers for Disease Control and Prevention), law enforcement authorities (*i.e.*, Federal Bureau of Investigation), or other appropriate authorities (*i.e.*, Department of Homeland Security). A few comments state that ''credible evidence/information'' should be similar to a ''probable cause'' standard and more than mere speculation or an anonymous telephone tip.

One comment states that, because administrative detention authority also is triggered in the context of FDA inspection and sampling authorities, the agency should ensure that the evidentiary standards and procedures adopted satisfy applicable Fourth Amendment and other constitutional requirements. In particular, the comment urges the agency to examine the ''credible evidence'' standard with reference to Fourth Amendment and related evidentiary standards developed in case law, and not to rely on a

superficial reading of the Bioterrorism Act or a plain language interpretation drawn from Webster's Dictionary. The comment states that the ''public health triggers'' defining FDA authority under the Bioterrorism Act are critically important jurisdictional provisions, which authorize extraordinary intrusions and control over private commercial property, including products subject to administrative detention.

(Response) FDA has considered these comments, and we have decided to maintain our decision not to define the term ''credible evidence or information.'' The decision to not define credible evidence or information reflects how the credible evidence or information standard has been applied in various other judicial and administrative contexts, and the need to maintain flexibility, given the range of circumstances in which articles of food might be detained under the administrative detention authority. The ''credible evidence or information'' standard requires fact-specific inquiries for which maximum interpretive discretion should be maintained. FDA intends to apply the credible evidence standard consistent with the terms of that standard and with applicable Fourth Amendment principles and case law.

(Comment 39) One comment states that administrative detention is triggered by two undefined criteria: The first is ''credible evidence or information,'' and the second is ''serious adverse health consequences or death to humans or animals.'' Many comments express concern that if these standards are not defined, detention decisions would be subjective, discriminatory and void of objective, scientific grounds. The comments argue that the question of the role of the application of the ''precautionary principle'' likewise arises.

(Response) The comment expressing concern about the application of the ''precautionary principle'' did not explain what they meant by their use of the term in the context of this rule. The standard for administrative detention as set out in the Bioterrorism Act is whether credible evidence or information exists indicating that an article of food presents a threat of serious adverse health consequences or death to humans or animals. This is the standard that we must apply. FDA intends to define ''serious adverse health consequences'' in a separate rulemaking. We will not define ''credible evidence or information'' for reasons set forth in our prior response to a similar comment.

(Comment 40) A few comments state that FDA should have clear evidence, such as laboratory analysis, to confirm the presence of an adulterant, and/or affidavits sworn under penalty of perjury. Several comments ask that FDA use internationally recognized methods for laboratory analyses, as well as internationally recognized standards such as Codex Alimentarius, an international food code, and provide countersamples to the owner of the article of food. One comment requests that FDA require that sampling and diagnostic testing (to confirm or deny suspicions of food tampering) be initiated within 24 hours of the date the detention order is issued.

(Response) FDA disagrees with these comments. Given the range of circumstances in which articles of food may be detained under the administrative detention authority, the agency needs to maintain flexibility to respond appropriately on a case-by-case basis. The ''credible evidence or information'' standard requires fact-specific inquiries for which maximum interpretive discretion should be maintained. FDA intends to apply the credible evidence standard consistent with the terms of that standard and with applicable constitutional principles and case law.

With respect to providing what some comments refer to as countersamples, section 702(b) of the FD&C Act describes FDA's responsibility to provide a part of an official sample of food to certain individuals, when a sample is collected for analysis under the FD&C Act. Section 702(b) of the FD&C Act requires the Secretary to, upon request, provide a part of such official sample for examination or analysis by any person named on the label of the article, or the owner thereof, or his attorney or agent; except that the Secretary is authorized, by regulations, to make such reasonable exceptions from, and impose such reasonable terms and conditions relating to, the operation of this section as he finds necessary for the proper administration of the provisions of this act. Exceptions from this section are set forth in 21 CFR 2.10.

(Comment 41) One comment suggests that credible evidence or information be directly related to a serious health consequence. Another comment is concerned whether the evidence for suspicion will be corroborated before an order for detention is made, or whether such an order would be made on a totally discretionary/subjective basis.

(Response) The Bioterrorism Act authorizes FDA to order an administrative detention only when an officer or qualified employee of FDA has credible evidence or information indicating that such article presents a threat of serious adverse health consequences or death to humans or animals. Consequently, serious adverse health consequences or death is an element of the standard FDA will apply in ordering that an article of food be detained. In evaluating whether credible evidence or information exists for purposes of administrative detention, FDA may consider a number of factors including, but not limited to, the reliability and reasonableness of the evidence or information, and the totality of the facts and circumstances.

(Comment 42) A few comments recommend issuing guidance with a list of criteria that define ''serious adverse health consequences'' because an illustrative list from FDA will ensure that excess (or unnecessary) detentions do not occur.

A few comments state that indications should be given to limit the scope of implementation of the law. These comments specifically request that interpretation of serious adverse health consequences should be based on the risk to a large part of the population, as opposed to merely a few individuals. These comments state that in situations where the risk associated with a food product only affects a very limited group of people, detention would not be the appropriate action to take. Furthermore, they state that the health consequences must be severe to the average person to justify a detention.

(Response) FDA agrees with the comments that the agency should define the term, ''serious adverse health consequences'' and intends to define the term in a separate rulemaking. The agency is developing a separate rule because the term is used in several provisions in Title III of the Bioterrorism Act, not just in section 303. FDA believes that defining ''serious adverse health consequences'' will promote uniformity and consistency across the agency in the understanding of this term and in the actions taken, as well as inform the public of what FDA considers a ''serious adverse health consequence.''

(Comment 43) One comment states that non-FDA employees from other agencies or states commissioned or deputized by FDA should not be considered officers or qualified employees of FDA for purposes of administrative detention.

(Response) Section 303 of the Bioterrorism Act provides that an officer or qualified employee of FDA may order a detention of a food found during an inspection, examination, or investigation under the FD&C Act. FDA

agrees that, under existing law, employees of other Federal agencies cannot be considered officers or qualified employees of FDA for purposes of ordering an administrative detention. The same cannot be said of State employees commissioned by FDA as officers of the Department. Section 702(a) of the FD&C Act authorizes the Secretary to conduct examinations and investigations for purposes of the FD&C Act, through officers and employees of the Department, or through health, food, or drug officers or employees of any State, Territory, or political subdivision thereof, duly commissioned as officers of the Department. Because they are ''officers'' of the Department, FDA believes that such State and local officers or employees have authority to order an administrative detention under section 303 of the Bioterrorism Act. FDA reiterates that under this final rule, any administrative detention ordered by an officer or qualified employee must be approved by an authorizing official.

(Comment 44) One comment states that ''qualified employee'' must be limited to those in FDA who, in their day-to-day job responsibilities, conduct food inspections, examinations and investigations.

(Response) Consistent with section 303 of the Bioterrorism Act, § 1.378 provides that an officer or qualified employee of FDA may order the detention of any article of food that is found during an inspection, examination, or investigation under the FD&C Act if the officer or qualified employee has credible evidence or information indicating that such article of food presents a threat of serious adverse health consequences or death to humans or animals. Consequently, any FDA employees, or State or local officers or employees commissioned by FDA as officers of the Department, may order a detention as part of their function of inspecting, examining or investigating an article of food. FDA does not believe the limitation proposed by the comment is necessary. Section 1.391 requires any detention to be approved by the FDA District Director in whose district the article of food is located or an FDA official senior to such director.

E. Comments on How Long May FDA Detain an Article of Food? (Proposed § 1.379)

(Comment 45) Many comments state that FDA should be required to limit the detention period to that period that is absolutely minimally necessary to undertake an investigation into the possible threat that underlies the detention order. These comments further state that the extension of time up to 30 calendar days must not be by a ''block'' of 10 calendar days, but rather a possible extension of up to 10 extra calendar days. One comment states that they agree that an article may be detained for an additional 10 calendar days; however, they want the reason for the extension to be limited to certain conditions, such as waiting for test results. This comment also states that the company should be immediately informed of any additional time requirement, the reason for the additional time, and the actual time period that will be required (up to 10 calendar days).

One comment proposes that the only reason a detention should be extended from 20 to 30 calendar days is to take legal action in a civil suit. A few comments state that the extension of the detention period should not be considered justified or ''necessary'' if the reason for the extension is because the testing of the affected product had not been conducted expeditiously, or that it could have been completed within the 20-calendar day period had it been accorded appropriate priority. One comment asks how FDA is going to notify the owner of the article of food if the detention period is extended beyond the initial 20 calendar days. Another comment states that there is no indication of the criteria used to determine the ''reasonableness'' of the detention period.

(Response) As FDA stated earlier, we intend to proceed as expeditiously as possible to resolve all issues involved with administrative detentions. However, FDA disagrees with the comments that want to preclude FDA from extending a detention in a ''block'' of 10 calendar days. It is not the best use of the agency's resources to grant extensions of the detention period in small increments, *e.g.* 1 day at a time. Moreover, the fact that a detention is extended for a ''block'' of 10 calendar days does not mean that an article will always be detained 10 additional calendar days; just as FDA may terminate a detention order on any day during the period initially specified in the detention order, FDA may terminate the detention on any one of the 10 calendar days covered by the extension. FDA has authority to extend a detention for 10 calendar days as necessary to enable the agency to institute a seizure or injunction action. Because the development of a seizure or injunction action is fact-specific, FDA will not always be able to specify, at the time of the extension, the precise steps that remain. Indeed, Congress made clear that a maximum detention period of 20 or 30 calendar days is reasonable when Congress included these detention timeframes in the Bioterrorism Act. Any extension of the length of a detention period to 30 calendar days requires the agency to prepare a new detention order and, if applicable, to place new tags or labels on the detained article of food to indicate the change in the detention dates.

In addition, FDA notes that under § 1.379(a), FDA can order detention of the article of food for 30 calendar days in the original detention order, if we know from the outset that 30 calendar days rather than 20 calendar days will be needed to institute a seizure or injunction against the detained article of food.

(Comment 46) Several comments suggest that the maximum length of time for a detention should be shortened, *e.g.*, to 15 calendar days, 10 calendar days, or 7 calendar days, and for perishable food, to 24 hours, because of the impact a detention can have on the normal flow of trade. A few comments suggest that fresh fruit should be kept in detention for only a few hours. A few other comments state that the maximum period of detention should be in accordance with the type of product to minimize costs for the exporters.

(Response) FDA disagrees with these comments because it is not appropriate to limit the authority and flexibility that Congress intended FDA to have under section 303 of the Bioterrorism Act, which authorizes FDA to detain an article of food that presents a threat of serious adverse health consequences or death to humans or animals for 20 calendar days, unless a greater period, not to exceed by 30 calendar days, is necessary to institute a seizure or injunction action. However, FDA intends to act as expeditiously as possible on all detentions. Detentions of perishable foods are subject to the shortened timeframes for filing an appeal and convening a hearing in § 1.402(a)(1) and (d), respectively, to process these detentions as quickly as possible. These shortened timeframes require both FDA and affected parties to move expeditiously.

(Comment 47) A few comments state that the availability of FDA resources and staff shortages should not be a justification for FDA's failure to act quickly on administrative detentions. Another comment states that any sampling and testing conducted with respect to a detention order should be given top priority at the appropriate FDA laboratory (or FDA contract laboratory) to expedite the process, such that the need for an additional 10

calendar days can be eliminated or shortened to less than 10 calendar days.

(Response) As we stated previously, FDA intends to proceed as expeditiously as possible to resolve all issues involved with administrative detentions. FDA agrees that any investigation and sampling of articles of food associated with an administrative detention should be given high priority.

1. Comments on Where and Under What Conditions Must the Detained Article of Food Be Held? (Proposed § 1.380)

FDA received many comments on this section III.E.1 of the rule. To clarify the resolution of the issues raised in the comments, we grouped the comments into topic areas that reflect the paragraphs in § 1.380.

As noted previously, the term ''limited conditional release,'' which was used in proposed rule, has been replaced by the term ''modification of a detention order'' in this final rule. Therefore, our responses to the comments that discuss a ''limited conditional release'' refer instead to a ''modification of a detention order.''

• Hold the detained article of food in the location and under the conditions specified by FDA in the detention order (proposed § 1.380(a)).

(Comment 48) One comment asks how FDA will determine the conditions under which detained food will be kept and how we will notify the owner. A few comments recommend that FDA should develop procedures for administrative detention of perishable foods that include a process for asking from the owners of such foods information as to the best storage methods to ensure the salvage of such foods. Another comment indicates that the rule should include a provision to allow, at the request of the owner, operator, or agent in charge, the freezing of detained ''fresh'' product that is (or will likely be) detained for 4 or more calendar days. One comment indicates that the Bioterrorism Act provides FDA with the authority to direct articles of food to be moved to a secure facility and, if necessary, to be moved from refrigerated storage to a freezer (§ 1.381), but that such an action is usually not neutral for the quality and integrity of the food, given that frozen food may then no longer be marketed as ''fresh'' food. The comments state that this action will change the intrinsic nature of the food.

(Response) FDA will determine the conditions for holding detained food on a case-by-case basis based on the totality of information available to us about the article of food. For example, if the food item is simply labeled ''Keep Refrigerated,'' with no additional information in the shipping documents, we are likely to specify that the food be stored under refrigerated conditions that comply with appropriate temperature recommendations (*e.g.*, recommended refrigeration temperatures for food in retail establishments listed in FDA's Model Food Code or common commercial practices). On the other hand, if the shipping documents specify that a specific refrigeration temperature must be maintained, we are likely to order that the food be stored at the temperature specified by the shipper. As stated in § 1.393(b)(7), the detention order will describe the appropriate storage conditions, *e.g.*, storage temperature. If necessary, FDA may consult with the owner of the food, if readily known, about appropriate storage conditions.

FDA advises that the removal of a detained article of ''fresh'' food from refrigerated storage to a freezer is an appropriate basis upon which the person who received the detention order, or that person's representative, may seek modification of the detention order of the detained food. However, FDA is unlikely to order a fresh food to be moved from refrigerated storage to a freezer, unless the owner, or that person's representative, advises us that such a move is appropriate. Section 1.381(c)(3) allows for a request to modify a detention order for this purpose, inasmuch as it provides that the request may be ''to maintain or preserve the integrity or quality of the article of food * * *''. Consequently, FDA does not believe a revision in the rule is needed.

(Comment 49) A few comments state that FDA should, upon request of the owner, provide the records of the storage conditions maintained during detention. Several comments state that if the storage conditions indicated in the detention order are not complied with during detention, causing loss of quality, there must be an opportunity to submit a claim to FDA for reimbursement. These comments suggest that FDA should include an appeal structure in the rules and create a fund for this purpose.

(Response) As we stated previously, the business arrangements for storing detained food are a private matter between the recipient of the detention order and the facility where the food will be stored. The recipient of the detention order is responsible for these arrangements, including matters concerning records to document that the specified storage conditions were maintained throughout the detention period. Neither the FD&C Act nor the Bioterrorism Act includes a provision for FDA compensating affected parties for any losses.

(Comment 50) Several comments address concerns about food being subject to administrative detention aboard a conveyance, *i.e.*, ships, trucks and railcars. These comments urge FDA to revise the regulation to require that when FDA issues an administrative detention order and the food is on a ship, truck, or railcar, FDA also must issue an order to the transporter to deliver the food to either the consignee or to a secure location, as determined by FDA officials. The comments further state that the order should specify that the person with the legal title to the food (*i.e.*, the shipper, the consignee, or a food broker), should bear the cost to store the detained food. Some comments state that the detention order should include provisions for the immediate removal to secure storage of a food that is detained administratively aboard a conveyance. One comment suggests that we define and make available for public comment the conditions that we believe would warrant transporting administratively detained food to secure storage facilities. Others state that the bases upon which a claimant may seek a limited conditional release should explicitly include the removal of a product from a conveyance to secure storage.

Another comment states that detaining food in place on a ship will affect the ship's schedule, causing deliveries of other cargoes to be delayed, which could cause plant shutdowns for lack of product. This comment also states that discharging a suspect cargo ashore into storage tanks would allow the cargo to be tested while under government supervision, which would provide the most cost effective solution while providing for security concerns.

(Response) FDA understands that detention of food aboard a conveyance may impact other activities of commerce that are dependent upon the ongoing operation of the conveyance. FDA will consult with CBP concerning the movement of food detained administratively aboard a conveyance to limit the impact on the flow of trade. However, we disagree with the suggestion that we should revise the regulation to obligate FDA to issue an order to the transporter to deliver the food to a specified destination at the expense of the person with the legal title to the food. We believe that the determination of whether we should order the food to be moved from the conveyance to another location should be made based on considerations about the nature of the contaminant, security,

preservation of the food, and accessibility to the food during the period of administrative detention. Based on our historical use of administrative detention with medical devices, we believe that we would detain food on a conveyance only under rare circumstances. It is more likely that we will allow the detained food to be removed from the conveyance to a storage facility.

FDA also disagrees with the suggestion that we specify in the detention order that a third party (*e.g.*, the shipper, consignee, or food broker) bear the cost of the transport of the food to secure storage. The business arrangements for storing detained food are a private matter between the recipient of the detention order and the facility where the food will be stored. The recipient of the detention order is responsible for making these arrangements.

With regard to the transporter's concerns that the detention of food aboard a conveyance has the potential to impact other activities of commerce that are dependent upon the ongoing operation of the ship, truck, or railcar, FDA advises that a transporter may seek modification of a detention order in order to remove a detained food from a conveyance to a storage facility. In § 1.381(c)(4), allows the transporter to request modification of a detention order for this purpose, inasmuch as it provides that the request may be ''for any other purpose that the authorized FDA representative believes is appropriate * * *.'' Accordingly, FDA does not believe a revision to § 1.381(c)(4) is warranted. However, FDA also advises that, although the regulations allow a transporter to request modification of a detention order to move the food from a conveyance to a storage facility, we will evaluate any such request on a case-by-case basis, considering all of the factors relevant to the specific case, such as whether the storage facility identified in the request can provide the necessary level of security for the food.

(Comment 51) One comment states that the proposed rule does not adequately address the case in which pet food products are detained administratively with shipments that may contain suspect food. The comment further states that the resulting delay could result in great loss to firms who plan to exhibit the detained products at a trade show.

(Response) If articles of detained food are part of a shipment containing food that is not subject to the detention order, the articles of food that are not subject to the detention order and can be readily segregated, can be so segregated and moved.

(Comment 52) One comment states that the detention process itself could increase the risk of intentional contamination of food because food, which normally moves quickly from farm to table, would be more vulnerable to attack when held for periods of time in storage or on a truck. The comment expresses concern about attacks on food under detention occurring in unguarded storerooms and garage sheds. Several comments ask that the detention be done where the merchandise is dispositioned to avoid the increase of the storage costs and the risk of robbery or damage of the merchandise. Another comment asks whether an article of food that is subject to a detention order must always be moved to a secure location.

(Response) The purpose of administrative detention is to help ensure that food for which the agency has credible evidence or information that the food presents a threat of serious adverse health consequences or death to humans or animals does not move in commerce, and to help ensure that such food is not distributed before the agency can initiate judicial enforcement actions against the food as appropriate. If FDA is concerned that a detained food is vulnerable to attack while under storage, we would order the storage to take place in an appropriately secured facility.

Section 1.380(b) states that if FDA determines that removal to a secure facility is appropriate, the article of food must be removed to a secure facility. FDA will consider, on a case-by-case basis, whether the article of food must be moved to a secure facility based on the situation and whether a given facility can provide the appropriate level of security.

(Comment 53) One comment addresses the potential impact of administrative detention on farmers. The comment states that, for many farmers, and all dairy farms, limited on-farm storage of perishable products will lead to a complete loss of value if products are stopped from shipment to markets or for further processing. The comment urges FDA to be careful when prohibiting shipment of food products from farms due to the unrecoverable costs of unmarketable product to the affected farm or farms. The comment further states that, for certain products, a critical market opportunity and the reputation of that farm as a reliable supplier could be lost for many years by a disruption in their ability to market their products.

(Response) FDA notes that the standard to detain any article of food is very high—credible evidence or information that the food presents a threat of serious adverse health consequences or death to humans or animals. If FDA orders a food to be detained administratively on a farm, and storage at the farm is limited, the farmer may, under § 1.381(d), request modification of the detention order to move the food to an offsite facility. In evaluating the request, we will consider, on a case-by-case basis, whether the facility identified in the request can provide an appropriate level of security.

In addition, we reiterate that we intend to proceed as expeditiously as possible to resolve all issues associated with particular administrative detentions.

- Removal to a secure facility, if FDA determines that such movement is appropriate (proposed § 1.380(b)).

(Comment 54) One comment states that it would be beneficial for FDA to identify any specific security requirements for storing detained product. This comment also states that nothing in the proposed regulation should be interpreted as elevating a warehouse's duty of care beyond that identified in the Uniform Commercial Code (UCC), as to do so will jeopardize the warehouse's insurance coverage.

(Response) Under the final rule, the detention order will identify specific storage security requirements for the detained food at issue. Issues regarding a warehouse's duty of care are beyond the scope of this rulemaking.

(Comment 55) One comment states that, if FDA orders the movement of a detained article of imported food to a secure location before a consumption entry is filed at the port of entry, the shipment would have to be moved in-bond, creating additional work and expense to the carrier and consumer. This comment suggests that FDA should publish, for public comment, the conditions that would warrant detained food articles to be transported before finalizing this rule. The comment states that it is critical that affected persons understand what the conditions are to ensure compliance with such conditions.

(Response) There are many situations that may arise that would warrant the movement of detained food to secure locations. At the present time, it is extremely difficult for FDA to anticipate and describe all scenarios and all conditions that would warrant detained food to be transported to a secure facility. When it is necessary for such transportation to occur, FDA will specify the appropriate conditions on a case-by-case basis in the detention order.

(Comment 56) One comment believes that FDA stated that detained articles of food should be moved by bonded carriers to make sure that the merchandise will be delivered to the facility that will be selected by FDA after the merchandise is released by CBP. In this situation, the comment asks that FDA put a high security seal (provided by the U.S. broker ahead of time) on the trailer and release the food to the U.S. broker or the trucking company facility. The comment states that this would be less expensive to the importers due to the fact that bonded carriers are expensive; demurrage charges are based on how many days it will take an FDA inspector to release or refuse the merchandise. Affected parties also will incur additional costs from the company that will be receiving the trailers, swamper and forklift services.

(Response) We do not define the security requirements for carriers or storage facilities in this rule. Instead, we will determine the relevant level of security of the facility on a case-by-case basis.

In some cases, we might require higher security, such as that associated with secure government storage facilities. In other cases, we might require lower security.

We note that we do not define the term ''secure facility'' either in this final rule or the final rule on prior notice. As we stated in the proposed rule on administrative detention, we will determine the relevant level of security for storage facilities on a case-by-case basis. Although we do not define the term ''secure facility,'' we note that the range of facilities available for storage of food that is detained administratively is broader than the range of facilities available for storage of food offered for import that is refused admission for a prior notice violation. This is because food offered for import that is refused admission for a prior notice violation is ''general order merchandise'' under title 19 of the United States Code. (See § 1.283(a)(2).) That merchandise must be stored in a bonded warehouse authorized to accept general order merchandise if one is available and capable of such storage. By comparison, food that is detained administratively has not been deemed to be subject to title 19 of the United States Code's limitations on general order merchandise. Accordingly, if the food product is imported and still subject to CBP control, FDA and CBP may determine that a facility other than a general order warehouse constitutes a ''secure facility'' for purposes of administrative detention.

(Comment 57) One comment states that detained articles of food should only be ordered moved to a secure facility in exceptional circumstances.

(Response) FDA will not know in advance all of the circumstances that may warrant removal to a secure facility. Each administrative detention action will be assessed based on the facts of the particular situation, including whether the storage facility can provide the necessary level of security for the food.

(Comment 58) Several comments raise issues concerning the costs for secure and nonsecure storage of detained food. One comment asks how recipients of the detention order would be informed about the costs charged by secure facilities for holding food. Other comments ask FDA whether there would be a standard fee for the storage costs, and whether FDA would ensure that the responsible party is able to afford the storage costs.

(Response) If removal to a secure facility is appropriate, FDA will state a specific location for storage of the food in the detention order, as provided in § 1.380(a), or in response to a request for modification of the detention order under § 1.381(c). The recipient of the detention order may contact the storage facility to determine the costs for storing the detained product. It is also possible that FDA could order a detained article of food to be stored in government storage, which may be less expensive.

(Comment 59) A few comments address the importance of adequate facilities being available for holding detained food. One comment states that FDA must guarantee that there will be enough facilities to ''ensure the conservation of the merchandise that is detained.''

(Response) Inasmuch as FDA will not operate the facilities that will be used to store detained foods, we are unable to guarantee that any particular facility will be available for use in storing detained foods at any particular time. However, we note that detained food will not necessarily be required to be removed to a secure facility. If detained food is required to be removed to such a facility, then, as we stated in the proposed rule, secure facilities are readily available throughout the United States.

(Comment 60) One comment states that it is necessary to know who is in charge of transporting food that is under administrative detention and where FDA has ordered such transportation.

(Response) FDA will decide on a case-by-case basis who will be responsible for transporting detained food. In some cases it may be necessary for us to designate a third party to transport the food, for example, if we believe that control of the food could be lost if the recipient of the detention order transported it. In cases where we believe that this risk is not present, we may direct the recipient of the detention order to transport the food.

- If FDA directs you to move the detained article of food to a secure facility, you must receive a modification of the detention order before you move the detained article of food. (proposed § 1.380)(c))

See comments under § 1.381, ''May a Detained Article of Food be Delivered to Another Entity or Transferred to Another Location?''

- You must ensure that any required tags or labels accompany the detained article during and after movement. (proposed § 1.380)(d))

See comments under § 1.382, ''What Labeling or Marking Requirements Apply to a Detained Article of Food?''

- The movement of an article of food in violation of a detention order is a prohibited act under section 301 of the FD&C Act. (proposed § 1.380(e))

(Comment 61) FDA did not receive comments on this issue.

(Response) We did not make any changes to this section.

2. Comments on May a Detained Article of Food be Delivered to Another Entity or Transferred to Another Location? (Proposed § 1.381)

(Comment 62) A few comments state that FDA should be required to allow detained food to be delivered to the importer, owner or consignee, subject to conditional recall, except where FDA believes there is an immediate threat of harm. One of these comments states that FDA could retain a bond to allow detained articles to be released for delivery to the importer, owner, or consignee until the detention has been terminated.

(Response) FDA disagrees with these comments because we do not have the authority to allow the delivery of foods that have been detained administratively to the owner's or importer's premises under bond. Section 303 of the Bioterrorism Act specifically states that this section may not be construed as authorizing the delivery of an article of food that is subject to a detention order under the execution of a bond while the article of food is subject to a detention order, and section 801(b) of the FD&C Act does not authorize the delivery of the article under the execution of a bond while the article is subject to the order.

(Comment 63) A couple of comments ask if FDA will ensure fast procedures

with respect to requests for the authorized movement of the detained article of food.

(Response) FDA intends to proceed as expeditiously as possible to resolve all issues involved with particular administrative detentions.

(Comment 64) One comment asks if the period of detention is suspended for the amount of time that it takes to complete the request and move the article of food under a limited conditional release.

(Response) The length of time to process a request for modification of a detention order and to move an article of food does not affect or extend the period of detention stated in the detention order (a maximum of 20 or 30 calendar days, as appropriate).

(Comment 65) One comment states that, if the distributor does not have direct control of the mode of transport, FDA's limited conditional release should stipulate that the mode of transport must not introduce any condition or substance that would adulterate or otherwise deleteriously impact the quality of the detained food.

(Response) As stated previously, FDA will decide on a case-by-case basis who will be responsible for transporting food that is detained administratively. In some cases it may be necessary for us to designate a third party to transport the food, if we believed that control of the food could be lost if the recipient of the detention order transported it. In cases where we believed that this risk is not present, we may direct the recipient of the detention order to transport the food. FDA does not believe that it is necessary to state in its approval of a request for modification of a detention order that the mode of transportation must not introduce an adulterant or otherwise deleteriously impact the quality of the detained food. However, if the food does become further adulterated during transport, possible ultimate release of the food could be affected.

(Comment 66) One comment indicates that FDA's current practice is to place routine imports of certain items on the ''Refused Entry/Administrative Detention'' status as part of the standard protocol for items such as raisins and avocado paste. The comment states that such a product is then held for additional testing in the United States before release when the product is shown to present no threat to U.S. health. The comment encourages FDA to exhibit discretion and allow for limited conditional release of such items and allow the product to be held in a facility capable of maintaining and preserving the integrity and quality of the article of food because they are low risk.

(Response) FDA believes that this comment is confusing FDA's refusal authority under section 801(a) of the FD&C Act and our ''administrative detention'' authority under section 303 of the Bioterrorism Act. Any current import alerts, such as those for raisins and avocado paste, are unaffected by this final rule.

3. Comments on What Labeling or Marking Requirements Apply to a Detained Article of Food? (Proposed § 1.382)

(Comment 67) One comment recommends that, in addition to the information on the FDA tags or labels described in § 1.382(d) of this rule, they should also include the expiration date of the detention order and the name of the authorized FDA representative who approved the detention order. This comment also states that if the detention period is extended for any additional time up to the 10-calendar day limit, the detention order and the affixed tags or labels should be amended accordingly.

(Response) FDA disagrees with the comment to revise § 1.382(d) to add the expiration date of the detention order and the name of the authorized FDA representative who approved the detention order to FDA's tags or labels. The name of the person who issued the detention order is required to be on the tag or label. In addition, FDA is revising the final rule to include § 1.393(b)(14), which requires that the detention order include the name and title of the authorized FDA representative who approved the detention order.

The period of detention is required on the tag or label; thus, the expiration date of the detention can be determined from this information. FDA agrees that, in the event that a detention is extended from 20 to 30 calendar days, another detention order must be issued and new tags affixed to the articles.

(Comment 68) A few comments state that applying a label or mark to the detained product should be avoided at all cost because, if the product is detained erroneously, the label or mark may make the food unmarketable. A few other comments ask whether FDA will remove the labels or marks upon termination of a detention order. One comment strongly recommends that detained articles be marked only on the packing cases, because any visible detention mark would make the food unmarketable.

(Response) As FDA stated in the proposed rule, any label or mark of detention will be attached as appropriate given the circumstances. In some instances, the mark or label may be attached to the food container, while in other instances, the mark may be fastened to a packing container. Where the agency cannot mark or label a container or packing container, a mark or label may be attached to accompanying documents. FDA may use other means of marking or labeling as appropriate or necessary. Once the detention order is terminated, FDA will remove, or authorize the removal of, the required labels or tags, as described in § 1.384. Accordingly, we would not expect the labeling and marking provision to impair the marketability of an article of food for which the detention order is terminated.

F. Comments on What Expedited Procedures Apply When FDA Initiates a Seizure Action Against a Detained Perishable Food? (Proposed § 1.383)

(Comment 69) FDA requested comments on this or other procedures that would address concerns about expedited enforcement actions with respect to perishable food. One comment states that the provision for expedited procedures to initiate a seizure action against a detained perishable food is unfair because the claimant would be robbed of any right to appeal a detention order in certain circumstances. The comment states that if the detention order is issued on a Wednesday, the claimant would be required to file its appeal by Friday. However, according to this comment, the FDA also is obligated to ''file'' its seizure action with the DOJ on that same day (Friday) because the actual 4th calendar day after detention is Sunday, when the Court is not in session. The comment argues that the claimant would not have a chance to appeal since the right to appeal is terminated when a seizure action is initiated.

(Response) FDA disagrees with this comment. The Bioterrorism Act requires FDA to provide by regulation, expedited procedures for instituting certain judicial enforcement actions involving perishable foods that are detained under section 303 of the Bioterrorism Act. The purpose of this statutory requirement is to ensure that FDA decides on an expedited basis whether to pursue Federal court seizure of detained perishable food, and that the owners of such perishable food have timely information about how the government plans to proceed with respect to their detained food.

The final rule is consistent with the Bioterrorism Act's directive. The comment appears to misunderstand the mechanics of the regulation's procedures. FDA's process of sending a

seizure recommendation to DOJ is not contemporaneous with the filing of that action in federal court. FDA anticipates that, if we send a seizure recommendation in these circumstances, the seizure will be filed, the court will issue a warrant, and the U.S. Marshal will seize the food, soon after the recommendation is sent to the DOJ. FDA lacks authority to mandate the timing of these actions. As a result, the filing and execution of the seizure may not occur on the same calendar day that the recommendation is sent to DOJ.

Moreover, the Bioterrorism Act provides that an appeal of an administrative detention is terminated once an enforcement action involving the detained food is instituted in Federal court, that is, when the court has issued a warrant, and the U.S. Marshal has seized the food. The regulation is consistent with this statutory provision. Until the seizure action is filed in Federal court, the appeal process will continue. Owners of detained food can increase their chances of having their views heard in the administrative forum of the appeal process by submitting an appeal immediately after the food is detained. Once a seizure action has been filed in Federal court, and the food has been seized, however, any challenge to the administrative detention would be moot, as the food would be under seizure under Federal district court rules. The owner of the food, or another party with sufficient interest in the food, can then contest the seizure action in Federal court. There, it can challenge the government's position that the food is adulterated or misbranded and is subject to seizure, condemnation, and forfeiture under section 304(a) of the FD&C Act. A claimant in a seizure action has the same opportunity to be heard in Federal court as the government. Although the forum may change from an administrative hearing before an FDA presiding officer to a judicial proceeding before a Federal court judge, the claimant nonetheless has the right to challenge FDA's determination that the food should be removed from commerce.

G. Comments on When Does a Detention Order Terminate? (Proposed § 1.384)

(Comment 70) One comment asks how a detention order can expire if confirmation of a detention order is considered final agency action.

(Response) Confirmation of a detention order by the presiding officer at a hearing on an appeal of a detention order is considered final agency action for purposes of the judicial review provisions of the Administrative Procedure Act (5 U.S.C. 702). Even if the order is confirmed, it expires on the 21st calendar day (or 31st calendar day if the detention has been extended) following the issuance of the detention order.

(Comment 71) One comment suggests that FDA amend § 1.379(c) to state that, in accordance with § 1.384, information regarding the termination of a detention shall be provided to the company in writing within calendar day of the decision by FDA that the order shall be terminated.

(Response) FDA expects that we would normally be able to issue the detention termination notice to the person who received the detention order (*e.g.*, the owner, operator or agent in charge of the place where the food is located and the owner of the food, if known) within 1 calendar day of the decision to terminate a detention, unless extenuating circumstances exist. However, we are not revising the rule to incorporate such a deadline because in some instances it may not be possible to inform the company in writing within 1 calendar day due to unforeseen circumstances beyond the agency's control.

H. Comments on How Does FDA Order a Detention?

1. Comments on Who Approves a Detention Order? (Proposed § 1.391)

(Comment 72) One comment recommends the establishment of a national detention approval board to ensure a uniform application of the regulation and to avoid costly errors and delays. A few comments state that the detention order must be approved at the Regional Food and Drug Director level or higher because the judgment of credible threats is case-by-case and the District Director level provides too much discretion.

(Response) FDA disagrees with these comments. Congress included language in the Bioterrorism Act that specifies who is authorized to approve a detention order, *i.e.*, the Secretary or an official designated by the Secretary (who may not be so designated unless the official is the director of the district in which the article involved is located, or is an official senior to such director). FDA believes that the Bioterrorism Act does not contemplate any sort of a national detention approval board. To the contrary, the statute makes clear that Congress expected that FDA District Directors, or officers senior to such directors, could and would exercise this authority.

(Comment 73) One comment states that the approval of a detention order should always be written to avoid misunderstandings.

(Response) Written approval of a detention order is required under § 1.391. This § 1.391 states that prior written approval must be obtained, or if prior written approval is not feasible, prior oral approval must be obtained and confirmed in writing as soon as possible. Thus, written approval always will be obtained.

2. Who Receives a Copy of the Detention Order? (Proposed § 1.392)

(Comment 74) Many comments state that it is imperative that FDA provide a copy of the detention order to the owner of the article of food that has been detained to ensure that such owner has all of the necessary information to address any potential corrective action or to determine if an appeal should be filed. These comments suggest that the recordkeeping and facility registration provisions of the Bioterrorism Act should permit identification of the owner of the food.

(Response) As provided in § 1.392, FDA will provide the detention order to the owner or agent in charge of the place where the detained article of food is located and the owner of the food, if the owner's identity can be determined readily. Examples of steps FDA will take to determine the identity of the owner of a detained article of food include examining any readily available bills of lading or invoices for the article of food and asking the owner, operator, or agent in charge of the place where the detained article of food is located for any information he or she may have regarding the identity of the owner of the article of food.

As the comment suggests, section 305 of the Bioterrorism Act requires facilities that manufacture, process, pack, or hold food for human or animal consumption in the United States to register with FDA by December 12, 2003 (68 FR 58893); however, this registration information does not always identify the owner of a particular article of food. The registration documents contain information such as the name of the facility that manufactured/processed the food (which may or may not be the current owner of the food), the type of establishment and what product(s) the facility manufactures/processes. Therefore, the fact that FDA has a registration from a manufacturer, processor, packer, or holder of an article of food does not necessarily facilitate contacting the owner of an article of food that has been detained. Nor is information identifying the owner of the food necessarily readily available from the records that are required to be

maintained under section 306 of the Bioterrorism Act.

(Comment 75) One comment asks whether the agent in charge of the place where the article of food is located is the same U.S. agent who is responsible for registration and prior notice under the Bioterrorism Act.

(Response) Use of the term ''agent in charge'' in this final rule simply means the person who is in charge of the place where an article of food is located at the time of a detention. The registration interim final rule (68 FR 58893), issued under section 305 of the Bioterrorism Act, requires that all foreign facilities required to register have a U.S. agent. The U.S. agent must be a person residing or maintaining a place of business in the United States, whom the owner, operator, or agent in charge of a foreign facility designates as its U.S. agent for purposes of registration. Thus, depending on where and when an article of food is detained, the U.S. agent may or may not be the same person as the agent in charge of the place where an article of food is located at the time of a detention. The prior notice interim final rule (68 FR 58974) does not require a U.S. agent.

(Comment 76) Several comments state that the exporting country of an article of food that has been detained must receive information concerning the detention so that it may take appropriate action. These comments suggest that FDA should contact the embassy of the country or the competent authority of the country. A few comments state that various parties should be informed of the administrative detention of imported articles of food (*e.g.*, the exporter, agent or importer, and the customhouse broker). A few other comments state that FDA should be able to notify the recipients of products subject to the detention order at multiple locations by accessing records maintained under the recordkeeping section of the Bioterrorism Act.

(Response) FDA disagrees with these comments in part. FDA will issue the detention order to the owner or agent in charge of the facility where the food is located and, as stated previously, the owner of the food, if their identity is readily available. However, FDA does not currently plan to routinely publicize the issuance of detention orders. The parties who receive the detention order may choose to inform any additional interested parties regarding the detention. In the event of a public health emergency, FDA may issue a Talk Paper or Press Release with information regarding an article of food that presents a threat of serious adverse health consequences or death to humans or animals. In such an emergency, FDA also may inform other departments, agencies or governments to ensure public health protection, as deemed appropriate based on the circumstances of each case.

Although it may be possible to identify other interested parties by accessing records maintained under the recordkeeping provisions, we do not believe that it is appropriate for FDA to be obligated to notify all of the various parties requested by the comments. Interested parties may request information regarding administrative detentions under an FOIA request. Such information may be released after FDA has removed any information that is protected from disclosure to the public.

(Comment 77) One comment suggests that FDA should publish information concerning administrative detentions in the Import Refusal Report. A few other comments state that information concerning administrative detentions should be considered confidential and only disclosed to the owner of the products and the exporting country when there is a proven threat of serious adverse health consequences or death to humans or animals. These comments suggest that such disclosure should be through a rapid alert system. Some comments suggest that we devise and test a method of communicating essential information to key industry officials in the United States in the event of a food security event.

(Response) As we stated previously, FDA will issue the detention order to the owner, operator, or agent in charge of the facility where the detained article of food is located, and as stated previously, the owner of the food if its identity is readily available. At this time, we have no plans to routinely publicize the issuance of detention orders, *e.g.*, in Import Refusal Reports or the European Union's Rapid Alert System. This is consistent with the practice FDA uses for medical device detentions, which are not routinely publicized in the manner suggested by these comments.

However, FDA agrees that there may be information related to administrative detention of food that is confidential or classified. A number of statutes, regulations, and policies address protection of these kinds of information from unauthorized disclosure.

We believe the request for FDA to devise and test a method of communicating essential information to key industry officials in the United States in the event of a food security event is intended to include activities beyond administrative detention. Consequently, this discussion is outside the scope of this rulemaking.

(Comment 78) One comment states that procedural safeguards should be put in place to protect both manufacturers and their customers during what is essentially a seizure-type action. This comment recommends that FDA revise the regulation to ensure that, similar to FDA's seizure authority under the FD&C Act and relevant court rules, notice of detention be accompanied by personal service upon the responsible party at individual locations.

(Response) FDA believes that the regulation in its present form adequately protects the interests of potential claimants. We note that administrative detention is not the equivalent of a seizure action, but is instead an administrative action that may precede a seizure action in Federal Court. If we were to institute a seizure after an administrative detention, the government would provide notice of that action in accordance with the Federal Rules of Civil Procedure and applicable local rules, which vary as to their requirements for personal service.

3. Comments on What Information Must FDA Include in the Detention Order? (Proposed § 1.393)

(Comment 79) A couple of comments state that the detention order should include a copy of the written approval granted by the authorized FDA representative. These comments state that the approval should include the information upon which the administrative detention was based, what actions will be taken with the product, and the expected time period for which the product will be held. A few other comments state that the detention order should include information such as grower codes, lot codes and other identifiers. A few comments believe it would be valuable for the appeal procedures and applicable deadlines to be explained in the detention order. One comment suggests that the detention order should include provisions regarding the appropriate storage and transportation conditions, such as refrigerated foods kept under 40 degrees Fahrenheit (F) and frozen foods kept under −4 degree F to meet the regulatory requirements and common industry practices and satisfy their customer expectations.

(Response) FDA agrees in part with these comments. Section 1.393(b)(6) requires that the detention order include a brief, general statement of the reason for the detention. Section 1.393(b)(4) requires that the detention order include the period of the detention. Section 1.393(b)(3) requires that the detention

order include information about the identification of the detained article of food. Identifying codes, such as lot numbers, may be included in the description of the detained article of food provided on the detention order. However, most food products are not required to bear a manufacturer's code; thus, this information may not be available. FDA notes that section 303 of the Bioterrorism Act provides that FDA may detain food for up to 30 calendar days to enable FDA to institute a seizure or an injunction action. Section 1.393(b)(10) requires that the detention order include the text of section 304(h) of the FD&C Act (section 303 of the Bioterrorism Act), as well as §§ 1.401 and 1.402, which describe the administrative detention authority, who may submit an appeal, and the requirements for submitting an appeal, respectively.

Section 1.393(b)(7) requires that the detention order include a description of the appropriate storage conditions, and § 1.393(b)(8) requires a description of any applicable conditions of transportation. As we stated earlier, FDA will determine the conditions under which detained food must be held on a case-by-case basis, based upon the totality of information available to us about the article of food. The record evidencing written approval and the detention order would be released to a requester under an FOIA request after FDA removes any information that is protected from disclosure to the public.

(Comment 80) Another comment states that the detention order should include the type of analysis, procedures for analysis, and the criteria used to determine if the product is adulterated. This comment further states that it is not clear who will do the sampling, who will pay for this process, and whether there will be a guarantee that the food has not been contaminated.

(Response) FDA disagrees with this comment because the nature of bioterrorist attacks or other food emergencies makes it difficult to predict whether sampling and analysis will be necessary, or the types of analyses that will be needed. If an analysis is done, FDA may disclose the type of analysis or the analytical procedure during an informal hearing. FDA routinely uses approved and validated methods. For information related to FDA's laboratory, laboratory procedures, new techniques and useful analytical findings in support of FDA regulatory activities. (See *http://www.fda.gov/ora/science_ref/default.htm*.) In most situations, FDA will do the sampling and offer to pay for the sample. FDA will do the sample analyses. However, the agency cannot guarantee that a particular article of food has not been contaminated, even if there are negative analytical findings of samples of the article. Given the nature of bioterrorist acts, the varied possible scenarios for contamination of food, and the various possible contaminants that may be used, we do not believe that it is possible for anyone to absolutely guarantee that a particular article of food has not been contaminated.

I. Comments on What Is the Appeal Process for a Detention Order?

1. Comments on Who is Entitled To Appeal? (Proposed § 1.401)

(Comment 81) One comment asks whether someone who does not have a proprietary interest in the detained object, but has a commercial interest (*e.g.*, the importer, U.S. agent (as defined in the registration interim final rule), or shipper), can appeal a detention order. Another comment asks whether someone designated by the owner, such as a lawyer or food technologist, can appeal a detention order. One comment indicates that the rule should state whether the person who appeals the detention has to have certain characteristics and reside in the United States.

(Response) We do not know what is meant by ''certain characteristics,'' but a person entitled to appeal a detention order need not be a resident of the United States. With respect to whether a proprietary interest is required, section 304(h)(4) of the FD&C Act states in part that ''any person who would be entitled to be a claimant for such article if the article were seized under section (a) may appeal the order.'' Thus, if a person were entitled to be a claimant in a seizure action, that person would also be entitled to be a claimant in an appeal from a detention order. To be a claimant in a seizure action, a person must have an interest in the seized goods sufficient to confer standing under both Article III of the U.S. Constitution, and Supplemental Rule C(6) of the ''Federal Rules of Civil Procedure'' (available at *http://www.uscourts.gov/rules*). The local rules of the Federal Court district in which a seizure or administrative detention occurs set forth the procedures by which a party establishes entitlement to be a claimant. A person who asserts an interest in, or right against, property that is the subject of an action must file a verified statement identifying the interest or right. The meaning of ''verified statement'' under Supplemental Rule C(6) is governed by the local Federal District Court rules in which the detention takes place, and usually means that the statement must be accompanied by an oath or affirmation attesting to the statement's veracity. A determination of whether a party has a sufficient interest in the food is made on a case-by-case basis. As such, it is outside the scope of this rulemaking.

2. Comments on What Are the Requirements for Submitting an Appeal? (Proposed § 1.402)

(Comment 82) FDA sought comments on whether there are other ways we should be counting days for filing appeals, while adhering to the statutory deadline of 5 days for FDA to issue a decision on appeal (for both perishable and nonperishable food). One comment states that for appeals, and any other sections of the regulations that incorporate specific timeframes, the timeframes should be ruled by ''international timetables.''

(Response) FDA's understanding is that the comment is asking FDA to take international time zones into consideration when counting calendar days to meet the various timeframe deadlines described in this final rule. FDA disagrees with this comment. It is not feasible for FDA to make exceptions on how we count calendar days based on the time zone where the owner of the goods is located. The total elapsed time from the time the detention order is issued throughout the detention process will be the same regardless of the time zone in which the detention order was issued. Under the final rule, the ''start'' and ''end'' times of a detention order, and all deadlines within that period, will be measured by the time zone in which the detention order was issued.

(Comment 83) One comment says that FDA stated that the request for appeal by the industry could be verbal, and FDA will respond by mail or letter, but it is not clear how quickly FDA is going to answer the request. Another comment asks whether the 5 days from the date of appeal that FDA has to issue a decision on an appeal are natural or working days.

(Response) FDA believes that this comment misunderstood the requirements in § 1.402(a). Section 1.402(a) of this rule requires all appeals to be submitted in writing. The written appeal can be delivered to the FDA District Director in person, by mail, e-mail, or fax. As stated previously, the Bioterrorism Act requires FDA to issue a decision on an appeal within 5 calendar days after the date of appeal. Therefore, FDA will issue a decision within the 5-calendar day statutory deadline. However, as FDA states earlier in this rule, FDA is committed to acting

as expeditiously as possible when we detain an article of food, especially in the case of an article of perishable food. Section 1.405 requires FDA to issue a decision on appeal within 5 calendar days from the date of appeal. Section 1.377 of the rule defines ''calendar day'' to mean every day shown on the calendar, which includes holidays and weekends.

(Comment 84) One comment states that Congress's directive that FDA issue procedures to expedite detention of perishable food appears at section 304(h)(2) of the FD&C Act as added by section 303(a) of the Bioterrorism Act, which is a provision relating to the ''period of detention.'' The comment asserts that FDA's proposal to implement this directive, however, relates only to appeals of detention orders, a subject addressed at section 304(h)(4) of the FD&C Act. In the comment's opinion, Congress's decision to place its mandate for the expediting of administrative detention procedures for perishable foods in the section entitled ''period of detention,'' rather than in the section entitled ''appeal of detention order,'' indicates its intent that FDA take direct action to accelerate the pace with which erroneously detained perishable food may be released, not merely the pace at which an informal hearing may be convened. The comment states that Congress required issuance of the expedited procedures to safeguard a claimant's rights with respect to perishable food, and FDA's proposal to restrict the rights of prospective claimants to appeal detention of such food is inconsistent with that objective. Another comment is concerned that the appeals procedure may cause undue delay in the detention process.

(Response) FDA disagrees with these comments. Section 303(a)(2) of the Bioterrorism Act requires the Secretary to provide procedures for instituting certain judicial enforcement actions under the FD&C Act on an expedited basis with respect to perishable foods. FDA provides for expedited procedures for initiating seizure actions in § 1.383 by requiring FDA to submit a seizure recommendation for a detained perishable food to DOJ within 4 calendar days after FDA issues the detention order, unless extenuating circumstances exist. Although a claimant may opt not to appeal the detention order, FDA is required to offer the opportunity to appeal under section 304(h)(4) of the FD&C Act.

The appeal and hearing procedures assist the process of appealing a detention order. Section 304(h)(4) of the FD&C Act requires FDA to confirm or terminate any detention order within 5 calendar days after an appeal is filed. However, if a claimant files an appeal sooner rather than later in the time period for filing appeals, a decision to terminate a detention order could occur before the 5-calendar day statutory deadline is reached.

(Comment 85) One comment suggests that FDA should provide for an ''automatic appeal'' on the second day after an administrative detention order is issued, with a decision on the appeal to be made within 24 hours of the hearing. Another comment requests that the appeal process for chilled, live shellfish that have a commercial shelf life of 48 hours following harvest, be measured in hours, with all attempts to release suitable consignments within 24 hours.

(Response) FDA disagrees with these comments and maintains the same timeframe for perishable food as we proposed. A more rapid procedure is not practicable. Furthermore, even a more rapid procedure would result in reductions in the shelf life of highly perishable food products, such as fresh seafood, possibly requiring such products to be reconditioned and sold as something other than ''fresh seafood.'' We do plan to work with claimants to preserve the article of food when possible; a request for modification of a detention order, for instance, may be used to move a detained article of food from refrigerated storage to a freezer. As we stated earlier, we are committed to acting as expeditiously as possible when we detain an article of food.

(Comment 86) A few comments ask that FDA treat all foods in the same manner as perishable foods for appeal purposes. Another comment indicates that a ''reasonable period'' of 20 calendar days, which could be extended to 30 calendar days, means in practical terms that all perishable foods/drinks, including those ''commercially'' perishable, are no longer suitable for sale. The comment states that this means that, if a ''fast-track'' appeal for perishable food does not allow a quicker release of detained food when it is found to be safe, the value of such an appeal is questionable.

(Response) FDA disagrees with these comments and is maintaining the same timeframes for appeal as we proposed. The Bioterrorism Act allows FDA to institute a detention for a reasonable period, not to exceed 20 calendar days, unless a greater period, not to exceed 30 calendar days, is necessary to enable the Secretary to institute a seizure or injunction action. As stated earlier, the Bioterrorism Act also requires FDA to provide an opportunity to file an appeal of the detention order and to confirm or terminate the detention order within 5 calendar days after an appeal is filed. If a claimant files for an appeal sooner rather than later in the time period for filing appeals, a decision to terminate a detention could occur before the 5-day statutory deadline for rendering a decision on appeal. The Bioterrorism Act also requires FDA to confirm or terminate a detention order within 5 calendar days after an appeal is filed, whether the food is a perishable commodity or not. Thus, the claimant of a nonperishable food, including one that is seasonal in nature could file an appeal within the first 2 calendar days after receipt of the detention order rather than later in the 10 calendar days allowed under the procedures for a nonperishable food, and obtain a decision as soon as than would occur under the ''fast-track'' appeal process for perishables.

(Comment 87) One comment states that FDA should establish that, in cases where the detention order is given to someone who is not authorized to appeal it, the time table for submitting the appeal should not begin until a person who has the right to appeal has been notified.

(Response) FDA disagrees with this comment. As described in § 1.392(a) of the final rule, FDA will provide a copy of the detention order to the owner or agent in charge of the place where the detained articles of food are located. Under § 1.392(a) of this rule, FDA also will provide a copy of the detention order to the owner of the food if their identities can be readily determined. Under § 1.392(b) of this rule, if FDA issues a detention order for an article of food located in a vehicle or other carrier used to transport the detained article of food, FDA also will provide a copy of the detention order to the shipper of record and the owner and operator of the vehicle or other carrier, if their identities can be determined readily. Examples of steps FDA will take to determine the identity of the owner of a detained article of food include examining any readily available bills of lading or invoices for the article of food and asking the owner, operator, or agent in charge of the place where the detained article of food is located for any information he or she may have regarding the identity of the owner of the article of food. There may be times when FDA cannot determine who would be entitled to be a claimant of the article. The purpose of administrative detention is to hold in place, and protect against any movement that could lead to further distribution of, the

food that poses the threat of serious adverse health consequences or death to humans or animals. Consequently, the action is against the articles, not the owner of the articles. We believe that it is likely that any responsible firm who has had product detained on their premises will notify the rightful owner. In addition, it is an owner's responsibility to know the whereabouts of its food product, and to be familiar with the chain of custody related to that food.

3. Comments on What Requirements Apply to an Informal Hearing? (Proposed § 1.403)

(Comment 88) Several comments argue that FDA should not have discretion to deny a request for an informal hearing; the comments argue that our interpretation is inconsistent with the Bioterrorism Act's plain meaning and legislative history, and violates due process under the Fifth Amendment. A few comments indicate that FDA must determine and specify the criteria used to concede or deny a hearing.

(Response) FDA disagrees with these comments because the Bioterrorism Act requires only that FDA ''provid[e] opportunity for an informal hearing''; the statutory language does not require FDA to conduct an informal hearing for every claimant who appeals a detention order. Our interpretation of this section of the Bioterrorism Act is consistent with our long-standing interpretation of similar statutory language in section 304(g) of the FD&C Act (21 U.S.C. 334(g)), which governs medical device detentions. FDA has authority to deny a hearing when the appeal raises no genuine and substantial issue of fact. (See *Weinberger* v. *Hynson, Westcott & Dunning,* 412 U.S. 609, 620–621 (1973).)

The final rule also is consistent with our regulation at § 16.26(a), which states that we do not have to grant all requests for hearings:

> A request for a hearing may be denied, in whole or in part, if the Commissioner or the FDA official to whom the authority to make the final decision on the matter has been delegated under part 5 determines that no genuine and substantial issue of fact has been raised by the material submitted. If the Commissioner or his or her delegate determines that a hearing is not justified, written notice of the determination will be given to the parties explaining the reason for denial.

(Comment 89) FDA sought comments on the timeframes for holding the informal hearing. One comment states that the hearing should be held within 2 calendar days from appeal. Another comment asks that FDA shorten the period for holding a hearing in appeals for perishable food to 3 calendar days. One other comment states that, because the timing of the hearing has no direct impact on the rendering of the agency's confirmation or termination of the detention order, FDA's proposal would have no inherent effect on expediting the release of erroneously detained perishable food. Another comment believes that the FDA has wisely decided upon an expedited hearing process for perishable foods that are detained administratively, but states that the proposed process is not fast enough. The comment notes that, as stated in the proposed regulation, an appeal and request for a hearing must be filed within 2 calendar days of receipt of a detention order. If FDA grants the request, the hearing will be within 2 calendar days after the date the appeal is filed. FDA's decision on the appeal must be issued within 5 calendar days of the date of the appeal filing. The comment states that this proposed procedure will still take up to 7 calendar days, and for highly perishable fresh seafood products, this would leave only 2 to 3 calendar days of acceptable shelf life remaining. Practically, these remaining days would be used in distribution so that a shipment of perishable food (*e.g.*, fresh seafood), in most cases, would be a total loss. One comment asks that FDA extend the time limit so that exporting countries will have enough time to prepare documents. Another comment states that, because the presiding officer may be an RFDD from another region or another official senior to the district director, the transit time from one region to the other must be factored into the established hearing deadlines.

(Response) FDA acknowledges that the timeframes for holding a hearing are relatively short. Because the Bioterrorism Act requires FDA to issue a decision on an appeal within 5 days after the appeal is filed, FDA had to establish quick timeframes for holding the hearing to ensure that we adhere to the statutory requirement. Short timeframes also should help to minimize the impact on an article of food that is detained, but is subsequently released from detention. FDA did not receive any comments that suggested alternate procedures that would both allow for a hearing and for compliance with the statutory requirement for the agency to issue a decision on an appeal within 5 days after the appeal is filed. Therefore, FDA is maintaining the timeframes we proposed.

If FDA grants a hearing, the timeframes will adhere to § 1.402(d) of the rule, which requires FDA to hold a hearing for food that has been detained within 2 calendar days after the date the appeal is filed. A claimant can control the time by which the hearing has to take place and the time by which FDA has to issue a decision if the claimant appeals the detention order sooner rather than later, *i.e.*, this final rule specifies the maximum timeframes claimants have to file an appeal. Claimants certainly can file earlier.

4. Comments on Who Serves as the Presiding Officer at an Informal Hearing? (Proposed § 1.404)

(Comment 90) Many comments recommend that the individual presiding over an appeal hearing must be senior to the individual who approved the detention order. Another comment suggests that the informal hearing on an appeal of a detention order also should allow third-party participants or attendees, not just participation by an FDA Regional Food and Drug Director or another FDA official senior to an FDA District Director.

(Response) FDA disagrees with the comment that the individual presiding over an appeal hearing must be senior to the individual who approved the detention order. FDA's regulation on presiding officers, § 16.42, ensures that the officer presiding over an appeal hearing is free from bias or prejudice.

Under §§ 16.42(c)(2) and 1.404, an FDA Regional Food and Drug Director, or another FDA official senior to an FDA District Director, may preside over an appeal hearing as long as that person has not participated in the investigation or action that is the subject of the hearing, or is subordinate to a person, other than the Commissioner of Food and Drugs (the Commissioner), who has participated in such investigation or action.

With respect to the suggestion that the hearing should allow participation or attendance by third parties, § 16.60 states that ''a regulatory hearing is public, except when the Commissioner determines that all or part of a hearing should be closed to prevent a clearly unwarranted invasion of personal privacy; to prevent the disclosure of a trade secret or confidential commercial or financial information * * *.'' FDA also notes that, if the hearing involves the discussion of classified information, we only would allow participation by parties, both within and outside FDA, by persons with the appropriate security clearance.

5. Comments on When Does FDA Have To Issue a Decision on an Appeal? (Proposed § 1.405)

(Comment 91) Several comments recommend that FDA's decision on appeal should be sooner than within 5 calendar days after the appeal is filed, *e.g.*, within 2 calendar days or 3 calendar days after the appeal is filed. Many comments recommend that FDA's decision on appeal should be made within 2 calendar days after the hearing for detained perishable and nonperishable foods. Another comment asks whether FDA can realistically accommodate administrative detention appeals in a timely manner. These comments state that, when identifying the detention and appellate timeframes, the agency must consider the logistical requirements (placing shipping orders, transportation and other distribution requirements) in evaluating the potential shelf life and value of the food product.

(Response) Under section 303 of the Bioterrorism Act, FDA must confirm or terminate a detention order within 5 calendar days after an appeal is filed. Because each detention and appeal will be assessed based on the facts of the particular situation, FDA can not know in advance what work will have to be accomplished or what information will have to be considered to make our decision to confirm or terminate a detention order following an appeal. Therefore, it is not appropriate to limit the authority and flexibility that Congress provided in the Bioterrorism Act by reducing the number of calendar days the agency has to confirm or terminate a detention order following an appeal. FDA notes that these are maximum timeframes for rendering a decision. As stated previously, FDA intends to act as expeditiously as possible. Thus, FDA may render decisions on appeal sooner than 5 calendar days if we are able to do so.

(Comment 92) One comment acknowledges that confirmation of a detention order by the presiding officer is to be considered a final agency action for purposes of the Administrative Procedure Act (5 U.S.C. 702) and asks if it is possible to further appeal a decision on the detention.

(Response) After the presiding officer confirms the detention order, no provisions for further review or appeal within the agency or HHS apply. A claimant's further recourse would be to initiate proceedings in Federal court.

In the proposed rule, § 1.402(d), which governs the requirements for submitting an appeal, referenced the definition of an informal hearing in section 201(x) of the FD&C Act. Section 201(x)(5) of the FD&C Act requires the presiding officer to prepare a written report of the hearing, and states that the participants in the hearing shall be given the opportunity to review and correct or supplement the presiding officer's report. FDA is revising §§ 1.403 and 1.405 to provide this opportunity for the hearing participant to review and request changes to the conclusions of the presiding officer, as reflected in his or her proposed decision. FDA is revising § 1.403(h) to clarify that § 16.60(e) and (f) does not apply to an informal hearing on an administrative detention. Revised §§ 1.403(h) and 1.405(a) provide that the presiding officer must issue a written report of the hearing, including a proposed decision with a statement of reasons. This section also provides for a 4-hour opportunity during which the hearing participant may review and comment on the written report. Under § 1.403(h), the presiding officer will then issue the final agency decision.

FDA is also revising § 1.403, which governs the requirements that apply to an informal hearing, by adding new paragraph (j) to make clear that § 16.119 does not apply to an informal hearing on an administrative detention. Section 16.119 states that, after any final administrative action that is the subject of a hearing under part 16, any party may petition the Commissioner for reconsideration or a stay of the decision or action.

FDA is revising § 1.403 to clarify that § 16.80(a)(4) does not apply to an informal hearing on administrative detention. Revised § 1.403(i) states that the presiding officer's report of the hearing and any comments on the report by the hearing participant under § 1.403(h) are part of the administrative record.

FDA is also revising § 1.403 to clarify that § 16.95(b) does not apply to an informal hearing on an administrative detention. New § 1.403(k) states that the administrative record of an informal hearing on an administrative detention as specified in §§ 16.80(a)(1), (a)(2), (a)(3), (a)(5), and 1.403(i) constitutes the exclusive record for the presiding officer's final decision on an administrative detention. In addition, § 1.403(k) states that, for purposes of judicial review under § 10.45, the record of the administrative proceeding consists of the record of the hearing and the presiding officer's final decision.

(Comment 93) One comment argued that the proposed expedited procedures for perishable foods do not accomplish what Congress intended in the Bioterrorism Act, *i.e.*, implementing regulations mandated by the Bioterrorism Act are supposed to achieve accelerated termination of detention orders and release of the detained perishable food when the agency finds there to be a lack of credible evidence or information that the detained article presents a threat of serious adverse consequences or death to humans or animals. The comment further explains that our proposed procedure would do nothing to expedite release of such food. The comment further states that, in some cases, the proposed procedure would allow FDA 3 calendar days after an informal hearing to render its decision with respect to perishable food, but only 2 calendar days with respect to nonperishable food (the example in the comment uses an appeal date of 2 calendar days after receipt of the detention order for both a perishable and nonperishable food).

(Response) FDA disagrees with this comment because it appears to confuse the expedited procedures mandated by the Bioterrorism Act for initiating certain enforcement actions against detained perishable food with the process for appealing a detention order. The Bioterrorism Act requires the Secretary to provide procedures for instituting certain judicial enforcement actions under the FD&C Act on an expedited basis with respect to perishable foods. Section 1.383 provides for expedited procedures for initiating seizure actions by requiring FDA to submit a seizure recommendation against a detained perishable food to DOJ within 4 calendar days after the detention order is issued, unless extenuating circumstances exist.

The appeal and hearing procedures assist the process of appealing a detention order. The Bioterrorism Act requires FDA to confirm or terminate any detention order within 5 days after an appeal is filed. However, if a claimant files for an appeal sooner rather than later in the time period for filing appeals, a decision on a detention order could occur before we are statutorily required to render that decision.

FDA notes that the comment is correct in that there is one situation where FDA would have more time to consider whether to confirm or terminate a detention order for perishable food than for nonperishable food and that would be if the appeals for both a perishable food and a nonperishable food were filed on the same calendar day and the hearings were held on the second and third calendar days following the appeals, respectively. The only way to eliminate this situation while still allowing FDA up to 5 calendar days to

render a decision on appeal is to revise the timeframe within which FDA would hold a hearing, if granted, to 2 calendar days after the date the appeal is filed for both perishable and nonperishable food. FDA is, therefore, revising § 1.402(d)(1) and (d)(2) to state that if a hearing is granted, it will be held within 2 calendar days after the date the appeal is filed for both perishable and nonperishable food. As we stated previously, FDA intends to proceed as expeditiously as possible to resolve all issues involved with administrative detentions.

6. Comments on How Will FDA Handle Classified Information in an Informal Hearing? (Proposed § 1.406)

(Comment 94) Many comments are concerned that this provision may lead to withholding information that a company would find necessary to prepare its defense against a detention order, including sampling and testing of the product to determine whether the article of food presents a threat of serious adverse health consequences or death to humans or animals. These comments also are concerned that this provision would restrict a company's ability to appeal or prepare for a hearing on the detention order. The comments ask that FDA provide, whenever possible, the specific reason why the agency believes the article of food presents a threat of serious adverse health consequences or death to humans or animals, *i.e.*, the product may be contaminated with agent X.

(Response) FDA is finalizing this provision as proposed. Under existing law, there is no accommodation or exception for disclosing classified information to individuals without the proper security clearance. However, we will provide as much information as we can without compromising the classified nature of the information. FDA notes that private companies can choose to obtain private facility security clearances through the Defense Industrial Security Clearance Office (DISCO) within the Defense Security Service (DSS), which is an agency within the Department of Defense.

FDA indicated in the proposed rule that the agency may develop general regulations for handling classified information on an agency-wide basis. After further review, however, we have decided that such regulations are unnecessary. The handling of classified information is a standardized process across the Federal Government and is governed by Executive Order 12958. Executive Order 12958 was last amended in March of 2003 (68 FR 15313, March 28, 2003).

IV. Conforming Amendment to Part 10

We are amending § 10.45(d) because under the administrative detention procedures, it is the final decision of the presiding officer, and not the Commissioner, that constitutes final agency action.

V. Conforming Amendment to Part 16

We are amending § 16.1(b)(1) to include section 304(h) of the FD&C Act relating to the administrative detention of food for human or animal consumption to the list of statutory provisions under which regulatory hearings are available.

VI. Analysis of Economic Impacts

A. Final Regulatory Impact Analysis

We have examined the economic implications of this final rule as required by Executive Order 12866. Executive Order 12866 directs us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 12866 classifies a regulatory action as a significant regulatory action if it meets any one of a number of specified conditions, including: Having an annual effect on the economy of $100 million or more, adversely affecting a sector of the economy in a material way, adversely affecting competition, or adversely affecting jobs. Executive Order 12866 also classifies a regulatory action as significant if it raises novel legal or policy issues. We have determined that this final rule is a significant regulatory action as defined by Executive Order 12866.

Costs and Benefits of Administrative Detention Final Rules: Summary

Administrative detention of food is a new enforcement tool, and we are not able to directly estimate how often it will be used. For an indirect estimate, we assumed that events that trigger certain existing enforcement actions represent a pool of events some of which might in the future trigger administrative detention. To estimate the size of this pool, we used the sum (for fiscal year 2002) of Class 1 recalls (184), instances in which we moved directly to seizure (16), and 10 percent of the instances referred to State authorities (23, or 0.01×230 actions referred to States). This sum—223 actions—represents the upper bound number of times we anticipate using administrative detention. The lower bound is zero; we may not use administrative detention at all.

The benefits of administrative detention will be the value of the illnesses or death prevented because the agency administratively detained food suspected of being adulterated. These benefits will be generated if the following two conditions hold: (1) The food is in fact adulterated, and (2) administrative detention prevents more illnesses or deaths than would have been prevented had we relied on our existing enforcement tools. The more often these conditions hold, and the larger the amount of adulterated food administratively detained, the larger will be the benefits of this final rule. There may also be benefits in terms of deterrence, to the extent that administrative detention increases the likelihood that adulterated products will not be shipped in the future.

One of the main costs of administrative detention, the loss of product value over the detention period, is associated with the administrative detention of food that is not in fact adulterated.

We do not know what fraction of detained products will prove to not be adulterated. For an upper bound we used the fraction of imported foods that we detain and then release: 48 percent. This percentage is an overestimate as applied to administrative detention, because less evidence is needed to detain an import under our current program than will be required to detain a food administratively. The lower bound percentage is zero, because we might never detain a food administratively that is not adulterated.

We estimate the range of costs for this final rule using a range of 0 to 223 administrative detentions and a range of 0 to 48 percent of those detentions involving products that turn out not to be adulterated. The total costs of this final rule will be the sum of the following components:

- Additional transportation to secure storage facility,
- Additional storage,
- Delay of conveyances that contain detained products,
- Loss of product value for foods with limited shelf lives,
- Marking or labeling of detained products, and
- Costs of appeals of administrative detentions.

The following summary table 1 shows the estimated range of costs:

SUMMARY TABLE 1.—ANNUAL COSTS FOR ADMINISTRATIVE FINAL RULE

Types of cost	Costs (in millions)
Transportation	$0 to $4
Delay of Conveyances	$0 to $4
Storage	$0 to $2
Loss of Product Value	$0 to $22
Marking or Labeling	$0 to $2
Appeals	$0 to $16
Total	$0 to $50

Regulatory Options

We considered the following regulatory options in the analysis of the proposed rule: (1) Take the proposed action (establish a regulatory framework for detaining food administratively, with expedited procedures for instituting certain enforcement actions involving perishable food); (2) take the proposed action but change the definition of perishable food, the maximum timeframe for administrative detention of perishable food, or both; (3) take the proposed action but define the level of security we require for transportation and storage; (4) issue regulations only to establish expedited procedures for instituting certain enforcement actions involving perishable food (*i.e.*, limit the action to the regulations required by section 303 of the Bioterrorism Act). We received comments pertaining to the first two options. We also received some comments on the maximum timeframe for administrative detention of nonperishable food. We have included these under Option Two and have renamed that option as follows: Take the proposed action but change the definition of perishable food, the maximum timeframe for administrative detention, or both. In addition, we received comments suggesting that we revise the proposed rule in various ways that we did not address in any of the other regulatory options. We will discuss the economic implications of these comments under a new regulatory Option Five: Take the proposed action but revise the proposed action in some other way. In many cases, a comment discussed a cost and suggested a way to minimize that cost. In those cases, we discuss the portion of the comment that dealt with the cost of the proposed rule under Option One (take the proposed action), and we discuss the portion of the comment that suggested revising the rule under one of the other options.

1. Option One: Take the Proposed Action (Establish a Regulatory Framework for Detaining Food Administratively, With Expedited Procedures for Instituting Certain Enforcement Actions Involving Perishable Food)

General

(Comment 95) One comment argues that our analysis of the proposed rule did not meet guidelines established by the Office of Management and Budget (OMB) for the five elements of a regulatory impact analysis. According to this comment, we did not adequately consider the need for, and consequences of, the rule on society in general; we did not show that the potential benefit of the rule outweighs the costs; we did not select our regulatory objectives with the goal of maximizing net benefits for society; we did not select the regulatory alternative having the lowest net cost for society; and we did not consider the affected food industries, potential future regulatory actions, and the weak state of the national economy.

(Response) We disagree that we did not meet the guidelines established by OMB for a regulatory impact analysis. We were unable to estimate annual benefits because this rule addresses low probability but potentially high risk events. These events do not occur regularly, and we have insufficient information to predict their occurrence. Our inability to estimate annual benefits meant that we were also unable to evaluate regulatory options that generated tradeoffs between costs and benefits to the extent that we would normally do so. However, the guidelines for regulatory impact analyses acknowledge that we will not always have sufficient information to quantify all relevant effects.

Benefits

(Comment 96) One comment suggests that the proposed rule would not generate any benefits because we can already request Class I recalls in situations in which we could use administrative detention. Another comment argues that the proposed rule would do little to improve food safety.

(Response) We discussed the benefits of the proposed rule given our enforcement alternatives prior to enactment of the Bioterrorism Act, including Class I recalls, in the analysis of the proposed rule. These comments did not provide information that would allow us to revise that discussion.

(Comment 97) One comment argues that we failed to consider the potential benefits of the proposed rule that go beyond avoiding adverse health consequences. This comment notes that an intentional food contamination event could have significant national and international implications because it could lead authorities to impose restrictions on the distribution and sale of similar products or lead some consumers to avoid buying the product. As an example of the latter effect, this comment notes that the discovery of a single cow in Alberta, Canada that tested positive for bovine spongiform encephalopathy (BSE) caused significant changes in cattle prices and retail sales of beef products.

(Response) Preventing adverse health consequences from adulterated food may reduce disruptions in consumer demand for that type of food. The effect of changes in consumer demand is primarily distributional because such changes harm some industries and help others. Of course, these distributional effects may be significant for the firms involved. In addition, these effects could generate net social costs by causing temporary unemployment, the loss of value of specialized inputs, and the loss of inventory, that are not balanced by increases in employment and the value of specialized inputs, and the use of otherwise unusable inventory, in competing industries that benefit from the shift in demand. Preventing adverse health consequences from food may also reduce the probability that authorities would place restrictions on the distribution and sale of food. The effect on industry of these restrictions would be similar to the effect of a shift in consumer demand, but these restrictions might also generate social costs in the form of lost consumer utility and enforcement costs because they would not necessarily reflect underlying changes in consumer demand. We recognize that preventing such effects would be a benefit of this rule. However, we have insufficient information to quantify these effects.

Costs

In the analysis of the proposed rule, we requested comments on a number of issues. These issues included the type of transportation, the cost of any specialized transportation, the amount of food that we might detain in an average administrative detention, the size of an average truckload of food that we might detain, the distances that we might need to transport food, storage and handling rates, labeling and marking costs, and the impact of the specific requirements of the proposed appeals procedures. We did not receive comments on any of these issues except for the appeals procedures. However, we received comments on a number of

other issues relating to the costs of this rule.

(Comment 98) One comment argues that the administrative burden generated by the proposed rule would dilute effective food safety measures by industry and divert our resources away from more effective food safety measures. This comment suggests that the net effect of the proposed rule would be to reduce food safety rather than increase it. Another comment argues that the proposed rule might increase food safety risks because it would slow the movement of food through the distribution system, thereby creating additional opportunities for adulteration. The comment envisioned numerous unguarded storerooms or garage sheds containing detained food, which the comment suggests would significantly increase the statistical probability that that food would be attacked.

(Response) This rule will not generate any administrative burden for a particular firm unless that firm were actually involved in an administrative detention. In the analysis of the proposed rule, we estimated 0 to 223 administrative detentions per year, and we estimated the universe of potentially affected firms to be 1.6 to 1.8 million firms. Therefore, the expected annual administrative burden for all potentially affected firms would be quite small and would not significantly displace food safety expenditures by industry. Similarly, this rule will only generate enforcement costs in those cases in which we choose to use it, and we would only use it if it were the most effective enforcement alternative available in a particular situation. Therefore, we disagree that this rule will generate a significant reallocation of our enforcement resources away from more effective food safety measures. This rule would slow distribution times for any food that we detain administratively and subsequently release. However, we can require firms to move food to secure storage or take other actions to ensure that food that we detain administratively is secure. Therefore, food that we detain administratively would not make an easy target for intentional adulteration during the detention period.

(Comment 99) Some comments note that the proposed rule could affect a wide variety of firms. These comments discuss live food animals; restaurants; color pigments used in indirect food contact applications; outer food packaging; raw materials and formulated products that are used as components in the manufacture of food-contact articles, such as conveyor belts, oven gaskets, coatings for film, paper, and metal substrates, adhesives, antifoam agents, antioxidants, polymeric resins, polymer emulsions, colorants for polymers, rubber articles, release coatings, and the like; ceramic and lead crystal tableware; and animal feed and pet food.

(Response) We discussed the wide variety of firms that might be affected in the analysis of the proposed rule. However, we based the cost estimate on conventional fresh or processed food for human consumption. The cost of an administrative detention for each of the product categories and types of firms mentioned by these comments would vary along a number of dimensions, including the production and distribution system, the typical mode of transport, the typical lot or shipment size, handling and storage costs, and rate of product value loss, if any. The comments did not provide estimates of how the costs for these firms would differ from the costs we estimated for the analysis of the proposed rule, and it would be costly and time consuming for us to analyze the costs for every type of firm and product that this rule might affect. In addition, as we discuss later in this analysis, if it were technically difficult or impossible to adulterate these types of food, then we would rarely or never receive information that would require us to detain it administratively. Based on these considerations, we have not revised the analysis to include a discussion of each of these types of products and firms.

(Comment 100) Some comments were concerned that any labeling or marking that we put on food that we detain administratively would remain on the food if we later determined that the food was not adulterated and terminated the detention order. One comment argues that we should place any marking or labeling on packing cases and not on the product itself. The comment notes that consumers would be skeptical of purchasing a product that we had marked in conjunction with an administrative detention.

(Response) Labeling or marking would not lead to a loss of product value because, if we terminated an administrative detention order, we would remove any labeling or marking, or authorize someone else to remove it.

(Comment 101) One comment suggests that we add the expiration date of administrative detention orders to the information that we put on the tags or labels that we affix to food that we detain administratively. The comment also suggests that we amend the tags or labels if we later amend the expiration date.

(Response) We would indicate the initial 20- or 30-calendar day expiration date of an administrative detention order on any tags or labels that we affix to food that we detain administratively. If the initial period for the detention were 20 calendar days and we extended the period an additional 10 calendar days, then we would amend the tags or labels to reflect the new expiration date of the detention period. We did not include the cost of amending tags or labels in the analysis of the proposed rule. We assume that the cost of amending a tag or label is the same as the cost of affixing the tag or label. We do not know how frequently we may need to use the additional 10 calendar days of detention, so we also assume that we may need to amend every tag or label. Under these assumptions and using the same procedures that we used to estimate these costs in the analysis of the proposed rule, we estimate this cost to be $0 to $2 million per year, rather than $0 to $1 million per year that we reported in the analysis of the proposed rule.

(Comment 102) One comment argues that we might detain entire containers or truckloads, but subsequently determine that only one or a very few cases of food are actually adulterated. This comment suggests that we might release a majority of the food that we detain administratively. Another comment suggests that we might intentionally detain more food than we believed was actually adulterated. For example, we might believe that a particular lot was adulterated, but we might detain the container that holds that lot along with other lots. One comment notes that a single shipping container might hold many small shipments of different products of different origins. The comment suggested we might detain the entire container in such a situation.

(Response) In the analysis of the proposed rule, we estimated that we might release 0 to 48 percent of the food that we detain administratively. Although this is not consistent with the comment's suggestion that we might release a majority of the food that we detain administratively, it is consistent with the notion that we might release a considerable portion of it. As we discussed in the analysis of the proposed rule, we based the upper end estimate of 48 percent on the number of import detentions that we subsequently released during the first three quarters of 2002. As we discussed in that analysis, it is highly unlikely that we would release a higher proportion of the food that we detain administratively than the proportion of food that we

place on import detention and subsequently release because the legal standard for administrative detention is higher than the legal standard for import detention. The comment did not provide sufficient information for us to change this assessment. If we determine that a container of food products contains both food that meets the criteria for administrative detention and food or other items that do not meet the criteria, the food or other items that can be readily segregated and not detained can be segregated and moved.

(Comment 103) Some comments argue that some food that has a shelf life of more than 7 days might suffer a significant loss of value if we detained it administratively under the conditions applying to nonperishable foods. One comment argues that this is true of snacks and snack ingredients. Another comment discusses pasteurized chilled juices and juice beverages that are transported and stored under refrigeration. This comment argues that most consumer outlets (retail and institutional) would not accept this type of food unless it had a remaining shelf life greater than it would have if we detained it administratively for 20 calendar days prior to delivery. This comment argues that the rate at which this food would lose value during an administrative detention is greater than the 1 to 3 percent per day that we assumed in the analysis of the proposed rule.

Some comments note that bakery products such as tortillas or snack cakes, might have a shelf life of 10 to 35 days, but retailers and distributors are more likely to reject delivery of these products, if the expiration date is less distant than other comparable products that are available at the time of purchase because consumers prefer products with more distant expiration dates. According to these comments, even a relatively brief administrative detention could render such products unmarketable. These comments also note that potato chips and cookies might have a shelf life of 60 to 120 days, but would be subject to a loss of value by the same mechanism. Some comments made a similar point about ''nouveau'' wines, which firms release for consumption on a specific date. These comments argue that this product would lose a significant amount of its value if it were not available for sale at the optimum date. These comments also note that the annual sales of this product typically take place within a brief period of 2 to 3 weeks.

One comment notes that farms often have limited on-farm storage and inflexible deadlines for delivering products to markets or for further processing. The comment notes that the loss of value of food that we detain administratively on farms could be very rapid. One comment discusses ''fresh products'' that have a shelf life of more than 7 days. This comment argues that one would not be able to market these products if we detained them for 7 days because they would not have enough shelf life left.

(Response) In the analysis of the proposed rule, we assumed that all administrative detentions could last up to 30 calendar days. We also assumed that food with a shelf life of 8 to 30 days would lose 3 percent of its starting value per day, which would essentially reduce the value of that product to zero by day 30. We have revised the daily rate of value loss to the more precise 3.3 percent. It is possible that food with a shelf life of more than 30 days might also lose its entire market value during a 30-calendar day detention period. However, in many cases, one could presumably sell such food at a discount to reflect the shortened shelf life or the suboptimal selling time. To reflect the possibility that this food might lose all of its value during a 30-calendar day detention, we have revised the rate of product loss for all shelf life categories that we used in the analysis of the proposed rule to 3.3 percent per day. Under this assumption and using the same procedures that we used to estimate these costs in the analysis of the proposed rule, we estimate this cost to be $0 to $22 million per year, rather than $0 to $15 million per year that we reported in the analysis of the proposed rule.

(Comment 104) One comment notes that our proposed definition of perishable food refers to the shelf life of the food from the time it was produced rather than from the time we detain it administratively.

(Response) One implication of this comment is that food with a shelf life of more than 30 days might become unmarketable during the detention period if we detained it when it had only part of its shelf life remaining. We discussed this phenomenon in the context of a previous comment. However, another implication of this comment is that we may have overestimated the loss of value for food that we detain near the end of its normal shelf life. Under the linear method that we used to estimate loss of product value over time in the analysis of the proposed rule, such food would already have lost a considerable portion of its starting value for reasons unrelated to the detention. However, we do not need to revise our analysis to account for this effect because our estimated range of the potential annual loss of product value goes to $0 at the low end.

(Comment 105) One comment discusses the shelf life of air freighted fish and fish products. This comment notes that chilled finfish has a normal commercial shelf life of about 7 days from the time of capture. They argue that attempting to extend the shelf life of this fish by freezing it would destroy its commercial value. Some comments note that chilled, live shellfish and crustaceans have a commercial shelf life of about 48 hours from the time they are packed for export. This comment notes that one may extend the shelf life for some species by introducing them back into temperature controlled, oxygenated, salt water. However, these comments doubted that we intended to operate appropriate tanking facilities at airports to handle detained live seafood in this way. Consequently, these comments argue that the current timeframes for administrative detention would almost certainly eliminate the value of these products if we detained and subsequently released them. These comments argue that any detention period longer than 24 hours would result in a loss of the value of the product.

Another comment argues that a detention period of 7 calendar days was excessive in the case of fresh salmon because the quality of fresh salmon would begin to deteriorate within 4 days. One comment notes that, for perishable foods, the maximum time between receipt of the detention order and an appeal is 2 calendar days, and that we have 5 calendar days from receipt of the appeal to confirm or set aside the detention order. This comment argues that these time periods are impracticable and would lead to the loss of the product. Some comments note that the appeals process may take up to 7 calendar days, assuming owners request an appeal within 2 calendar days of receipt of the administrative detention notice and we would reach a decision on the appeal 5 calendar days after the date of the filing of the appeal. This comment suggests that this would leave only 2 or 3 days of acceptable shelf life for highly perishable fresh seafood products, which would be insufficient time to distribute it to retail outlets. Thus, this comment suggests that the proposed procedure would lead to a total loss of value for this type of product.

(Response) These comments are consistent with the analysis of the proposed rule, in which we estimated that perishable food might lose up to all of its value during the detention period.

We discuss suggestions to revise the rule under Options Two and Five.

(Comment 106) One comment argues that we might direct someone to move food that we detain administratively from refrigerated storage to a freezer. The comment notes that this might reduce the value of the food because the owner could no longer sell it as ''fresh.''

(Response) We would not direct someone to move food from refrigerated storage to a freezer. If we detained the food in place, then the food would remain under existing storage conditions unless the owner requested us to change those conditions. Similarly, if we directed a firm to transport food to a secure storage facility, then we would allow that firm to maintain existing storage conditions during transport and storage, unless the owner requested otherwise.

(Comment 107) Some comments were concerned about the economic consequences of detaining large oceangoing vessels. They noted that detaining such vessels administratively for up to 30 calendar days would generate large costs. One comment notes that detaining such vessels might cause the deliveries of other cargoes to be delayed, which could cause some manufacturing plants to shut down because they lacked necessary inputs. Some comments thought we might detain or reroute trucks and their drivers for up to 30 calendar days. One of these comments notes that we did not account for the costs associated with the idling of trucks and their drivers during administrative detentions. One comment discusses trucks that transport bulk food, including liquid commodities such as vegetable oil. This comment notes that if we detained such a vehicle, then the trailer would be unusable for the period of the detention.

(Response) In situations involving conveyances, a request can be made for modification of a detention order to offload the cargo to a secure storage facility. However, in some cases, it may not be feasible to offload the cargo. In that case, the conveyance itself might be delayed. The comment did not provide information on the costs of delaying a ship. However, a recent newspaper story suggested that delaying one ship for 1 day may cost as much as $80,000 (Ref. 1). This implies that detaining one ship for 30 calendar days could cost up to $2.4 million. It is possible, but unlikely, that a single administrative detention could involve more than one ship. We might also detain other types of conveyances.

The comment that discussed the costs of delaying tanker trailers did not provide information on those costs. However, one firm that posted a cost proposal on the Internet listed a standard rate as of July 1, 2002, of $250 per day for a semitrailer with code tanker and $200 per day for a semitrailer with liquid transporter (Ref. 2). These rates probably overstate the cost of the loss of a tanker trailer because in some cases in which we detain food on a tanker trailer, the semitrailer itself could probably be used with another tanker trailer. However, this might not always be possible. This implies that the loss of the use of one tanker trailer could cost up to $8,000 over a 30-calendar day detention period. In addition, in some cases, the drivers of tanker trailers may be idled during the detention period. The average wage of a truck driver in July 2002 was $14.40 per hour (Ref. 3). If we assume 100 percent overhead, then idling a truck driver for 30 calendar days would cost an additional $7,000. Therefore, the total potential cost of detaining one tanker truck and driver for 30 calendar days could be up to $15,000. A single administrative detention might involve more than one tanker trailer or other types of equipment. In the analysis of the proposed rule, we assumed that any given detention could involve up to 67 truckloads of food. Detaining 67 tanker trailers for up to 30 calendar days could generate estimated costs of up to $1 million.

We do not have information on the cost of delaying other types of conveyances such as trains, airplanes, or other types of trucks. However, those costs are probably similar to the cost of delaying ships and tanker trucks. Delaying conveyances could also generate costs by disrupting the delivery or production schedules of other firms. We do not have information on these costs. We could attempt to construct a model to estimate these costs. However, that would be costly and time consuming and would reflect a great deal of variability in the potential costs. Therefore, we determined that it would probably not be worthwhile to construct such a model for this rule. Although the costs of detaining conveyances are potentially quite high, the probability that we would need to detain conveyances is quite low. None of the 223 enforcement actions that we discussed in the analysis of the proposed rule in the context of estimating the maximum number of times we might use administrative detention per year involved a situation in which we would have detained conveyances. In addition, none of the 24 seizure actions that we took in fiscal year 2002 or in fiscal year 2003 involved a situation in which we would have detained conveyances. Therefore, our best estimate of the number of times per year that we might need to detain conveyances is zero.

Detaining food located on conveyances may also generate other costs that we did not discuss in the analysis of the proposed rule. In those cases in which we required a firm to transport the detained food to a secure storage facility, we would generate costs associated with the loss of the use of the conveyance and the idling of the crew or drivers during the offloading process and the costs for other firms generated by that delay. If we assume that offloading takes 0 to 6 hours, then the cost of delaying a ship would be $0 to $20,000 based on a cost of up to $80,000 for delaying a ship 24 hours. We do not have information on the costs for other firms generated by the delay of a ship, and the estimated cost of $80,000 per day might already reflect those costs. Again, it is unlikely that we would delay more than one ship as part of a single administrative detention.

The estimated cost of delaying a fleet of tanker trucks by 0 to 6 hours would be $0 to $8,000 based on the cost information we provided earlier. We assume that the cost of delaying other types of conveyances, such as trains, airplanes, and other types of trucks, would be less than the cost of delaying a ship, despite the higher probability that we might delay more than one of these other types of conveyances. We do not know how many of the 223 enforcement actions on which we based our estimate of the maximum number of administrative detentions in the proposed rule involved food located on conveyances. Therefore, we assume that between 0 and 223 of the estimated administrative detentions that we might take per year could involve food located on conveyances. In that case, the estimated cost from delaying conveyances would be $0 to $4 million per year.

(Comment 108) One comment notes that most tanker trucks containing food are sealed at all openings and that we would need to break those seals to investigate such food. The comment notes that receivers would not accept loads with broken seals. The comment suggests that some receivers might not accept such a load even if we resealed the load using an FDA seal.

(Response) If we were to break the seal on a truck or other conveyance and subsequently release all or some of the cargo on that conveyance, then we would reseal the conveyance with an FDA seal. Therefore, transporters would not need to deliver loads with broken

seals. In the analysis of the proposed rule, we did not account for the possibility that a receiver might not accept a load even if we resealed it with an FDA seal. The comment did not provide information on the prevalence of this practice. However, we would expect market forces to minimize this effect because investigating and resealing a load should have little effect on the underlying value of that load. Therefore, we have not revised the analysis to account for this possibility.

(Comment 109) One comment notes that firms challenge our food seizure actions 65 percent of the time and suggests that firms would probably challenge administrative detentions at least as often, and perhaps more often, because of the ambiguity of the legal criteria involved.

(Response) In the analysis of the proposed rule, we assumed that 65 percent of administrative detentions would result in appeal hearings based on the rate at which firms have contested recent seizure actions. It is possible that firms might be more likely to request appeal hearings for administrative detentions than they are to contest seizure actions. However, we have no information establishing this would be the case. In the proposed rule, we noted that the credible evidence or information standard has been applied in various other judicial and administrative contexts. In addition, we are currently developing a separate rulemaking that defines ''serious adverse health consequences,'' as this term is used in several provisions in Title III, Subtitle A, of the Bioterrorism Act, not just in its section 303. Therefore, the ambiguity surrounding the criteria for administrative detention may be less than suggested by this comment.

In addition, we would only grant a request for a hearing after an appeal is filed, if the information a firm submitted raised a genuine and substantial issue of fact. In contrast, we have no comparable pre-screening process to determine whether firms can contest seizure actions. This suggests that the rate at which firms contest seizure actions may be greater than the rate at which we would hold appeal hearings for administrative detentions. We have no way of knowing whether the rate for contesting seizure actions will be greater than the rate at which we would hold appeal hearings for administrative detentions. Therefore, we have assumed for purposes of this analysis that we will grant all requests for appeal hearings. Based on these considerations, we have not revised our assumption concerning the estimated number of appeal hearings.

(Comment 110) One comment notes that it appeared as though we attempted to expedite the appeals process for perishable food by conducting appeal hearings within 2 calendar days from when a firm filed a request for such a hearing rather than within 3 calendar days, as for nonperishable food. This comment notes that this provision would not necessarily reduce the timeframes for perishable food, because the date on which we hold an appeal hearing does not necessarily dictate when we will reach a decision on that appeal. Some comments note that we said that we would make a decision on an appeal involving nonperishable goods within 2 calendar days of the hearing, but that we committed to no comparable deadline for perishable food.

One comment notes that the expedited hearing process for perishable food is not fast enough to prevent the effective total loss of market value of fresh produce, fluid milk, and live fish and seafood. They note that a claimant must file an appeal within 2 calendar days of receiving the detention order. Then, if we grant a hearing, we would hold the hearing within 2 calendar days of when the appeal was filed. We would then reach a decision based on the hearing within 5 calendar days. This comment notes that this process implies a total time for the appeal hearing process for perishable food of 4 to 10 calendar days after a firm receives the administrative detention order.

(Response) The timeframe under which we must reach a decision on an appeal hearing is 5 calendar days after the appeal is filed for both perishable and nonperishable food. In the analysis of the proposed rule, we estimated that perishable food might lose up to all of its value during the detention period even under the expedited appeal hearing process.

(Comment 111) One comment argues that the ambiguity surrounding the legal criteria for using administrative detentions would encourage some firms to attempt to use administrative detention to discredit competitors.

(Response) If this effect were to occur, then it would decrease the net benefits of this rule by generating administrative detentions that have costs but no corresponding benefits. This effect would probably be minimal because of the legal and financial consequences of supplying us with false information to discredit competitors.

(Comments 112) Some comments argue that firms would not be able to provide counterevidence during an appeal because we would not provide them with complete information on the reasons we detained a food administratively. These comments argue that this would make the appeal process ineffective, which could lead to administrative detentions that appear arbitrary.

(Response) As we explain earlier, if we detain an article of food based on classified information, we will provide as much information as we can without divulging classified information to those without the proper security clearance. Finally, we disagree that the appeals process would necessarily be rendered ineffective because of our inability to share classified information with those that do not have the proper security clearance. Based on these considerations, we have not revised the rule.

Distributional Issues

(Comment 113) One comment thinks that we were unclear about who would pay for the storage of food that is detained administratively. The comment wonders how we intend to ensure that the owner or carrier would be able to afford the storage costs, if they were responsible for those costs. Another comment asks who would be responsible for feeding, watering, and providing adequate housing and medical care to live animals that we detain. One comment asks who would be responsible for the costs associated with administrative detention in the case of a food that was produced in one country and then repackaged in another country before being imported into the United States.

(Response) The party or parties responsible for paying the storage costs of food that we detain administratively is a matter between the private parties involved with the food. FDA is not liable for those costs. An owner, operator, or agent in charge of the place where the food is located can always request modification of a detention order to destroy the food if they do not want to store it. This does not change the analysis of the proposed rule because firms would not choose to destroy food unless the cost of doing so were less than the combined cost of storing the food and any loss of product value during the storage period. We set the low end of our range of potential costs to zero to account for the fact that we might not detain any food during a given year. Therefore, the estimated range includes the costs that would arise if some owners found it less costly to destroy food than to pay for storage.

(Comment 114) One comment argues that the proposed rule would give a

competitive advantage to domestic food over imported food because we only subject domestic food to administrative detention, but we subject imported food to both administrative detention and normal import detention. One comment notes that in the analysis of the proposed rule, we based the upper end of the estimated range of the potential number of administrative detentions per year that involve food that we later determine is not adulterated on the number of import detentions that we released per year. The comment notes that we stated that we expected that this rate would probably be less than the rate at which we release import detentions, because the criteria for administrative detention are more restrictive than the criteria for normal import detentions. The comment argues that this showed that we treated imported food unfairly relative to domestic food.

(Response) This rule covers both domestic and imported food, and we will apply it in the same way to both types of food.

(Comment 115) One comment notes that the costs associated with administrative detentions would impose a substantial hardship on farmers because they have little or no ability to pass on any costs. The comment also notes that administrative detentions could create marketing disruptions that could cause a farm to lose its reputation as a reliable supplier for many years. One comment argues that a motor carrier and driver would bear some of the costs of administrative detention because the motor carrier would lose the use of the equipment during the period of the detention, and the driver might be detained or rerouted, thereby losing compensation for miles driven.

(Response) This rule may adversely affect some farmers and motor carriers. We have insufficient information to quantify the expected or average effect on these specific types of firms, nor did comments submit such information.

(Comment 116) Some comments suggest that if we told the public that we detained a particular product, then we would damage the reputation of the company that manufactured the product, even if we subsequently found that the product was not adulterated and reported that information to the public.

(Response) We do not currently plan to routinely inform the public of administrative detentions, although we might if there were public health reasons for doing so. Therefore, it is possible that we might inform the public of an administrative detention that we later terminated based on a successful appeal or that we later determined involved food that did not pose a threat of serious adverse health consequences or death to humans or animals. In that case, our announcement of the administrative detention could generate changes in consumer perceptions that might adversely affect some firms. We classify this type of impact as a distributive issue rather than a social cost, per se, because reductions in the demand for a given product will be offset by increases in the demand for other products, so that the net impact to society is uncertain. We have insufficient information to quantify this effect, nor did comments provide this information.

TABLE 2.—ANNUAL COSTS FOR OPTION ONE: FINAL RULE

Types of cost	Costs (in millions)
Transportation	$0 to $4
Delay of Conveyances	$0 to $4
Storage	$0 to $2
Loss of Product Value	$0 to $22
Marking or Labeling	$0 to $2
Appeals	$0 to $16
Total	$0 to $50

2. Option Two: Take the Proposed Action but Change the Definition of Perishable Food, the Maximum Timeframe for Administrative Detention, or Both

(Comment 117) A number of comments address the option of changing the definition of perishable food or the maximum timeframe for administrative detentions. Many of these comments suggest changes that would reduce costs but might also reduce benefits. However, these comments did not provide sufficient information to allow us to quantify the changes in costs or benefits. Therefore, we are unable to revise our estimates of the costs and benefits of this option.

Some comments recommend that we define perishable food as food with a shelf life of 90 days or less. Other comments recommend that we define perishable food as food with a shelf life of 120 days or less. One comment suggests that we define perishable foods according to the definition in the Perishable Commodities Act, which includes fresh fruits and vegetables of every kind and character where the original character has not been changed. One comment suggests that we base our definition of a perishable food on the definition of perishable food in the NIST Handbook 130 Regulations for Uniform Open Dating. The comment also suggests that we adopt the definition of semiperishable foods from that regulation and that we treat semiperishable food the same as perishable food. The comment notes that the relevant definition of perishable food is any food having a significant risk of spoilage, loss of value, or loss of palatability within 60 days of the date of packaging, and the definition of semiperishable food is any food having a significant risk for spoilage, loss of value, or loss of palatability after a minimum of 60 days and a maximum of 6 months after the date of packaging.

One comment suggests that we revise the rule to define perishable food as ''food that may have been heat-treated or otherwise preserved so as to prevent the quality of the food from being adversely affected for a period of 90 days or less under normal shipping and storage conditions.'' This comment notes that this definition would include raw agricultural commodities, refrigerated pasteurized products (milk and milk products, juice and juice concentrates), and packaged produce, all of which have a short shelf life and need to move expeditiously through marketing channels to the consumer. However, the comment notes that, even under this revised definition, detaining perishable food which has less than 14 days of shelf life remaining would essentially prevent the product from reaching the market, even with an expedited appeal process and a decision in favor of the owner of the food. One comment argues that we should not consider the issue of whether a food had been subjected to heat treatment or thermal processing to be relevant to the definition of perishable food. Some comments argue that we should take into account not only physical or biological properties, but also how a product is marketed. Some comments argue that we should treat all food as perishable food for purposes of an appeal.

(Response) Changing the definition of perishable food as suggested by these comments would allow more products to qualify for the expedited procedures for appeals and for initiating certain judicial enforcement actions that we established for perishable food. The expedited procedures for initiating certain judicial enforcement actions may reduce the overall duration of an administrative detention in some cases. However, we have insufficient information to determine the impact of these procedures on the duration of administrative detentions. If these procedures reduced the duration of detentions, then it would also reduce storage and loss of product value in cases in which detentions involved food

that we later determined does not present a threat of serious adverse health consequences or death to humans or animals. However, it might also increase our enforcement costs or reduce benefits. It would increase our enforcement costs if we could compensate for the shortened timeframe by assigning additional personnel to the enforcement action. It would decrease benefits in those cases in which we could not fully compensate for the shortened timeframe by assigning additional personnel. Treating more or all food as perishable for appeal purposes would reduce the maximum timeframe in which firms must file appeals for that food from 10 calendar days to 2 calendar days after receipt of the detention order. The reduced timeframe would probably reduce the number of appeals, because any firm that could file an appeal within 2 calendar days is not precluded from doing so with a maximum specified timeframe for filing an appeal of 10 calendar days. Some firms, however, that would be able to file an appeal within 10 calendar days might have difficulty doing so with a maximum specified timeframe for filing an appeal of 2 calendar days. Reducing appeals would decrease our enforcement costs for administering hearings. However, it might also reduce benefits because appeals may allow us to terminate detention orders that we would not have terminated in the absence of appeals. Terminating detention orders would eliminate the storage and loss of product value for detained articles of food. However, reducing the timeframe in which we hold appeal hearings would also increase our enforcement costs and possibly reduce benefits. Again, it would increase our enforcement costs if we could compensate for the shortened timeframe by assigning additional personnel to the appeal hearing. It would decrease benefits in those cases in which we could compensate fully for the shortened timeframe by assigning additional personnel.

(Comment 118) A number of comments raised various issues relating to the timeframes involved in administrative detentions. Some comments argue that we should provide information on the criteria that we intend to use to determine the ''reasonable period'' of time that we detain food administratively because of the impact of that decision on the costs of administrative detention. One comment questions whether this reasonable period of time would depend on the availability of FDA resources. Another comment argues that we should give top priority to any sampling and testing associated with administrative detentions to ensure that we minimize the amount of time that we require. One comment suggests that we initiate any sampling and diagnostic testing within 24 hours of issuing an administrative detention order.

(Response) Defining the criteria that we would use to establish the reasonable amount of time that we would detain food administratively would increase the cost for us to develop this rule because we would need to evaluate every consideration that might affect that time. Also, if we wrote these criteria into the rule, and we failed to anticipate all considerations that might affect this timeframe, then we might need to release food that we detained administratively before we determined that such food should be released. The benefit of defining these criteria is that it would allow the public to provide input on the factors that we believe lead to these time requirements.

(Comment 119) Some comments suggest that we reduce the maximum time of administrative detentions from 30 to 15 days. One comment suggests a maximum of 10 days. One comment suggests a maximum of 7 days. One comment argues that we should revise the rule to limit the period of detention for perishable commodities, including fresh cut salads, fresh fruits, and vegetables to 7 days. One comment suggests that we revise the rule to limit the administrative detention period to 7 days for foods with a shelf life of between 8 and 30 days. Some comments suggest that we develop a system to determine within 24 hours if detention continues to be necessary for perishable food such as fruit, vegetables, and fresh fishery products. These comments suggest that we should only detain fresh noncitrus fruit a few hours, and that we should not detain peppers and citrus fruits for more than 24 hours.

(Response) Reducing the maximum time that we could detain food administratively would reduce storage costs and the loss of value of any food that we later determine is not adulterated. However, this change would also reduce benefits by increasing the risk that an administrative detention order would terminate before we were able to fully assess the health risks associated with the detained food.

(Comment 120) One comment argues that we should inform the owner within 1 calendar day if we terminate an administrative detention order. The comment argues that this would minimize the possible loss of market value by allowing the owner to distribute the food as soon as possible.

(Response) We would only directly inform the owner of the termination of a detention order if we had been able to readily identify the owner and had sent the owner a copy of the detention order. In such a case, we would normally be able to inform the owner of the termination of the detention order within 1 calendar day of when we terminated the detention order. In some other cases, owners could make arrangements with the owner, operator or agent in charge of the place where the food is located to notify them if we notified the owner, operator or agent in charge of the place where the food is located that we terminated a detention order. The timeframe in that case would also be 1 calendar day because we expect that we would normally be able to inform the owner, operator or agent in charge of the place where the food is located within 1 calendar day. Allocating additional employees to this task could generate opportunity costs by reducing the employees that we can assign to other tasks having public health consequences. We have insufficient information to quantify these opportunity costs. The benefit of committing to informing the owner within 1 calendar day, if we inform the owner, would be up to a 1-calendar day reduction in storage costs and loss of product value.

(Comment 121) Some comments state that we set a deadline for making decisions on appeals involving nonperishable food, but we did not set a comparable deadline for appeals involving perishable food. These comments suggest that we revise the rule to specify that the same deadline that applies to nonperishable foods also applies to perishable foods. One comment suggests that we reach decisions on appeals involving perishable foods within four days of the date of the appeal. One comment suggests that we commit to reaching decisions on appeals involving perishable food within 24 hours of the appeal hearing. One comment suggests that we set up an expedited appeal procedure for perishable food.

(Response) Our deadline for making decisions on appeals is the same for both perishable and nonperishable food, *i.e.*, no more than 5 calendar days after an appeal is filed. Reducing the timeframe in which we must render a decision on appeals involving perishable food from 5 to 4 calendar days or to 1 calendar day would either increase our enforcement costs or decrease benefits as per the mechanism we described earlier. It would increase

our enforcement costs if we could compensate for the shortened timeframe by assigning additional personnel to the appeal. In other cases, reducing the time we have to reach decisions might decrease benefits by increasing the risk that we would inappropriately terminate detention orders. However, reducing the time we have to reach decisions on appeals involving perishable foods would also reduce storage costs and loss of product value in those cases in which we terminated those detentions because of those appeals.

(Comment 122) One comment suggests that we extend the timeframe for appealing detentions beyond the proposed 4 calendar days for nonperishable foods and 2 calendar days for perishable food. The comment argues that, in the case of imports, the parties in the exporting countries would not have sufficient time to prepare the necessary documents under the proposed deadlines.

(Response) Although firms must indicate their intention to appeal administrative detentions of nonperishable food within 4 calendar days of when we deliver the detention notice to the owner, operator, or agent in charge of the place where the food is located, they have 10 calendar days to prepare and file their appeals. Therefore, in the case of nonperishable food, both the proposed rule and this final rule are consistent with the comment. Extending the timeframe for appealing nonperishable food would increase our enforcement costs because we would need to keep employees assigned to those cases throughout the potential appeal period to prepare for a possible appeal. It would also increase the number of appeals, which would increase our enforcement costs for reviewing those appeals and administering any appeal hearings that we might grant. However, increasing the number of appeals might also increase benefits by allowing us to terminate some detentions that we might not have otherwise terminated or that we might have terminated after a longer detention period.

We were unable to determine that any of the suggested revisions would generate higher net benefits than the actions that we discussed in the analysis of the proposed rule, which were to broaden the definition of perishable food to include any food with a shelf life of 30 days or less and reduce the maximum timeframe for detaining a perishable food administratively to 14 calendar days. However, we have updated the cost estimates for that action to reflect the revisions we previously discussed under Option One.

TABLE 3.—ANNUAL COSTS FOR OPTION TWO: ALTERNATIVE DEFINITION AND MAXIMUM DETENTION PERIOD FOR PERISHABLE FOOD

Types of cost	Costs (in millions)
Transportation	$0 to $4
Delay of Conveyances	$0 to $4
Storage	$0 to $1
Loss of Product Value	$0 to $15
Marking or Labeling	$0 to $2
Appeals	$0 to $16
Total	$0 to $42

3. Option Three: Take the Proposed Action, but Define the Level of Security We Require for Transportation and Storage

We did not receive any comments on this option. However, we have updated the cost estimates for that action to reflect the revisions we previously discussed under Option One.

TABLE 4.—ANNUAL COSTS FOR OPTION THREE: NO TRANSPORTATION AND ONE ADDITIONAL GUARD

Types of cost	Costs (in millions)
One Additional Guard	$0 to $11
Delay of Conveyances	$0 to $4
Storage	$0 to $2
Loss of Product Value	$0 to $22
Marking or Labeling	$0 to $2
Appeals	$0 to $16
Total	$0 to $56

4. Option Four: Issue Regulations Only to Establish Expedited Procedures for Instituting Certain Enforcement Actions Involving Perishable Food (*i.e.* Limit the Action to the Regulations Required by Section 303 of the Bioterrorism Act)

We did not receive any comments on this option.

5. Option Five: Take the Proposed Action But Revise the Proposed Action in Some Other Way

(Comment 123) In the analysis of the proposed rule, we requested comments on other regulatory options that we should consider. A number of comments suggested revisions that did not correspond to any of the other regulatory options. Many of these suggestions involved revisions that would reduce costs but might also reduce benefits. Other suggestions involved revisions that would reduce some costs, such as costs faced by industry, but would increase other costs, such as our enforcement costs.

(Response) The comments did not provide sufficient information to allow us to quantify the changes in costs or benefits. Therefore, we have insufficient information to determine that any of the recommended changes would increase the net benefits of this rule. Nevertheless, we list the more significant suggested revisions in the following paragraphs and indicate the tradeoffs that would be involved in those revisions.

a. *General.* (Comment 124) One comment argues that rather than adding to industry's burden for food security, we should provide government funding to help industry institute measures to improve food security.

(Response) This comment raises an issue that is beyond the scope of this rulemaking. In the discussion of Option One, we argued that the expected annual burden for all potentially affected firms would be quite small and would not significantly displace food safety expenditures by industry. Declining to issue this rule would generate minimal cost savings because the authority to detain food is self-implementing and is in effect now. This regulation specifies procedures and defines terms to ensure we meet the statutory timeframes for detaining food, and rendering a decision on appeal.

(Comment 125) Some comments suggested that we provide foreign language translations of the Bioterrorism Act and any explanatory information that we prepare on this regulation. The comments suggest that we disseminate the translated material on our Web site and by other means. Some comments request that we establish foreign language consultation services at U.S. embassies.

(Response) As stated earlier in this rule, we have posted on FDA's Web site transcripts of the May 7, 2003, public meeting that we held to discuss both the administrative detention and recordkeeping proposed rules. We also posted transcripts of the broadcast in English, French, and Spanish, which are the three official WTO languages. We plan to make similar outreach efforts directed to both domestic and international stakeholders after publication of this final rule. Providing other translations and foreign language consultants would increase our enforcement costs, but reduce the costs of foreign firms that wished to appeal administrative detentions. Reducing the cost of appeals for firms would probably increase the number of appeals. As we discussed earlier, increasing the number of appeals would increase our

enforcement costs but would also allow us to terminate administrative detentions that we would otherwise not have terminated or terminated after a longer detention period. Terminating administrative detentions would reduce storage costs and loss of product value.

b. *Coverage.* (Comment 126) One comment suggests that we exempt regulated indirect food contact color pigments that firms may use in the manufacture of food packaging. This comment argues that exempting these products would have a minimal effect on benefits. According to this comment, our regulations require that indirect food contact color pigments be proven safe and incapable of migrating into food in more than *de minimis* quantities. This comment also argues that color pigments must be almost completely insoluble in the medium in which they are used, particularly for food packaging, which means that the amount of contaminant that would be necessary to pose a threat to food by migration from polymers and coatings would almost certainly compromise the basic stable coloration function of the pigment. This comment also states that if someone did manage to adulterate these products, then it would probably affect the chemistry of these substances in such a way that the pigment would no longer function correctly in the packaging, polymer or coating systems. The comment also notes that they know of no biological contaminants that could occur in food that could survive in the harsh environment of bulk commercial color pigments or the severe environment that occurs in the manufacturing of plastics, inks and coatings. Finally, the comment notes that they know of no cases of foodborne illness that have been attributed to contaminants that migrated from a color pigment used in food packaging.

Some comments suggest that we exempt outer food packaging. These comments argue that the risk to humans and animals from the adulteration of outer food packaging is relatively small compared to the risk from the adulteration of food contact packaging.

One comment suggests that we exempt raw materials and formulated products that are used as components in the manufacture of food-contact articles, such as conveyor belts, oven gaskets, coatings for film, paper, and metal substrates, adhesives, antifoam agents, antioxidants, polymeric resins, polymer emulsions, colorants for polymers, rubber articles, release coatings, and the like.

One comment suggests that we exempt ceramic and lead crystal tableware. This comment argues that such products would be unlikely to feature in terrorist incidents and that deploying our resources to deal with these products would reduce our ability to deal with other products.

One comment suggests that we exempt animal feed and pet food and limit the scope of the proposed regulations to food that is intended for direct human consumption without further processing.

One comment suggests that we exempt food in purely intrastate commerce.

(Response) The scope of the detention authority extends to those articles that meet the definition of food in section 201(f) of the FD&C Act. Exempting the products in this comment that meet this definition would have little effect on estimated costs because, if it were technically difficult or impossible to adulterate these types of food, then we would rarely or never receive information that would require us to detain it administratively. There are no costs associated with this rule for products that do not appear to present a threat of serious adverse health consequences to humans or animals. However, exempting these products could significantly reduce benefits because we would be unable to use administrative detention in the unlikely case that someone did manage to adulterate these products in a way that generated a risk of serious adverse health consequences. This type of event, although rare, could generate significant health costs. Therefore, the net effect of this revision would be to reduce the net benefits of this rule.

(Comment 127) Some comments suggest that we limit our use of administrative detention to situations involving real or suspected intentional acts of terrorism. Some comments argue specifically that we should continue to request Class I recalls in situations involving unintentional adulteration. One comment argues that we should not use administrative detention to deal with imported food containing undeclared allergens.

(Response) Limiting the use of administrative detention to situations involving real or suspected terrorism would significantly reduce both the potential costs and benefits of this rule. Only one of the 223 enforcement actions upon which we based our estimate in the proposed rule of the potential maximum number of times we might use administrative detention in 1 year may have involved intentional contamination, and it is possible that none of them did. We did not estimate the number of outbreaks per year that this rule might prevent due to our ability to remove food that presents a threat of serious adverse health consequences or death to humans or animals from commerce by placing it under administrative detention while we pursue a seizure action. However, the number of intentional outbreaks would be much smaller than the number of intentional outbreaks plus the number of unintentional outbreaks because most outbreaks have been unintentional.

(Comment 128) Some comments suggest that we cooperate with TTB of the U.S. Department of the Treasury when detaining alcoholic beverages administratively because the TTB is normally responsible for regulating these products and has expertise on that sector of the economy. The comment suggests that we revise the rule to specify that TTB officials are responsible for ordering any administrative detentions of alcoholic beverages.

(Response) As stated previously, FDA recognizes that working in conjunction with TTB is an important tool we have in the event of a threat to the nation's food supply. However, TTB does not have exclusive jurisdiction over alcoholic beverages. FDA exercises jurisdiction over alcoholic beverages as ''food'' for the purposes of the adulteration provisions and other provisions of the FD&C Act. FDA has concluded that alcoholic beverages are covered under the administrative detention regulation because alcohol is food, as that term is defined in section 201(f) of the FD&C Act. The term ''food'' as used in section 303 of the Bioterrorism Act has the meaning given in section 201(f) of the FD&C Act.

c. *Definition of criteria.* (Comment 129) Some comments state that we should define ''credible evidence or information'' and ''threat of serious adverse health consequences or death to humans or animals.'' These comments argue that these steps would be necessary to protect against arbitrary or unsupported detentions that might function as trade barriers. Some comments suggest we use internationally valid standards, such as Codex standards, when defining these terms. One comment suggests that we provide additional guidance on ''credible evidence or information'' by naming all the sources of information that we consider reliable and describing requirements with respect to accuracy of the information. One comment suggests that we adopt a more precise definition of the criteria involved because it would minimize the cost of wrongly ordered detentions. One comment argues that we should not define the criteria for

administrative detention, but should instead decide whether a particular case meets the definition on a case-by-case basis, as we proposed. This comment argues that we should not limit our discretion to use administrative detention by identifying the types of evidence that we would need to support a detention order because terrorist events might arise under conditions that we could not anticipate.

One comment offers suggestions about how to define ''threat of serious adverse health consequences or death to humans or animals.'' Some comments suggest that we define ''credible evidence'' to require evidence, such as laboratory analyses, to confirm the presence of an adulterant or affidavits sworn to under penalty of perjury. One comment argues that we should define ''serious adverse health consequences or death to humans or animals'' so that it necessarily involves risks for a large part of the population and also for the average consumer, not just a sensitive subpopulation.

(Response) We are developing a separate rule in which we will define the phrase, ''serious adverse health consequences or death to humans or animals.'' This phrase is also used in other provisions in Title III, Subtitle A, of the Bioterrorism Act, not just in its section 303. Therefore, it would not be efficient to define this phrase in this rule.

More precisely defining ''credible evidence or information'' would increase the cost for us to develop this rule because we would need to consider and evaluate a number of possible scenarios in order to define that term. In addition, if we wrote a definition of this term into this rule, then we might need to revise the rule as we encountered new situations. Also, if we wrote a definition into the rule, and we failed to anticipate all relevant situations, then we might be unable to use administrative detentions in some situations in which there might be benefits from doing so. The benefit of more precisely defining this term is that it would reduce the possibility that some people might perceive administrative detentions as arbitrary. In the discussion of Option One, we pointed out that the credible evidence or information standard has been applied in various other judicial and administrative contexts.

d. *Administrative detention orders and the dissemination of other information relating to administrative detentions.* (Comment 130) A number of comments addressed the issue of who would receive copies of administrative detention orders. One comment notes that § 1.392 of the proposed rule provides that we would provide a copy of the detention order to the owner, operator or agent in charge of the place where the food is located, and that we would provide a copy to the owners of the food if we could readily determine their identity. The comment notes that because we are requiring operators to register with us, we should be able to readily identify the sending company, the buying company and all intermediaries of the food detained. The comment argues that at least one of these parties would typically be the owner and suggested that we inform all of them of detention orders. The comment suggests that this would be the only way to give the owner a realistic chance to file an appeal.

One comment notes that the owner of the place or the vehicle where we detain food administratively might not have a vested interest in the detained product. This comment suggests that we also notify the importer or the owner of the food. One comment suggests that if we detain an exporter's product, then we should notify that exporter. One comment suggests that we notify the importer and exporter of record and the Customhouse broker. One comment requests that we notify the agent or importer. One comment requests that we notify people of administrative detentions by both a formal written communication and a telephone call.

(Response) We will issue an administrative detention order to the owner, operator, or agent in charge of the place where the food is located. We will also provide a copy of the detention order to the owner of the food, if the owner of the food is different from the owner, operator, or agent in charge of the place where the food is located, and if we can readily determine the owner's identity. Finally, we will provide a copy of the detention order to the shipper of record and to the owner and operator of the vehicle or other carrier, if the food is located on a common carrier, and if we can readily determine the identities of the owners and operators. We intend personally to deliver the detention order to the owner, operator, or agent in charge of the place where the food is located because it permits our investigator to observe the article of food and therefore better describe it in the detention order. We will notify other parties using whatever method of communication is quickest, given the information that we can readily determine about how we can contact them. The registrations that we will be requiring in another rulemaking will not provide us with a list of parties that would probably include the owners of food that we detain administratively. Committing to notifying additional parties beyond those specified in the proposed rule, notifying owners even when we cannot readily determine their identities, or notifying owners by telephone and written communications even when we cannot readily determine their phone numbers or addresses, would increase our enforcement costs.

The benefit of such a revision is that it would increase the probability that we would notify a party that has an incentive to appeal an administrative detention in time for them to meet our deadlines for filing an appeal. This would increase the number of appeals. As we previously discussed, this may generate social benefits because appeals may allow us to terminate some detentions. Terminating detentions would limit the storage and loss of product value associated with those detentions.

(Comment 131) One comment suggests that we revise the rule to require that we accompany a notice of detention by personal service upon the responsible party at individual locations.

(Response) We will notify in person the owner, operator, or agent in charge of the place where the food is. If more than one location is involved, then we would notify in person the owner, operator, or agent in charge of each location. Committing to notifying other parties in person would substantially increase our enforcements costs and might decrease benefits because notifying other parties in person might not be the quickest way of notifying them. The comment did not provide a mechanism by which notifying other parties in person would generate benefits. Therefore, this change would probably not increase the net benefits of this rule.

(Comment 132) A number of comments ask questions about who would receive information on administrative detentions other than copies of detention orders. Some comments suggest that we provide essential information, such as the cause of administrative detentions, to key industry officials in the event of a food security event. One comment suggests that we provide information on administrative detentions to the government of the home country of the owner, operator, or agent in charge of the place where the food is located. Some comments suggest that we inform foreign governments if we detain products from their countries so they can take measures to recall or otherwise deal with the products. One comment suggests that we provide information on

administrative detentions to foreign governments only if the product from that country constituted a serious threat. Some countries suggest methods by which we could provide information. One comment suggests that we notify foreign governments using a rapid alert system, if a product from that country constituted a serious threat. Some comments suggest that we devise and test a method of communicating essential information to key industry officials in the United States in the event of a food security event.

(Response) We will directly notify foreign governments and industry officials of administrative detentions on a case-by-case basis when we think there would be benefits to doing so. Committing to notifying these parties of every administrative detention would increase our enforcement costs. However, it might also generate benefits because we might otherwise fail to notify these parties of administrative detention in some situations in which such notification would generate benefits. The probability that we would fail to notify these parties in situations in which such notification would generate benefits is probably small.

(Comment 133) Some comments raise the issue of the information that we would provide to owners or others, either as part of the administrative detention order or otherwise. Some comments request information that would help them identify the detained food. Some comments suggest that we provide owners with grower codes so that they or others could trace the secondary supplier. One comment suggests that we provide a description of the food, the quantity, and the lot or code numbers or other identifiers.

(Response) We will provide information relevant to identifying food that we detain administratively in the detention order. This information will typically include a description of the food, the quantity of food, and any identifying codes, such as grower codes and lot numbers, that we can readily determine. Committing to always providing particular codes would increase our enforcement costs. In some cases, such as a detention involving a number of pallets containing products from multiple lots, it might be difficult for us to identify all of the relevant lot codes. Committing to always providing particular identifying codes would generate benefits because it would help owners, and possibly other parties such as foreign governments, to take steps to investigate the potential problem and possibly reduce the risk of additional serious adverse health consequences. In addition, some parties may find particular identifying codes useful during the appeal process.

(Comment 134) One comment suggests that we provide foreign governments with the produce name and lot number, the producer, and the exporter of the detained food.

(Response) In those cases in which we directly inform foreign governments of administrative detentions, we would provide them with a copy of the detention order and any other information we deem appropriate, which may include the name of the product, the lot number, the producer, and the exporter. Committing to always providing foreign governments with this information would increase our enforcement costs and possibly increase other food safety risks. The benefit of committing to always providing this information is that foreign governments might be able to take more effective steps to address potential food safety risks than they would otherwise. We have insufficient information to quantify the net impact of this revision.

(Comment 135) Other comments discuss the information that we would provide as the bases for administrative detentions. One comment suggests that we include in the detention order the information upon which we based an administrative detention. Some comments suggest that we provide owners with complete information on the reasons for detentions so that owners can provide counterevidence during an appeal. One comment suggests that we should at least include a description of the ''credible evidence or information'' that resulted in the detention order, because without such information, the owner of the detained article would be denied information critical to its own investigation, which would hamper or deny its ability to make a meaningful appeal. The comment notes that we could provide information on why we believe the article of food subject to the order ''presents a threat of serious adverse health consequences or death to humans or animals'' even if the ''credible evidence'' that we used is classified information. One comment suggests that we provide foreign governments with the reasons for administrative detentions.

(Response) We will provide a statement of the reasons for a detention in the detention order, but we will not divulge classified information to those without the proper security clearance. Similarly, in those cases in which we directly notify foreign governments or other parties of administrative detentions, we will provide a statement of the reasons for those detentions as is consistent with national security considerations and applicable disclosure laws. Providing classified information to those without the proper security clearance could generate costs by increasing the risk of future food safety incidents. It would also be illegal.

(Comment 136) One comment suggests that we include in the detention order a description of the actions we intend to take with the product and the amount of time we intend to hold the product.

(Response) Detention orders will be dated and will include the period of detention. Therefore, anyone can determine the expiration date of that detention order. We could attempt to predict at the time we issued detention orders whether we might terminate those detention orders or move to seizure actions before the expiration date, or whether we might need to extend the detentions for an additional 10 calendar days. We could then revise detention orders as our assessment changed over time. However, that would substantially increase our enforcement costs. The benefit of this action is that the recipient of the detention order might be in a better position to plan any appeals or subsequent disposition of the food.

(Comment 137) One comment suggests that we provide information on the analyses and methods that we use to analyze food that we detain administratively.

(Response) As we discussed earlier in this preamble, information on the analyses and methods that we use to analyze food is available on FDA's Web site at *http://www.fda.gov.*

(Comment 138) Some comments suggest that we provide the owner a sample of the detained food to allow them to conduct their own tests.

(Response) With respect to providing counter-samples, section 702(b) of the FD&C Act describes FDA's responsibility to provide a part of an official sample of food to certain individuals, when a sample is collected for analysis under the FD&C Act. Section 702(b) of the FD&C Act requires the Secretary to, upon request, provide a part of such official sample for examination or analysis by any person named on the label of the article, or the owner thereof, or his attorney or agent; except that the Secretary is authorized, by regulations, to make such reasonable exceptions from, and impose such reasonable terms and conditions relating to, the operation of this section as he finds necessary for the proper administration of the provisions of the FD&C Act. Therefore, when our own collection of a sample requires us to

provide a part of that sample to the owners, we will do so. However, when we are not required to provide a part of that sample to the owners, we will not do so. If we do not take a sample, then we will also not provide owners with a sample. Always providing owners with a sample when we collect a sample would increase our enforcement costs but might reduce costs in some situations by allowing us to terminate some detention orders. Providing owners with samples in situations in which we do not take samples for our own purposes would increase our enforcement costs and would have a minimal impact on other costs. In particular, if we did not rely on testing to establish our case for an administrative detention, then providing owners with samples would probably likely have little impact on the appeal.

(Comment 139) One comment suggests that we allow owners of detained food to have access to the written approval granted by the authorized FDA representative to ensure that the owners have all of the necessary information to address any potential concerns.

(Response) The owner of detained food can obtain a copy of the written approval granted by the authorized FDA representative under FOIA, after we have removed any information that is protected from disclosure to the public. However, owners might not be able to get such a copy quickly enough to use during their appeal. Providing owners of food that we detain administratively faster access to written approvals granted by authorized FDA representatives would increase our enforcement costs and would probably generate no or minimal benefits. Allowing owners access to written approvals would allow them to confirm that administrative detention orders were properly approved. However, owners do not need access to those documents to raise this issue in an appeal. Therefore, making this change would probably not increase net benefits.

(Comment 140) Some comments were concerned about the information that we would provide to the public concerning administrative detentions. Some comments suggest that we should only make information on administrative detentions public if it were necessary to protect public health. These comments suggest that we ensure that any information that we release to the public on administrative detentions is accurate and that we transmit such information in a clear, unemotional, and factual manner without unduly or inaccurately raising public concern.

(Response) We do not currently plan to publicize administrative detentions unless it is necessary to protect the public health. However, members of the public can request information on administrative detentions under the Freedom of Information Act. If we found it necessary to inform the public for public health reasons, then we would ensure that the information that we provided to the public is accurate and that we transmitted it in an appropriate manner that would not unduly or inaccurately raise public concern.

(Comment 141) One comment suggests that we revise the rule to require that Regional FDA Directors or more senior level officials approve administrative detentions because of the serious cost implications involved.

(Response) This revision would increase our enforcement costs by reducing the number of eligible authorizing officials and by increasing the payroll and opportunity costs associated with approving detentions. The potential benefit would be a reduction in the number of administrative detentions that we later terminate because of a successful appeal or because we later determined that they involved food that did not pose a serious adverse health consequences or death to humans or animals threat. We have no information establishing that this benefit would occur.

(Comment 142) One comment notes that we proposed that government employees commissioned or deputized by FDA may order a detention. This comment argues that we should revise the rule to allow only FDA employees to order and administer detentions because that would aid in the credibility of the process.

(Response) Revising the rule to allow only FDA employees to order and administer administrative detentions would increase our enforcement costs. If this revision aided the credibility of the process, then it might reduce the possibility of legal complaints and might also reduce the number of unjustified appeals, both of which would decrease costs. However, the comment did not provide information establishing that this effect would occur.

e. *Compensation.* (Comment 143) Many comments argue that we should compensate firms for costs associated with administrative detentions that we later terminate because of a successful appeal or because we later determined that it involved food that did not pose a threat of serious adverse health consequences or death to humans or animals. One comment suggested that we should at least compensate firms for some percentage of the costs, because it would provide us with an incentive to avoid excessive use of administrative detentions. One comment suggests that we compensate farmers for the costs of administrative detentions.

(Response) Neither the FD&C Act nor the Bioterrorism Act provide FDA with authority to compensate firms for costs associated with administrative detention. Even if FDA had such authority, if we compensated firms for costs associated with administrative detentions, then we would shift the burden of those costs from the affected firms to taxpayers in general. This is primarily a distributional issue that goes beyond the scope of this analysis.

f. *Labeling and marking.* (Comment 144) One comment suggests that we add the name of the authorized FDA representative to the information that we put on the tags or labels that we affix to food that is detained administratively.

(Response) Including the name of the authorized FDA representative on the tags or labels that we affix to detained food would increase our enforcement costs slightly, but would not affect other costs or benefits. We will provide information on how to appeal or obtain more information on administrative detentions in the detention order. It is possible that someone might have access to the tag or label but not the detention order, so there could be some benefit to adding a contact name to the tag or label. However, this situation is probably unlikely. Most people who may be interested in appealing an administrative detention will probably be able to obtain a copy of the detention order. Therefore, this change would probably not increase net benefits.

g. *Transportation.* (Comment 145) One comment suggests that we define and make available for public comment the conditions that we believe would warrant transporting food that is detained administratively to secure storage facilities.

(Response) Defining the conditions that would warrant transporting food to secure storage facilities would increase the cost for us to develop this rule because we would need to consider and evaluate every scenario that might require transportation. In addition, if we wrote these conditions into the rule, then we might need to revise the rule as we gain experience with administrative detentions. Also, if we wrote these conditions into the rule, and we failed to anticipate all situations in which transportation was appropriate, then we might need to resort to relatively inefficient and expensive alternatives.

The benefit of defining the conditions warranting transporting food to secure storage facilities is that it would prevent inconsistent decisions about transporting food to secure storage and would allow the public to provide input on when transportation would be most worthwhile.

(Comment 146) One comment requests that we change the rule to include some provisions regarding appropriate transportation conditions, such as keeping refrigerated foods under 40 degrees F and frozen foods under −4 degrees F. One comment notes that we did not define the mode of transport in the case of limited conditional release and argues that we should require that the mode of transport not introduce any condition or substance that would adulterate or otherwise deleteriously impact the quality of the detained food.

(Response) We will normally maintain existing storage conditions during transportation to secure storage facilities. If the owner wishes, he or she can request that we maintain different storage conditions or request modification of a detention order. In the case of a request to modify the detention order, the party requesting modification of the detention order would determine the conditions during transportation.

(Comment 147) One comment requests that we revise the rule to require that the owner, purchaser, importer, or consignee, pay the transportation costs of food that is detained administratively. This comment notes that this would be consistent with the rule on prior notice (part 1, subpart I). The comment argues that a trucking company should not have to pay transportation costs because they have no control over the quality or safety of what a shipper loads into the trailer.

(Response) Resolving the issue of who should pay for transportation is a distributional issue that is beyond the scope of this analysis.

h. *Storage facilities.* (Comment 148) Some comments state that we should guarantee that we will have enough secure storage facilities with appropriate storage conditions for products that we detain administratively.

(Response) Guaranteeing that we have appropriate secure storage facilities for all food that we might detain administratively could generate significant costs because of the uncertainty over the number and location of detentions and whether there is a need to transport detained food to secure storage. It would generate minimal benefits because, in many cases, it may be cheaper and more or equally effective to secure detained food in place. Therefore, this change would probably increase the net costs of this rule.

(Comment 149) One comment notes that our decision to move food to secure storage, and our selection of appropriate storage facilities, could have a significant impact on the storage costs that the owners of detained food would face. The comment suggests that we ensure that such storage facilities impose the minimum cost necessary to achieve the objectives of the detention, with respect to both security and food storage conditions such as refrigeration.

(Response) Ensuring that storage facilities impose the minimum cost necessary to achieve the objectives of administrative detentions would increase our enforcement costs by requiring us to spend time shopping for storage facilities. This would also increase the time we need to implement administrative detentions, which might reduce benefits. The benefit of ensuring that we use the lowest cost storage facility is that it would give us an incentive to reduce storage costs to the lowest level possible. This benefit would probably be small. When we use commercial storage facilities, the price difference between the facility that we choose and the lowest cost appropriate storage facility would probably be relatively modest due to price competition in the commercial storage market. The same considerations apply to any conveyances that we use to move food that we detain administratively to secure storage facilities.

(Comment 150) One comment suggests that we require the person holding legal title to the food to bear the cost of storing food that is detained administratively. This person might be a shipper, the consignee, or a food broker. One comment requests that we revise the rule to require that the owner, purchaser, importer, or consignee pay any storage costs. This comment notes that this would be consistent with the rule on prior notice (part 1, subpart I). The comment argues that a trucking company should not pay storage costs because they have no control over the quality or safety of the food a shipper loads into the trailer.

(Response) The issue of who should pay for storing food that is detained administratively is a distributional issue that is beyond the scope of this analysis.

(Comment 151) One comment suggests that we provide records of storage conditions during detention to owners of detained food, upon request.

(Response) Providing records of storage conditions to owners upon request would increase our enforcement costs slightly. This revision would probably have a minimal impact on benefits or distributional effects because we will allow owners to verify storage conditions, except where security concerns prevent it.

(Comment 152) Some comments argue that owners should be able to inform us about the optimal storage conditions for food that we detain administratively and that they should be able to submit a claim against us if we do not follow their recommendations. One comment requests that we revise the rule to include some provisions regarding appropriate storage, such as keeping refrigerated foods under 40 degrees F and frozen foods under −4 degrees F. One comment requests that we commit to holding refrigerated and frozen food at the same refrigerated and frozen temperatures and conditions that are found in U.S. commercial cold storage facilities. This comment also suggests that we allow owners, operators, or agents to request that we freeze detained fresh products that are or are likely to be, detained for 4 or more days. One comment recommends that we develop procedures regarding administrative detention for perishable foods, including a specific process that would ensure the preservation of such foods until we resolve the administrative detention.

(Response) We will normally maintain existing storage conditions during administrative detentions. If the owner wishes, he or she can request that we hold the food under different conditions or request modification of the detention order. We would accede to one or the other of these requests except where security concerns prevent it. We know of no process that would ensure the preservation of perishable foods during the detention period.

i. *Off loading from conveyance/partial loads.* (Comment 153) One comment suggests that we reduce the potential economic effects of detaining large oceangoing vessels by taking one of the following actions: (1) Not detaining products on vessels at ports without first allowing the product to be offloaded to secure storage; (2) specifically providing for the removal of products from vessels to secure storage in the detention order; or (3) specifying that moving detained product from the vessel qualifies as a basis for a conditional release, thus permitting the movement of detained product to secure storage. One comment notes that ships carrying bulk vegetable oils hold the oil in individual parcel tanks. This comment notes that a ship might transport many parcel tanks of various types of vegetable oil to many buyers in different locations. The comment notes

that a single ship could carry more than 50 separate parcel tanks. This comment argues that if we receive intelligence on the potential contamination of a particular parcel tank, then we should remove that parcel tank to secure shore storage and allow the ship to proceed with deliveries of the remaining parcel tanks. One comment argues that removal of a product from a conveyance to secure storage should be one of the bases on which a claimant may seek a limited conditional release. Another comment suggests that we revise the rule to indicate that, if we detain food on a truck, then we will issue an order to the trucking company to deliver the food to either the consignee or to a secure location.

(Response) Owners and operators of conveyances may request modification of a detention order to move food from a conveyance to other storage. We generally would accede to such requests unless they generated health risks or raised security concerns. If we determine that only a portion of a cargo of food products meets the criteria for administrative detention, the food or other items that can be readily segregated and not detained can be segregated and moved. In the analysis of the proposed rule, we noted that our experience with other enforcements actions is that we would not cause significant delays in the delivery of food that is packed with food that we detain administratively. These comments did not provide information that would require us to revise that assessment.

(Comment 154) One comment requests that we develop a process by which we would reseal a tank truck load that we determined did not present a problem with an FDA seal and indicate the resealing on an official FDA document. The comment notes that receivers might still reject the load, but that they would be less likely to reject it under these conditions.

(Response) We will reseal a tank truck load that did not present a problem with an FDA seal, but we will not provide an official FDA document to that effect. Providing an official FDA document would increase our enforcement costs slightly. It is possible that such a document might reduce costs by encouraging receivers to accept resealed loads. However, in the discussion of this issue under Option One, we concluded that market forces would probably minimize unnecessary rejections of resealed loads. The comment did not provide information that would allow us to quantify this practice or to estimate the effect of an official FDA document on reducing it.

j. *Timeframes.* (Comment 155) One comment argues that if we needed to use any of the additional 10 calendar days beyond the initial 20-calendar day period, then we should inform the owner of the food of this additional time requirement, the reasons we need the additional time, and the actual time period that we will require, up to the maximum of 10 calendar days.

(Response) The initial detention order will include an expiration date based on the initial 20-calendar day period. In addition, FDA notes that under § 1.379(a), FDA can order detention of the article of food for 30 calendar days in the original detention order, if we know from the outset that 30 rather than 20 calendar days will be needed to institute a seizure or injunction against the detained article of food.

If we needed to use the additional 10 calendar days, then we would issue a new detention order with a new period of detention based on that time period. Basing the period of detention of the new detention order on our estimate of the portion of the maximum period of 10 calendar days that we think we might require would increase our enforcement costs because it would require us to develop a model to estimate the time required, and we might need to prepare additional detention orders if we underestimated the time that we needed. The benefit of this change is that it would allow owners to make plans based on our current assessment of the time that we require. This benefit would probably be minimal because we will inform owners as quickly as possible if we terminate a detention order before the detention period has expired. Providing owners with the reasons we need additional time would also increase our enforcement costs. The benefit of providing this information to owners is unclear. Any benefit would probably be minimal because we intend to proceed as quickly as possible with activities pertaining to food that we detain administratively. Therefore, these changes would probably not increase net benefits.

k. *Appeal hearings.* (Comment 156) One comment suggests that we start the timeframe for appeal when we notify someone who is authorized to file an appeal. One comment requests that we revise the rule to give the shipper the right to appeal. One comment wonders whether everyone with a commercial interest in the food, such as an importer, could file an appeal. One comment suggests that we revise the rule to allow the owner to designate someone else to appeal a detention order, such as a lawyer or a food engineer, in case the owner felt that he or she did not have the proper skills to do so.

(Response) Any person who would be entitled to be a claimant for the article of food, if seized under section 304(a) of the FD&C Act, may appeal an administrative detention. The local rules of the Federal court district in which a seizure or administrative detention occurs set forth the procedures by which a party establishes entitlement to be a claimant, or files a statement of interest under the revised Supplemental Rule C(6) of the ''Federal Rules of Civil Procedure,'' and a determination of whether a party has a sufficient interest in the goods is made on a case-by-case basis.

As required in § 1.392, we will provide a copy of the detention order to the owner, operator or agent in charge of the place where the food is located and to the owner of the food, if the owner's identity can be determined readily. Examples of steps FDA will take to determine the identity of the owner of a detained article of food include examining any readily available bills of lading or invoices for the article of food and asking the owner, operator, or agent in charge of the place where the detained article of food is located for any information he or she may have regarding the identity of the owner of the article of food. Though FDA will make reasonable efforts to identify the owner of the food and to notify that person of the administrative detention while there is still time to file an appeal, it may not always be possible for us to identify the owner of the food.

Other parties with a commercial interest in the food, including importers and shippers, would generally be able to file an appeal. Owners or other parties who wished to appeal an administrative detention may choose to have other parties, such as lawyers and food engineers, represent them for purposes of the appeal, once the appeal is filed in the owner's name.

Changing the rule to ensure that at least one party that is able to file an appeal has time to file an appeal after they learn of the detention, or that everyone with a financial interest in the food has time to appeal a detention, or that owners or other parties who wished to appeal a detention have an opportunity to arrange for other parties to represent them, would increase our enforcement costs. It would also probably increase the number of appeals, which would further increase our enforcement costs but also increase benefits by the mechanism we described earlier. These changes might also address some distributional concerns.

The revised §§ 1.403(h) and 1.405(a) require the presiding officer to issue a report, including a proposed decision confirming or revoking the detention order, by noon on the fifth calendar day, while giving the participant 4 hours to submit changes and corrections before a final decision is issued. These changes will increase the probability that we will correctly terminate a detention order when the food does not present a risk, but will also increase our enforcement costs by some amount.

(Comment 157) Some comments argue that we should guarantee the right to a hearing. One comment suggests that we establish a national detention approval board to ensure uniform application of the regulation. The comment argues that establishing such a board would allow us to avoid costly errors and delays.

(Response) As we indicated earlier, we would only grant a request for a hearing after an appeal is filed, if a firm submitted material that raised a genuine and substantial issue of fact. Guaranteeing the right to an appeal hearing would increase our enforcement costs. It might also increase benefits, because in some cases, our initial assessment of whether a firm submitted material that raised a genuine and substantial issue of fact might be incorrect. In that case, we might fail to terminate a detention that we would otherwise have terminated. This effect would probably be minimal because, as stated earlier, we will probably grant a hearing in most cases in which a hearing is requested.

Establishing a national detention approval board would increase our enforcement costs. It might reduce the costs of this rule by allowing us to avoid costly errors and delays. However, the comment did not provide evidence that this effect would occur.

(Comment 158) Some comments request that we provide additional guidance on how to file an appeal, addressing such issues as whether we require all appeals to include certain basic information. One comment suggests that we run workshops for local trainers and prepare slide and video presentations, online training manuals, and explanatory leaflets on how to appeal administrative detentions. One comment suggests that we describe appeal procedures and deadlines in the detention order. The comment suggests that we include the following information in the detention order: The claimant has a right to appeal the order; the appeal must be submitted in writing to the appropriate (and identified) FDA District Director, the number of days the claimant has to file the appeal and request a hearing, and the date by which such an appeal and request must be made.

(Response) We will provide information on how to appeal administrative detentions in the detention orders. As stated previously, we also plan extensive outreach materials, including explanatory materials, such as slide presentations, a satellite downlink meeting, and fact sheets, to explain the requirements of the final rule, similar to what we did for the proposed rule. Providing other information and guidance would increase our enforcement costs. It would probably have a minimal impact on other costs and distributional effects because anyone wishing to file an appeal could learn what to do from these materials.

(Comment 159) Some comments suggest that we revise the rule to require that the official presiding at an informal hearing be senior to the official who approved the detention order. They argue that presiding officials may be less likely to terminate detention orders if FDA employees senior to those presiding officials authorized those orders.

(Response) Revising the rule as this comment suggests might increase the likelihood that we would terminate some administrative detention orders during the appeal process for the reasons this comment suggests. However, we have insufficient information to establish that this effect would take place. This revision would increase our enforcement costs by reducing the pool of employees that would be eligible to either authorize administrative detentions or to preside at appeals hearings.

(Comment 160) One comment suggests that appeals hearings should include participation or attendance by third parties.

(Response) Including a third party in appeals hearings would increase the costs associated with those hearings. The comment did not explain the mechanism by which the presence of a third party would reduce costs or increase benefits. We note, however, that hearings generally are open to anyone who wishes to attend as a nonparticipant, unless classified or confidential information (*e.g.*, information exempt from disclosure under applicable laws) is being discussed.

1. *Summary.* Table 5 of this document summarizes the range of costs and benefits for the five options that we have considered. We have indicated that we cannot determine the effects of many of the suggested revisions that we discussed under Option Five. However, we have insufficient information to establish that any of those revisions would increase net benefits.

TABLE 5.—SUMMARY OF ANNUAL COSTS AND BENEFITS

Option	Costs (in millions)	Benefits
One—Transportation and Perishable Foods as Proposed	$0 to $50	>$0.
Two—Perishable Foods Alternatives	$0 to $42	>$0, But < Option One.
Three—No Transportation, But One Additional Guard	$0 to $56	>$0.
Four—Limited to the Bioterrorism Act	>$0 to >$50	>$0, But ≤ Option One.
Five—Revise in Other Ways	N/A	N/A.

B. Final Regulatory Flexibility Analysis

We have examined the economic implications of this final rule as required by the Regulatory Flexibility Act (5 U.S.C. 601–612). If a rule has a significant economic impact on a substantial number of small entities, the Regulatory Flexibility Act requires us to analyze regulatory options that would lessen the economic effect of the rule on small entities. We find that this final rule would not have a significant economic impact on a substantial number of small entities.

(Comment 161) In the analysis of the proposed rule, we requested comments on the impact of the proposed rule on small entities. The only comment we received on this issue noted that most firms making indirect food contact color pigments that firms may use in the manufacture of food packaging are small businesses.

(Response) This comment is consistent with the analysis in the proposed rule. Therefore, we have not

revised the analysis that we presented in the proposed rule.

C. Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires cost-benefit and other analyses before any rulemaking if the rule would include a "* * * Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year." The current inflation-adjusted statutory threshold is $112.3 million per year. We have estimated that the total cost of the proposed rule would be no more than $50 million per year. Therefore, we have determined that this final rule does not constitute a significant rule under the Unfunded Mandates Reform Act.

D. Small Business Regulatory Enforcement Fairness Act (SBREFA) Major Rule

SBREFA (Pub. L. 104–121) defines a major rule for the purpose of congressional review as having caused, or being likely to cause, one or more of the following: An annual effect on the economy of $100 million; a major increase in costs or prices; significant adverse effects on competition, employment, productivity, or innovation; or significant adverse effects on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets. In accordance with SBREFA, OMB has determined that this final rule is not a major rule for the purpose of congressional review.

VII. Paperwork Reduction Act of 1995

This final rule contains information collection provisions that are subject to review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

We conclude that these information collection provisions are exempt from OMB review under 44 U.S.C. 18(c)(1)(B)(ii) and 5 CFR 1320.4(a)(2) as collections of information obtained during the conduct of a civil action to which the United States or any official or agency thereof is a party, or during the conduct of an administrative action, investigation, or audit involving an agency against specific individuals or entities. The regulations in 5 CFR 1320(c) provide that the exception in 5 CFR 1320.4(a)(2) applies during the entire course of the investigation, audit or action, but only after a case file or equivalent is opened with respect to a particular party. Such a case file would be opened as part of the decision to detain an article of food.

VIII. Analysis of Environmental Impact

The agency has carefully considered the potential environmental effects of this action. FDA has concluded under 21 CFR 25.30(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

IX. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the final rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the agency concludes that the final rule does not contain policies that have federalism implications as defined in the Executive Order and, consequently, a federalism summary impact statement has not been prepared.

X. References

The following references have been placed on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852 and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. FDA has verified the Web site addresses, but FDA is not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.

1. Holcomb, Harry, Area officials have adapted a tracking system to watch over U.S. ships in an age of terrorism, accessed on the Internet at *http://www.philly.com/mld/inquirer/5369951.htm,* accessed on September 16, 2003.

2. AAA Environmental Industry, Inc., Cost Proposal, Schedule of Standard Rates Effective July 1, 2002, available on the Internet at *http://vendornet.state.wi.us/vendornet/wais/bulldocs/1431_4.doc,* accessed on September 16, 2003.

3. National Compensation Survey: Occupational Wages in the United States, July 2002. U.S. Department of Labor, Bureau of Labor Statistics, June 2003. Available on the Internet at *http://stats.bls.gov/ncs/ocs/sp/ncbl0539.pdf,* accessed on September 16, 2003.

List of Subjects

21 CFR Part 1

Cosmetics, Drugs, Exports, Food labeling, Imports, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 10

Administrative practice and procedure, News media.

21 CFR Part 16

Administrative practice and procedure.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 1, 10, and 16 are amended as follows:

PART 1—GENERAL ENFORCEMENT REGULATIONS

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

Authority: 15 U.S.C. 1453, 1454, 1455; 19 U.S.C. 1490, 1491; 21 U.S.C. 321, 331, 332, 333, 334, 335a, 343, 350c, 350d, 352, 355, 360b, 362, 371, 374, 381, 382, 393; 42 U.S.C. 216, 241, 243, 262, 264.

■ 2. Subpart K is added to part 1 to read as follows:

Subpart K—Administrative Detention of Food for Human or Animal Consumption

General Provisions

Sec.

1.377 What definitions apply to this subpart?
1.378 What criteria does FDA use to order a detention?
1.379 How long may FDA detain an article of food?
1.380 Where and under what conditions must the detained article of food be held?
1.381 May a detained article of food be delivered to another entity or transferred to another location?
1.382 What labeling or marking requirements apply to a detained article of food?
1.383 What expedited procedures apply when FDA initiates a seizure action against a detained perishable food?
1.384 When does a detention order terminate?

How Does FDA Order a Detention?

1.391 Who approves a detention order?
1.392 Who receives a copy of the detention order?
1.393 What information must FDA include in the detention order?

What is the Appeal Process for a Detention Order?

1.401 Who is entitled to appeal?
1.402 What are the requirements for submitting an appeal?

1.403 What requirements apply to an informal hearing?
1.404 Who serves as the presiding officer for an appeal, and for an informal hearing?
1.405 When does FDA have to issue a decision on an appeal?
1.406 How will FDA handle classified information in an informal hearing?

Subpart K—Administrative Detention of Food for Human or Animal Consumption

General Provisions

§ 1.377 What definitions apply to this subpart?

The definitions of terms that appear in section 201 of the act (21 U.S.C. 321) apply when the terms are used in this subpart. In addition, for the purposes of this subpart:

Act means the Federal Food, Drug, and Cosmetic Act.

Authorized FDA representative means an FDA District Director in whose district the article of food involved is located or an FDA official senior to such director.

Calendar day means every day shown on the calendar.

Food has the meaning given in section 201(f) of the act (21 U.S.C. 321(f)). Examples of food include, but are not limited to, fruits, vegetables, fish, dairy products, eggs, raw agricultural commodities for use as food or components of food, animal feed, including pet food, food and feed ingredients and additives, including substances that migrate into food from food packaging and other articles that contact food, dietary supplements and dietary ingredients, infant formula, beverages, including alcoholic beverages and bottled water, live food animals, bakery goods, snack foods, candy, and canned foods.

Perishable food means food that is not heat-treated; not frozen; and not otherwise preserved in a manner so as to prevent the quality of the food from being adversely affected if held longer than 7 calendar days under normal shipping and storage conditions.

We means the U.S. Food and Drug Administration (FDA).

Working day means any day from Monday through Friday, excluding Federal holidays.

You means any person who received the detention order or that person's representative.

§ 1.378 What criteria does FDA use to order a detention?

An officer or qualified employee of FDA may order the detention of any article of food that is found during an inspection, examination, or investigation under the act if the officer or qualified employee has credible evidence or information indicating that the article of food presents a threat of serious adverse health consequences or death to humans or animals.

§ 1.379 How long may FDA detain an article of food?

(a) FDA may detain an article of food for a reasonable period that may not exceed 20 calendar days after the detention order is issued. However, an article may be detained for 10 additional calendar days if a greater period of time is required to institute a seizure or injunction action. The authorized FDA representative may approve the additional 10-calendar day detention period at the time the detention order is issued, or at any time within the 20-calendar day period by amending the detention order.

(b) The entire detention period may not exceed 30 calendar days.

(c) An authorized FDA representative may, in accordance with § 1.384, terminate a detention order before the expiration of the detention period.

§ 1.380 Where and under what conditions must the detained article of food be held?

(a) You must hold the detained article of food in the location and under the conditions specified by FDA in the detention order.

(b) If FDA determines that removal to a secure facility is appropriate, the article of food must be removed to a secure facility. A detained article of food remains under detention before, during, and after movement to a secure facility. FDA will also state in the detention order any conditions of transportation applicable to the detained article.

(c) If FDA directs you to move the detained article of food to a secure facility, you must receive a modification of the detention order under § 1.381(c) before you move the detained article of food to a secure facility.

(d) You must ensure that any required tags or labels under § 1.382 accompany the detained article during and after movement. The tags or labels must remain with the article of food until FDA terminates the detention order or the detention period expires, whichever occurs first, unless otherwise permitted by the authorized FDA representative.

(e) The movement of an article of food in violation of a detention order issued under § 1.393 is a prohibited act under section 301 of the act (21 U.S.C. 331).

§ 1.381 May a detained article of food be delivered to another entity or transferred to another location?

(a) An article of food subject to a detention order under this subpart may not be delivered under the execution of a bond. Notwithstanding section 801(b) of the act (21 U.S.C. 381(b)), while any article of food is subject to a detention order under section 304(h) of the act (21 U.S.C. 334(h)), it may not be delivered to any of its importers, owners, or consignees. This section does not preclude movement at FDA's direction of imported food to a secure facility under an appropriate Customs' bond when that bond is required by Customs' law and regulation.

(b) Except as provided in paragraph (c) of this section, no person may transfer a detained article of food within or from the place where it has been ordered detained, or from the place to which it was removed, until an authorized FDA representative releases the article of food under § 1.384 or the detention period expires under § 1.379, whichever occurs first.

(c) The authorized FDA representative may approve, in writing, a request to modify a detention order to permit movement of a detained article of food for any of the following purposes:

(1) To destroy the article of food,

(2) To move the detained article of food to a secure facility under the terms of a detention order,

(3) To maintain or preserve the integrity or quality of the article of food, or

(4) For any other purpose that the authorized FDA representative believes is appropriate in the case.

(d) You must submit your request for modification of the detention order in writing to the authorized FDA representative who approved the detention order. You must state in your request the reasons for movement; the exact address of and location in the new facility (or the new location within the same facility) where the detained article of food will be transferred; an explanation of how the new address and location will be secure, if FDA has directed that the article be detained in a secure facility; and how the article will be held under any applicable conditions described in the detention order. If you are requesting modification of a detention order for the purpose of destroying the detained article of food, you also must submit a verified statement identifying the ownership or proprietary interest you have in the detained article of food, in accordance with Supplemental Rule C to the ''Federal Rules of Civil Procedure.''

(e) If FDA approves a request for modification of a detention order, the article may be transferred but remains under detention before, during, and after the transfer. FDA will state any conditions of transportation applicable to the detained article. You may not transfer a detained article of food without FDA supervision unless FDA has declined in writing to supervise the transfer. If FDA has declined in writing to supervise the transfer of a detained article, you must immediately notify in writing the authorized FDA representative who approved the modification of the detention order that the article of food has reached its new location, and the specific location of the detained article within the new location. Such written notification may be in the form of a fax, e-mail, or other form as agreed to by the authorized FDA representative.

(f) You must ensure that any required tags or labels under § 1.382 accompany the detained article during and after movement. The tags or labels must remain with the article of food until FDA terminates the detention order or the detention period expires, whichever occurs first, unless otherwise permitted by the authorized FDA representative who approves the modification of a detention order under this section.

(g) The transfer of an article of food in violation of a detention order issued under § 1.393 is a prohibited act under section 301 of the act.

§ 1.382 What labeling or marking requirements apply to a detained article of food?

The officer or qualified employee of FDA issuing a detention order under § 1.393 may label or mark the detained article of food with official FDA tags or labels that include the following information:

(a) A statement that the article of food is detained by FDA in accordance with section 304(h) of the act;

(b) A statement that the article of food must not be consumed, moved, altered, or tampered with in any manner for the period shown, without the written permission of an authorized FDA representative;

(c) A statement that the violation of a detention order or the removal or alteration of the tag or label is a prohibited act, punishable by fine or imprisonment or both; and

(d) The detention order number, the date and hour of the detention order, the detention period, and the name of the officer or qualified employee of FDA who issued the detention order.

§ 1.383 What expedited procedures apply when FDA initiates a seizure action against a detained perishable food?

If FDA initiates a seizure action under section 304(a) of the act against a perishable food subject to a detention order under this subpart, FDA will send the seizure recommendation to the Department of Justice (DOJ) within 4 calendar days after the detention order is issued, unless extenuating circumstances exist. If the fourth calendar day is not a working day, FDA will advise the DOJ of its plans to recommend a seizure action on the last working day before the fourth calendar day and send the recommendation as soon as practicable on the first working day that follows. For purposes of this section, an extenuating circumstance includes, but is not limited to, instances when the results of confirmatory testing or other evidentiary development requires more than 4 calendar days to complete.

§ 1.384 When does a detention order terminate?

If FDA terminates a detention order or the detention period expires, an authorized FDA representative will issue a detention termination notice releasing the article of food to any person who received the detention order or that person's representative and will remove, or authorize in writing the removal of, the required labels or tags. If FDA fails to issue a detention termination notice and the detention period expires, the detention is deemed to be terminated.

How Does FDA Order a Detention?

§ 1.391 Who approves a detention order?

An authorized FDA representative, *i.e.*, the FDA District Director in whose district the article of food involved is located or an FDA official senior to such director, must approve a detention order. If prior written approval is not feasible, prior oral approval must be obtained and confirmed in writing as soon as possible.

§ 1.392 Who receives a copy of the detention order?

(a) FDA must issue the detention order to the owner, operator, or agent in charge of the place where the article of food is located. If the owner of the article of food is different from the owner, operator, or agent in charge of the place where the article is detained, FDA must provide a copy of the detention order to the owner of the article of food if the owner's identity can be determined readily.

(b) If FDA issues a detention order for an article of food located in a vehicle or other carrier used to transport the detained article of food, FDA also must provide a copy of the detention order to the shipper of record and the owner and operator of the vehicle or other carrier, if their identities can be determined readily.

§ 1.393 What information must FDA include in the detention order?

(a) FDA must issue the detention order in writing, in the form of a detention notice, signed and dated by the officer or qualified employee of FDA who has credible evidence or information indicating that such article of food presents a threat of serious adverse health consequences or death to humans or animals.

(b) The detention order must include the following information:

(1) The detention order number;

(2) The date and hour of the detention order;

(3) Identification of the detained article of food;

(4) The period of the detention;

(5) A statement that the article of food identified in the order is detained for the period shown;

(6) A brief, general statement of the reasons for the detention;

(7) The address and location where the article of food is to be detained and the appropriate storage conditions;

(8) Any applicable conditions of transportation of the detained article of food;

(9) A statement that the article of food is not to be consumed, moved, altered, or tampered with in any manner during the detention period, unless the detention order is first modified under § 1.381(c);

(10) The text of section 304(h) of the act and §§ 1.401 and 1.402;

(11) A statement that any informal hearing on an appeal of a detention order must be conducted as a regulatory hearing under part 16 of this chapter, with certain exceptions described in § 1.403;

(12) The mailing address, telephone number, e-mail address, and fax number of the FDA district office and the name of the FDA District Director in whose district the detained article of food is located;

(13) A statement indicating the manner in which approval of the detention order was obtained, *i.e.*, verbally or in writing; and

(14) The name and the title of the authorized FDA representative who approved the detention order.

What Is the Appeal Process for a Detention Order?

§ 1.401 Who is entitled to appeal?

Any person who would be entitled to be a claimant for the article of food, if seized under section 304(a) of the act, may appeal a detention order as specified in § 1.402. Procedures for establishing entitlement to be a claimant for purposes of section 304(a) of the act are governed by Supplemental Rule C to the ''Federal Rules of Civil Procedure.''

§ 1.402 What are the requirements for submitting an appeal?

(a) If you want to appeal a detention order, you must submit your appeal in writing to the FDA District Director, in whose district the detained article of food is located, at the mailing address, e-mail address, or fax number identified in the detention order according to the following applicable timeframes:

(1) *Perishable food:* If the detained article is a perishable food, as defined in § 1.377, you must file an appeal within 2 calendar days of receipt of the detention order.

(2) *Nonperishable food:* If the detained article is not a perishable food, as defined in § 1.377, you must file a notice of an intent to request a hearing within 4 calendar days of receipt of the detention order. If the notice of intent is not filed within 4 calendar days, you will not be granted a hearing. If you have not filed a timely notice of intent to request a hearing, you may file an appeal without a hearing request. Whether or not it includes a request for hearing, your appeal must be filed within 10 calendar days of receipt of the detention order.

(b) Your request for appeal must include a verified statement identifying your ownership or proprietary interest in the detained article of food, in accordance with Supplemental Rule C to the ''Federal Rules of Civil Procedure.''

(c) The process for the appeal of a detention order under this section terminates if FDA institutes either a seizure action under section 304(a) of the act or an injunction under section 302 of the act (21 U.S.C. 276) regarding the article of food involved in the detention order.

(d) As part of the appeals process, you may request an informal hearing. Your request for a hearing must be in writing and must be included in your request for an appeal specified in paragraph (a) of this section. If you request an informal hearing, and FDA grants your request, the hearing will be held within 2 calendar days after the date the appeal is filed.

§ 1.403 What requirements apply to an informal hearing?

If FDA grants a request for an informal hearing on an appeal of a detention order, FDA must conduct the hearing in accordance with part 16 of this chapter, except that:

(a) The detention order under § 1.393, rather than the notice under § 16.22(a) of this chapter, provides notice of opportunity for a hearing under this section and is part of the administrative record of the regulatory hearing under § 16.80(a) of this chapter;

(b) A request for a hearing under this section must be addressed to the FDA District Director in whose district the article of food involved is located;

(c) The provision in § 16.22(b) of this chapter, providing that a person not be given less than 3 working days after receipt of notice to request a hearing, does not apply to a hearing under this subpart;

(d) The provision in § 16.24(e) of this chapter, stating that a hearing may not be required to be held at a time less than 2 working days after receipt of the request for a hearing, does not apply to a hearing under this subpart;

(e) Section 1.406, rather than § 16.24(f) of this chapter, describes the statement that will be provided to an appellant where a detention order is based on classified information;

(f) Section 1.404, rather than § 16.42(a) of this chapter, describes the FDA employees, *e.g.*, Regional Food and Drug Directors or other officials senior to a District Director, who preside at hearings under this subpart;

(g) The presiding officer may require that a hearing conducted under this section be completed within 1 calendar day, as appropriate;

(h) Section 16.60(e) and (f) of this chapter does not apply to a hearing under this subpart. The presiding officer must prepare a written report of the hearing. All written material presented at the hearing will be attached to the report. The presiding officer must include as part of the report of the hearing a finding on the credibility of witnesses (other than expert witnesses) whenever credibility is a material issue, and must include a proposed decision, with a statement of reasons. The hearing participant may review and comment on the presiding officer's report within 4 hours of issuance of the report. The presiding officer will then issue the final agency decision.

(i) Section 16.80(a)(4) of this chapter does not apply to a regulatory hearing under this subpart. The presiding officer's report of the hearing and any comments on the report by the hearing participant under § 1.403(h) are part of the administrative record.

(j) No party shall have the right, under § 16.119 of this chapter to petition the Commissioner of Food and Drugs for reconsideration or a stay of the presiding officer's final agency decision.

(k) If FDA grants a request for an informal hearing on an appeal of a detention order, the hearing must be conducted as a regulatory hearing pursuant to regulation in accordance with part 16 of this chapter, except that § 16.95(b) does not apply to a hearing under this subpart. With respect to a regulatory hearing under this subpart, the administrative record of the hearing specified in §§ 16.80(a)(1), (a)(2), (a)(3), and (a)(5), and 1.403(i) constitutes the exclusive record for the presiding officer's final decision on an administrative detention. For purposes of judicial review under § 10.45 of this chapter, the record of the administrative proceeding consists of the record of the hearing and the presiding officer's final decision.

§ 1.404 Who serves as the presiding officer for an appeal, and for an informal hearing?

The presiding officer for an appeal, and for an informal hearing, must be an FDA Regional Food and Drug Director or another FDA official senior to an FDA District Director.

§ 1.405 When does FDA have to issue a decision on an appeal?

(a) The presiding officer must issue a written report that includes a proposed decision confirming or revoking the detention by noon on the fifth calendar day after the appeal is filed; after your 4 hour opportunity for submitting comments under § 1.403(h), the presiding officer must issue a final decision within the 5-calendar day period after the appeal is filed. If FDA either fails to provide you with an opportunity to request an informal hearing, or fails to confirm or terminate the detention order within the 5-calendar day period, the detention order is deemed terminated.

(b) If you appeal the detention order, but do not request an informal hearing, the presiding officer must issue a decision on the appeal confirming or revoking the detention within 5 calendar days after the date the appeal is filed. If the presiding officer fails to confirm or terminate the detention order during such 5-calendar day period, the detention order is deemed terminated.

(c) If you appeal the detention order and request an informal hearing and your hearing request is denied, the presiding officer must issue a decision

on the appeal confirming or revoking the detention within 5 calendar days after the date the appeal is filed. If the presiding officer fails to confirm or terminate the detention order during such 5-calendar day period, the detention order is deemed terminated.

(d) If the presiding officer confirms a detention order, the article of food continues to be detained until we terminate the detention under § 1.384 or the detention period expires under § 1.379, whichever occurs first.

(e) If the presiding officer terminates a detention order, or the detention period expires, FDA must terminate the detention order as specified under § 1.384.

(f) Confirmation of a detention order by the presiding officer is considered a final agency action for purposes of 5 U.S.C. 702.

§ 1.406 How will FDA handle classified information in an informal hearing?

Where the credible evidence or information supporting the detention order is classified under the applicable Executive order as requiring protection from unauthorized disclosure in the interest of national security (''classified information''), FDA will not provide you with this information. The presiding officer will give you notice of the general nature of the information and an opportunity to offer opposing evidence or information, if he or she may do so consistently with safeguarding the information and its source. If classified information was used to support the detention, then any confirmation of such detention will state whether it is based in whole or in part on that classified information.

PART 10—ADMINISTRATIVE PRACTICES AND PROCEDURES

■ 3. The authority citation for 21 CFR part 10 continues to read as follows:

Authority: 5 U.S.C. 551–558, 701–706; 15 U.S.C. 1451–1461; 21 U.S.C. 141–149, 321–397, 467f, 679, 821, 1034; 28 U.S.C. 2112; 42 U.S.C. 201, 262, 263b, 264.

■ 4. Section 10.45 is amended by revising paragraph (d) introductory text to read as follows:

§ 10.45 Court review of final administrative action; exhaustion of administrative remedies.

* * * * *

(d) Unless otherwise provided, the Commissioner's final decision constitutes final agency action (reviewable in the courts under 5 U.S.C. 701 *et seq.* and, where appropriate, 28 U.S.C. 2201) on a petition submitted under § 10.25(a), on a petition for reconsideration submitted under § 10.33, on a petition for stay of action submitted under § 10.35, on an advisory opinion issued under § 10.85, on a matter involving administrative action which is the subject of an opportunity for a hearing under § 16.1(b) of this chapter, or on the issuance of a final regulation published in accordance with § 10.40, except that the agency's response to a petition filed under section 505(j)(2)(C) of the act (21 U.S.C. 355(j)(2)(C)) and § 314.93 of this chapter will not constitute final agency action until any petition for reconsideration submitted by the petitioner is acted on by the Commissioner.

* * * * *

PART 16—REGULATORY HEARING BEFORE THE FOOD AND DRUG ADMINISTRATION

■ 5. The authority citation for 21 CFR part 16 continues to read as follows:

Authority: 15 U.S.C. 1451–1461; 21 U.S.C. 141–149, 321–394, 467f, 679, 821, 1034; 28 U.S.C. 2112; 42 U.S.C. 201–262, 263b, 364.

■ 6. Section 16.1 is amended in paragraph (b)(1) by adding an entry in alphanumerical order as follows:

§ 16.1 Scope.

* * * * *

(b) * * *

(1) * * *

Section 304(h) of the act relating to the administrative detention of food for human or animal consumption (see part 1, subpart k of this chapter).

* * * * *

Dated: May 13, 2004.

Lester M. Crawford,

Acting Commissioner of Food and Drugs.

Dated: May 25, 2004.

Tommy G. Thompson,

Secretary of Health and Human Services.

[FR Doc. 04–12366 Filed 5–27–04; 10:57 am]

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Federal Register

Friday,
June 4, 2004

Part III

Department of Education

34 CFR Parts 74, 75, 76, and 80

Participation in Education Department Programs by Religious Organizations; Providing for Equal Treatment of All Education Program Participants; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 74, 75, 76, and 80

RIN 1890–AA11

Participation in Education Department Programs by Religious Organizations; Providing for Equal Treatment of All Education Program Participants

AGENCY: Center for Faith-Based and Community Initiatives, Office of the Secretary, U.S. Department of Education.

ACTION: Final regulations.

SUMMARY: These final regulations implement Executive branch policy that, within the framework of constitutional church-state guidelines, religiously affiliated (or ''faith-based'') organizations should be able to compete on an equal footing with other organizations for funding by the U.S. Department of Education (Department). We are revising Department regulations to remove barriers to the participation of faith-based organizations in Department programs and to ensure that these programs are implemented in a manner consistent with the requirements of the U.S. Constitution, including the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment.

DATES: These regulations are effective July 6, 2004.

FOR FURTHER INFORMATION CONTACT: John J. Porter, Director, Center for Faith-Based and Community Initiatives, Office of the Secretary, U.S. Department of Education, 555 New Jersey Avenue, NW., Suite 410, Washington, DC 20208–8300. Telephone: (202) 219–1741.

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SUPPLEMENTARY INFORMATION:

Background

Faith-based organizations make an important contribution to the education of Americans and provide an important part of the social services network of the United States. Faith-based organizations acting alone or in partnership with public schools, community-based organizations, institutions of higher education, and other private organizations do much good work to advance the quality of education for all Americans. Often this good work of faith-based organizations is done despite meager resources, and, in the past, it has generally been done without the assistance of the Federal government. The Department seeks to facilitate the contribution of faith-based and community organizations to increase the effectiveness of its programs and to provide equal access to a quality education for all Americans.

President Bush has directed Federal agencies, including this Department, to take steps to ensure that Federal policies and programs are fully open to faith-based organizations in a manner that is consistent with the U.S. Constitution and statutory requirements. The Administration believes that faith-based organizations possess an under-appreciated ability to meet the educational needs of disadvantaged children and to strengthen our system of education. The Administration believes that Federal agencies should ensure that there is equal opportunity for all private organizations—faith-based and secular—to use Federal resources to meet the needs of their communities.

On September 30, 2003, the Secretary published a notice of proposed rulemaking (NPRM) in the **Federal Register** (68 FR 56417) to amend Department regulations that imposed unwarranted barriers to the participation of faith-based organizations in Department programs. The proposed regulations were part of the Department's effort to fulfill its responsibilities under two Executive Orders issued by President Bush.

Executive Order 13198, dated January 29, 2001, directs several Departments to identify and eliminate regulatory and other programmatic obstacles to the full contribution of faith-based and community organizations in order to increase the effectiveness of their programs.

Executive Order 13279, dated December 12, 2002, directs those Departments to review and evaluate existing policies that have implications for faith-based and community organizations. The stated purpose of the review and evaluation is to assess the consistency of those policies with certain fundamental principles and policymaking criteria designed to ensure a level playing field for religious and nonreligious organizations. The order directs the Departments, to the extent permitted by law, (1) to amend all such existing policies to ensure that they are consistent with the fundamental principles and policymaking criteria; (2) where appropriate, to implement new policies that are consistent with and necessary to further the fundamental principles and policymaking criteria; and (3) to implement new policies that are necessary to ensure that the Departments collect data regarding the participation of faith-based and community organizations in social service programs that receive Federal financial assistance.

The NPRM proposed the following changes to the Department's regulations:

1. *Participation by faith-based organizations in Education Department programs.* The proposed regulations specifically provided that faith-based organizations are eligible to apply for and to receive funding under Department programs on the same basis as any other private organization, with respect to programs for which such other organizations are eligible. If a faith-based organization meets the statutory and regulatory tests for eligibility, the Department considers it eligible. The proposed regulations additionally provided that the Department and the States shall not discriminate against a private organization on the basis of the organization's religious character or affiliation.

2. *Inherently religious activities.* The NPRM sought to clarify that a faith-based organization that receives a grant under a program of the Department or a subgrant from a State under a State-administered program of the Department is subject to the existing regulatory provisions that prohibit grantees and States and subgrantees from using their grants and subgrants to pay for inherently religious activities, such as religious worship, instruction, or proselytization. In addition, the NPRM sought to clarify that such an organization is subject to the existing regulatory provisions that prohibit grantees and States and subgrantees from using their grants and subgrants to pay for equipment or supplies used for religious worship, instruction, or proselytization. If an organization engages in these religious activities, then it must offer those services separately in time or location from any programs or services supported by grants from the Department or subgrants from a State under a State-administered program of the Department. Additionally, participation in any inherently religious activities by beneficiaries of the programs supported by the grants or subgrants must be voluntary.

3. *Independence of faith-based organizations.* The proposed regulations also clarified that a religious organization that participated in Department programs would retain its

independence and could continue to carry out its mission, including the definition, practice, and expression of its religious beliefs. Among other things, a faith-based organization could use space in its facilities to provide Department-funded services without removing religious art, icons, scriptures, or other religious symbols. In addition, a Department-funded religious organization could retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious references in its organization's mission statements and other governing documents.

4. *Nondiscrimination in providing assistance.* The NPRM provided that an organization that received a grant from the Department or that received a subgrant from a State under a State-administered program of the Department would not be allowed to discriminate against a beneficiary or prospective beneficiary of that program on the basis of religion or religious belief.

5. *Removal of prohibition on use of grants and subgrants to pay for an activity of a school or department of divinity.* The proposed regulations clarified that the most qualified applicants will receive funding under the Department's programs, and that the religious character or affiliation of the private organizations that apply will not be taken into account. For that reason, we proposed to remove the regulation prohibiting grantees and subgrantees from using their grants and subgrants to pay for an activity of a school or department of divinity.

6. *Technical amendment relating to the prohibition on use of grants to pay for equipment or supplies to be used for religious worship, instruction, or proselytization.* In the NPRM, we proposed a technical amendment to the Department's regulations, clarifying that grantees cannot use their grants to pay for equipment or supplies used for religious worship, instruction, or proselytization.

7. *Removal of prohibition on use of grants and subgrants to pay for construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for religious worship, instruction, or proselytization.* We proposed to remove §§ 75.532(a)(3) and 76.532(a)(3), which prohibit the use of Department funds to pay for construction, remodeling, repair, operation, or maintenance of any private educational facility (or part of a private educational facility). This regulation is not necessary because there is no statutory authority for this use of Department funds. Accordingly, the Department has no programs that fund such capital improvements.

8. *Eligibility of faith-based organizations to contract with or otherwise receive assistance from grantees and subgrantees, including States, on the same basis as other private organizations, with respect to contracts or assistance for which such organizations are eligible.* The NPRM proposed to clarify that faith-based organizations are eligible to contract with or otherwise receive assistance from grantees and subgrantees, including States, on the same basis as other private organizations, with respect to contracts or assistance for which such organizations are eligible. These faith-based organizations are subject to the same limitations to which grantees and subgrantees are subject regarding the use of funds for inherently religious activities, unless the organization is selected as a result of the genuine and independent private choices of individual beneficiaries of the program and provided the organization otherwise satisfies the requirements of the program.

These final regulations contain several significant changes from the NPRM. We fully explain these changes in the appendix at the end of these final regulations.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 12 parties submitted a total of 14 comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM is published as an appendix at the end of these final regulations.

We group major issues according to subject. Generally, we do not address technical and other minor changes.

Executive Order 12866—Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this final rule under Executive Order 12866, *Regulatory Planning and Review.* OMB determined that the rule is a ''significant regulatory action,'' as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order).

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This final rule does not impose any Federal mandates on any State, local, or tribal governments, or the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

Executive Order 13132—Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this final rule and in so doing certifies that the rule will not have a significant economic impact on a substantial number of small entities. The final rule will not impose any new costs, or modify existing costs, applicable to Department grantees and subgrantees. Rather, the purpose of the rule is to remove policy prohibitions that currently restrict the equal participation of religious or religiously affiliated organizations (large and small) in the Department's programs.

Paperwork Reduction Act of 1995

These regulations do not contain any information collection requirements.

Intergovernmental Review

These final regulations affect direct grant programs that are subject to Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive Order is to foster an intergovernmental partnership and to promote federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, we intend this document to provide early notification of our specific plans and actions for these programs.

Assessment of Educational Impact

In the NPRM we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the

United States gathers or makes available.

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List of Subjects

34 CFR Part 74

Accounting, Grant programs, Reporting and recordkeeping requirements.

34 CFR Part 75

Accounting, Administrative practice and procedure, Education, Grant programs-education, Private schools, Reporting and recordkeeping requirements.

34 CFR Part 76

Administrative practice and procedure, Compliance, Eligibility, Grant administration, Reporting and recordkeeping requirements.

34 CFR Part 80

Accounting, Grant programs, Reporting and recordkeeping requirements.

Dated: May 28, 2004.

Rod Paige,

Secretary of Education.

■ For the reasons discussed in the preamble, the Secretary amends parts 74, 75, 76, and 80 of title 34 of the Code of Federal Regulations as follows:

PART 74—ADMINISTRATION OF GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NON-PROFIT ORGANIZATIONS

■ 1. The authority citation for part 74 continues to read as follows:

Authority: 20 U.S.C. 1221e–3 and 3474; OMB Circular A–110, unless otherwise noted.

■ 2. Section 74.44 is amended by adding new paragraph (f) to read as follows:

§ 74.44 Procurement procedures.

* * * * *

(f)(1)(i) A faith-based organization is eligible to contract with recipients on the same basis as any other private organization, with respect to contracts for which such other organizations are eligible.

(ii) In the selection of goods and services providers, recipients shall not discriminate for or against a private organization on the basis of the organization's religious character or affiliation.

(2) The provisions of §§ 75.532 and 76.532 applicable to grantees and subgrantees apply to a faith-based organization that contracts with a recipient, unless the faith-based organization is selected as a result of the genuine and independent private choices of individual beneficiaries of the program and provided the organization otherwise satisfies the requirements of the program.

(3) A private organization that engages in inherently religious activities, such as religious worship, instruction, or proselytization, must offer those services separately in time or location from any programs or services supported by a contract with a recipient, and participation in any such inherently religious activities by beneficiaries of the programs supported by the contract must be voluntary, unless the organization is selected as a result of the genuine and independent private choices of individual beneficiaries of the program and provided the organization otherwise satisfies the requirements of the program.

(4)(i) A faith-based organization that contracts with a recipient may retain its independence, autonomy, right of expression, religious character, and authority over its governance.

(ii) A faith-based organization may, among other things—

(A) Retain religious terms in its name;

(B) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(C) Use its facilities to provide services without removing or altering religious art, icons, scriptures, or other symbols from these facilities;

(D) Select its board members and otherwise govern itself on a religious basis; and

(E) Include religious references in its mission statement and other chartering or governing documents.

(5) A private organization that contracts with a recipient shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief.

(6) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the organization contracts with a recipient.

PART 75—DIRECT GRANT PROGRAMS

■ 3. The authority citation for part 75 continues to read as follows:

Authority: 20 U.S.C. 1221e–3 and 3474, unless otherwise noted.

■ 4. Add § 75.52 to subpart A under the undesignated center heading ''Eligibility for a Grant'' to read as follows:

§ 75.52 Eligibility of faith-based organizations for a grant.

(a)(1) A faith-based organization is eligible to apply for and to receive a grant under a program of the Department on the same basis as any other private organization, with respect to programs for which such other organizations are eligible.

(2) In the selection of grantees, the Department shall not discriminate for or against a private organization on the basis of the organization's religious character or affiliation.

(b) The provisions of § 75.532 apply to a faith-based organization that receives a grant under a program of the Department.

(c) A private organization that engages in inherently religious activities, such as religious worship, instruction, or proselytization, must offer those services separately in time or location from any programs or services supported by a grant from the Department, and participation in any such inherently religious activities by beneficiaries of the programs supported by the grant must be voluntary.

(d)(1) A faith-based organization that applies for or receives a grant under a program of the Department may retain its independence, autonomy, right of expression, religious character, and authority over its governance.

(2) A faith-based organization may, among other things—

(i) Retain religious terms in its name;

(ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(iii) Use its facilities to provide services without removing or altering religious art, icons, scriptures, or other symbols from these facilities;

(iv) Select its board members and otherwise govern itself on a religious basis; and

(v) Include religious references in its mission statement and other chartering or governing documents.

(e) A private organization that receives a grant under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief.

(f) If a grantee contributes its own funds in excess of those funds required by a matching or grant agreement to supplement federally funded activities, the grantee has the option to segregate those additional funds or commingle them with the funds required by the matching requirements or grant agreement. However, if the additional funds are commingled, this section applies to all of the commingled funds.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the organization receives financial assistance from the Department.

(Authority: 20 U.S.C. 1221e–3 and 3474)

■ 5. In § 75.532, revise paragraph (a)(2), remove paragraphs (a)(3) and (4), and remove and reserve paragraph (b) to read as follows:

§ 75.532 Use of funds for religion prohibited.

(a) * * *

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

(b) [Reserved.]

PART 76—STATE-ADMINISTERED PROGRAMS

■ 6. The authority citation for part 76 continues to read as follows:

Authority: 20 U.S.C. 1221e-3, 3474, 6511(a), and 8065a, unless otherwise noted.

■ 7. Add § 76.52 to subpart A under the undesignated center heading ''Eligibility for a Grant or Subgrant'' to read as follows:

§ 76.52 Eligibility of faith-based organizations for a subgrant.

(a)(1) A faith-based organization is eligible to apply for and to receive a subgrant under a program of the Department on the same basis as any other private organization, with respect to programs for which such other organizations are eligible.

(2) In the selection of subgrantees, States shall not discriminate for or against a private organization on the basis of the organization's religious character or affiliation.

(b) The provisions of § 76.532 apply to a faith-based organization that receives a subgrant from a State under a State-administered program of the Department.

(c) A private organization that engages in inherently religious activities, such as religious worship, instruction, or proselytization, must offer those services separately in time or location from any programs or services supported by a subgrant from a State under a State-administered program of the Department, and participation in any such inherently religious activities by beneficiaries of the programs supported by the subgrant must be voluntary.

(d)(1) A faith-based organization that applies for or receives a subgrant from a State under a State-administered program of the Department may retain its independence, autonomy, right of expression, religious character, and authority over its governance.

(2) A faith-based organization may, among other things—

(i) Retain religious terms in its name;

(ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(iii) Use its facilities to provide services without removing or altering religious art, icons, scriptures, or other symbols from these facilities;

(iv) Select its board members and otherwise govern itself on a religious basis; and

(v) Include religious references in its mission statement and other chartering or governing documents.

(e) A private organization that receives a subgrant from a State under a State-administered program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief.

(f) If a State or subgrantee contributes its own funds in excess of those funds required by a matching or grant agreement to supplement Federally funded activities, the State or subgrantee has the option to segregate those additional funds or commingle them with the funds required by the matching requirements or grant agreement. However, if the additional funds are commingled, this section applies to all of the commingled funds.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the organization receives financial assistance from the Department.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

§ 76.532 [Amended]

■ 8. Section 76.532 is amended by removing paragraphs (a)(3) and (a)(4); and removing and reserving paragraph (b).

PART 80—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

■ 9. The authority citation for part 80 is revised to read as follows:

Authority: 20 U.S.C. 1221e–3(a)(1) and 3474, OMB Circular A–102, unless otherwise noted.

■ 10. Section 80.36 is amended by adding new paragraph (j) to read as follows:

§ 80.36 Procurement.

* * * * *

(j) *Contracting with faith-based organizations.* (1)(i) A faith-based organization is eligible to contract with grantees and subgrantees, including States, on the same basis as any other private organization, with respect to contracts for which such other organizations are eligible.

(ii) In the selection of goods and services providers, grantees and subgrantees, including States, shall not discriminate for or against a private organization on the basis of the organization's religious character or affiliation.

(2) The provisions of §§ 75.532 and 76.532 applicable to grantees and subgrantees apply to a faith-based organization that contracts with a grantee or subgrantee, including a State, unless the faith-based organization is selected as a result of the genuine and independent private choices of individual beneficiaries of the program and provided the organization otherwise satisfies the requirements of the program.

(3) A private organization that engages in inherently religious activities, such as religious worship, instruction, or proselytization, must offer those services separately in time or location from any programs or services supported by a contract with a grantee or subgrantee, including a State, and participation in any such inherently religious activities by beneficiaries of

the programs supported by the contract must be voluntary, unless the organization is selected as a result of the genuine and independent private choices of individual beneficiaries of the program and provided the organization otherwise satisfies the requirements of the program.

(4)(i) A faith-based organization that contracts with a grantee or subgrantee, including a State, may retain its independence, autonomy, right of expression, religious character, and authority over its governance.

(ii) A faith-based organization may, among other things—

(A) Retain religious terms in its name;

(B) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(C) Use its facilities to provide services without removing or altering religious art, icons, scriptures, or other symbols from these facilities;

(D) Select its board members and otherwise govern itself on a religious basis; and

(E) Include religious references in its mission statement and other chartering or governing documents.

(5) A private organization that contracts with a grantee or subgrantee, including a State, shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief.

(6) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the organization contracts with a grantee or subgrantee.

Appendix—Analysis of Comments and Changes

Note: The following appendix will not appear in the Code of Federal Regulations.

Participation by Faith-Based Organizations in Education Department Programs

Comments: Several commenters expressed appreciation and support for the Department's efforts to clarify the regulations governing participation of faith-based organizations in its programs. Other commenters disagreed with the proposed regulations, asserting that they would allow Federal funds to be given to ''pervasively sectarian'' organizations in violation of the U.S. Constitution. These commenters maintained that the regulation places no limitations on the kinds of religious organizations that can receive funds, and they requested that ''pervasively sectarian'' organizations be barred from receiving Department funds. Similarly, other commenters suggested that the proposed regulation improperly allows grants of public funds to religious organizations in which religious missions overpower secular functions.

Discussion: We do not agree that the U.S. Constitution requires the Department to distinguish between different religious organizations in providing funding for Department programs. Organizations that receive direct Department funds may not use these funds for inherently religious activities. These organizations must ensure that such religious activities are separate in time or location from services funded by the Department and must also ensure that participation in such religious activities is voluntary. Furthermore, program participants that violate these requirements will be subject to applicable sanctions and penalties. The regulations thus ensure, as required by current legal precedent, that there is no government funding of inherently religious activities.

In addition, the Supreme Court's ''pervasively sectarian'' doctrine—which held that there are certain religious institutions in which religion is so pervasive that no government aid may be provided to them because their performance of even ''secular'' tasks will be infused with religious purpose—no longer enjoys the support of a majority of the Court. Four Justices expressly abandoned it in *Mitchell* v. *Helms*, 530 U.S. 793, 825–829 (2000) (plurality opinion), and Justice O'Connor's opinion in that case, joined by Justice Breyer, set forth reasoning that is inconsistent with that doctrine's underlying premises, *see id.* at 857 (O'Connor, J., concurring in judgment) (requiring proof of ''actual diversion'' of public support to religious uses). Thus, six members of the Court have rejected the view that aid provided to religious institutions will invariably advance the institutions' religious purposes, and that view is the foundation of the ''pervasively sectarian'' doctrine. The Department therefore believes that, under current legal precedent, the Department may fund all service providers, without regard to religion and free of criteria that require the provider to abandon its religious expression or character.

To clarify that the final rule bars not only discrimination against, but favoritism of, faith-based organizations, we have modified it to expressly prohibit discrimination against, and favoritism of, faith-based providers in the selection of grantees, subgrantees, and goods and services providers. However, nothing in the regulation precludes those administering Department-funded programs from accommodating religious organizations in a manner consistent with the Establishment Clause of the First Amendment to the U.S. Constitution.

Changes: Sections 74.44(f)(1)(ii), 75.52(a)(2), 76.52(a)(2), and 80.36(j)(ii) are revised to reflect that a private organization shall not be subjected to discrimination, either in its favor or to its detriment, on the basis of the organization's religious character or affiliation.

Inherently Religious Activities

Comments: Some commenters suggested that the proposed regulation does not sufficiently detail the scope of religious content that must be omitted from government-funded programs. For example, some suggested that the explanation given of ''inherently religious activities'' as ''religious worship, instruction, or proselytization'' is unclear or incomplete. Relatedly, it was suggested that the proposed regulation authorizes conduct that will impermissibly convey the message that the government endorses religious content. One commenter requested that the proposed regulation be changed to make clear that the government may not disburse public funds to organizations that convey religious messages or in any way advance religion. A few commenters also suggested that the Department could not engage in effective grant monitoring activities without violating the First Amendment to the U.S. Constitution.

Discussion: The Department disagrees with these comments. As the commenters' own submissions suggest, it would be difficult to establish an acceptable list of all ''inherently religious'' activities. Inevitably, the regulatory definition would exclude some inherently religious activities or include certain activities that are not inherently religious. Rather than attempt to establish an exhaustive regulatory definition, the Department has decided to retain the language of the proposed regulation, which provides examples of the general types of activities that are considered ''inherently religious.'' This approach is consistent with Supreme Court precedent, which likewise has not comprehensively defined inherently religious activities. For example, prayer and worship are inherently religious activities, but Department-funded activities do not become inherently religious merely because they are conducted by individuals who are religiously motivated to undertake them or view the activities as a form of ''ministry.''

As for the suggestion that the regulation indicates that the Department endorses religious content, we again emphasize that the regulation forbids the use of government assistance for inherently religious activities and states that any such activities must be voluntary and separated, in time or location, from any programs or services supported by a grant from the Department or by a subgrant from a State under a State-administered program of the Department. The Department believes that the term ''voluntary'' sufficiently protects beneficiaries. Conditioning receipt of services funded by the Federal Government upon active participation in inherently religious activities would be one example of involuntary participation in inherently religious activities.

Finally, there is no constitutional support for the view that the government must exclude from its programs those organizations that convey religious messages or advance religion with their own funds. As noted above, the Supreme Court has held that the U.S. Constitution forbids the use of government funds for inherently religious activities, absent an element of genuine and

independent private choice, but the Court has rejected the presumption that religious organizations will inevitably divert such funds and use them for their own religious purposes. The Department rejects the view that organizations with religious commitments cannot be trusted to fulfill their written promises to adhere to grant requirements. The Department also disagrees with commenters that stated that the Department could not monitor faith-based organizations without running afoul of the First Amendment to the U.S. Constitution. The Department's monitoring of faith-based organizations for compliance with Federal requirements will be no different from its monitoring of other organizations, which does not violate the First Amendment to the U.S. Constitution. We further discuss monitoring below under ''Assurance Requirements.''

Changes: None.

Programs of Choice

Comments: Some commenters claimed that where the proposed regulation addressed the selection of a faith-based organization as a result of the genuine and independent private choice of the beneficiary of the program, it did not contain sufficient safeguards under *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). These commenters stated that secular alternatives are not available in the social services context, eliminating the possibility of real choice by program beneficiaries. They requested that the regulation clearly state that beneficiaries have the right to object to a religious provider assigned to them and to receive a secular provider, and that the beneficiaries be given notice of these rights.

Some commenters also objected to the Department's classification of the supplemental educational services program of section 1116 of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001, as one that involves the genuine and independent private choice of the beneficiary of the program. Additionally, they objected to this classification because payment for the services rendered may be made directly by the government to service provider organizations. The commenters also believe the application of the proposed regulations violates the supplemental educational services program statute, which requires that the instruction and content of supplemental educational services be secular, neutral, and non-ideological.

Another commenter stated that programs in which the organization is selected as a result of the genuine and independent private choice of the beneficiary should be labeled as such in the procurement contract and in any public notification regarding that program.

Discussion: The Department declines to adopt the recommendations of the commenters. Any programs of choice offered by the Department must, of course, comply with Federal law (including current legal precedent), and nothing in the proposed regulation provides otherwise. The regulation comports with Supreme Court precedent by requiring a ''genuine and independent private choice[].'' The Department thus believes that the proposed regulation adequately addresses the commenters' constitutional concerns.

With respect to the commenters' objection relating to the supplemental educational services program, we believe that this regulation must be read together with all applicable statutory requirements. For example, the supplemental educational services program requires State educational agencies, among other things, to promote maximum participation by providers to ensure, to the extent practicable, that parents have as many choices as possible and to approve providers based upon objective criteria.

Furthermore, it is not dispositive for constitutional purposes that the funds for supplemental educational services may formally pass directly from the government to the faith-based organization, provided there is genuine and independent private choice for the ultimate beneficiaries and the aid follows them to the service providers of their choice. The United States Court of Appeals for the Seventh Circuit recently addressed this issue:

The state in effect gives eligible offenders ''vouchers'' that they can use to purchase a place in a halfway house, whether the halfway house is ''parochial'' or secular. We have put ''vouchers'' in scare quotes because the state has dispensed with the intermediate step by which the recipient of the publicly funded private service hands his voucher to the service provider. But so far as the policy of the establishment clause is concerned, there is no difference between giving the voucher recipient a piece of paper that directs the public agency to pay the service provider and the agency's asking the recipient to indicate his preference and paying the provider whose service he prefers.

Nor does it make a difference that the state, rather than accrediting halfway houses, enters into contracts with them.

Freedom from Religion Found., Inc. v. *McCallum*, 324 F.3d 880, 882 (7th Cir. 2003). The Department finds the reasoning of this decision compelling.

As for whether application of these regulations violates the terms of the supplemental educational services program statute, the Department does not believe that these regulations alter in any way those statutory requirements. The Department's non-regulatory guidance on supplemental educational services affirms that the instruction and content of these Federally funded services be secular, neutral, and non-ideological, and the proposed regulation provided that organizations, including faith-based organizations, must satisfy the requirements of the applicable programs.

We note also that the recently enacted DC School Choice Incentive Act of 2003 is another example of a program in which schools are selected as the result of the genuine and independent choices of individual beneficiaries. That Act includes a number of provisions similar to those included in these regulations, including provisions to preserve the identity and mission of participating schools.

With respect to the comment regarding procurement contracts and public notification, the Department does not believe that these regulations are the appropriate place to categorize each of its many programs.

Changes: None.

The ''Separately in Time or Location'' Requirement

Comments: Some commenters maintained that the proposed regulation should be amended to clarify the ''separately in time or location'' requirement. Specifically, one commenter requested a prohibition on conducting inherently religious activities immediately prior to or immediately after Federally funded activities. Additionally, some suggested that the requirement be strengthened to require that inherently religious activities be ''separate by both time and location.''

Discussion: The Department declines to adopt these suggestions. As an initial matter, the Department does not believe that the requirement is ambiguous or necessitates additional regulation for proper adherence. If a religious organization receives government assistance, any religious activities that the organization offers must simply be offered separately—in time or location—from the activities supported by government funds. As for the suggestion that the rule must require separation in both time and location, the Department believes that such a requirement is not legally necessary and would impose an unnecessarily harsh burden on small faith-based organizations, which may have access to only one location that is suitable for the provision of Department-funded services.

Changes: None.

State and Local Diversity Requirements and Preemption

Comments: Additional commenters expressed concern that the proposed regulations will exempt religious organizations from State and local diversity requirements. Further, the commenters suggested that the proposed regulations be modified to state that State and local laws will not be preempted by the rule.

Discussion: The requirements that govern funding under the Department programs at issue in these regulations do not address preemption of State or local laws. Federal funds, however, carry Federal requirements. No organization is required to apply for funding under these programs, but organizations that apply and are selected for funding must comply with the requirements applicable to the program. Accordingly, the rule also provides that if a grantee, State, or subgrantee contributes its own funds to supplement Federally funded activities, these regulations apply to all of the commingled funds.

Changes: None.

Religious Identity and Display of Religious Art or Symbols

Comments: Several commenters disagreed with the provisions allowing religious organizations conducting Department-funded programs in their facilities to retain the religious art, icons, scriptures, or other religious symbols found in their facilities. One commenter voiced a concern that the proposed rule was unclear in its mention in

the preamble of the rule's clarification that a faith-based organization does not have to suppress its ''religious identity'' to qualify for a grant or subgrant.

Discussion: The Department disagrees with these comments. A number of Federal statutes affirm the principle embodied in this rule. *See, e.g.*, 42 U.S.C. 290kk–1(d)(2)(B) (relating to programs of the Substance Abuse and Mental Health Services Administration). Moreover, the Department does not prescribe for any of the programs it funds the types of artwork or symbols that may be placed within the structures or rooms in which Department-funded services are provided. In addition, a prohibition on the use of religious icons would make it more difficult for many faith-based organizations than other organizations to participate in Department programs by forcing them to procure additional space. It would thus be an inappropriate and excessive restriction, typical of the types of regulatory barriers that this final regulation seeks to eliminate. Consistent with constitutional church-state guidelines, a faith-based organization that participates in Department programs will retain its independence and may continue to carry out its mission, provided that it does not use Department funds to support any inherently religious activities. Accordingly, this final regulation continues to provide that faith-based organizations may use space in their facilities to provide Department-funded services, without removing religious art, icons, scriptures, or other religious symbols.

With respect to the comment regarding the clarity of the rule's discussion of ''religious identity,'' the rule gives illustrative examples of what is meant by religious identity in §§ 74.44(f)(4), 75.52(d), 76.52(d), and 80.36(j)(4).

Changes: None.

Religious Freedom Restoration Act

Comments: Another commenter requested that the Department include language in the regulation that the Religious Freedom Restoration Act of 1993 (''RFRA''), 42 U.S.C. 2000bb *et seq.*, may also provide relief from otherwise applicable provisions prohibiting employment discrimination on the basis of religion. The commenter noted, for example, that, in the final regulations it promulgated governing its substance abuse and mental health programs, the Department of Health and Human Services recognized that RFRA may provide relief from certain employment nondiscrimination requirements.

Discussion: The Department notes that the RFRA, which applies to all Federal law and its implementation, is applicable regardless of whether it is specifically mentioned in these regulations. *See* 42 U.S.C. 4000bb–3 and 4000bb–2(1). Whether or not a party is entitled to an exemption or other relief under the RFRA depends upon whether the party satisfies the requirements of that statute. The Department, therefore, declines to adopt this recommendation at this time.

Changes: None.

Exemption Under Title VII of the Civil Rights Act of 1964

Comments: One commenter urged the Department to recognize specifically faith-based organizations' right to hire persons who support their sense of mission because the Department's proposed regulation did not directly address this issue. The commenter indicated that the hiring rights of faith-based organizations are a matter of serious concern to those organizations and that the lack of clarity on this issue may discourage qualified organizations from providing services. Other commenters urged the Department to take the position that those organizations that accept Federal funding should forfeit their Title VII exemption. Still others urged the Department to interpret section 9534 of the Elementary and Secondary Education Act of 1965 to mean that faith-based organizations must forfeit their Title VII exemption.

Discussion: The Department agrees with the commenter who supported the religious hiring autonomy of faith-based organizations, and it disagrees with the objections to the principle that a religious organization does not forfeit its Title VII exemption when administering Department-funded services. Applicable statutory nondiscrimination requirements are not altered by this regulation. Congress establishes the conditions under which religious organizations are exempt from Title VII. These requirements, including their limitations, are fully applicable to federally funded organizations unless Congress says otherwise.

Section 9534 of the Elementary and Secondary Education Act of 1965 preserves the existing state of civil rights law. If Congress intended to dramatically alter the status quo, it would have done so in unmistakable terms as it has done on other occasions. As for the suggestion that the U.S. Constitution prohibits the government from providing funding for social services to religious organizations that consider faith in hiring, that view does not accurately represent the law. The employment decisions of organizations that receive extensive public funding are not attributable to the state, *see Rendell-Baker* v. *Kohn,* 457 U.S. 830 (1982), and it has been settled for more than 100 years that the Establishment Clause of the First Amendment to the U.S. Constitution does not bar the provision of Federal grants to organizations that are controlled and operated exclusively by members of a single faith. *See Bradfield* v. *Roberts,* 175 U.S. 291 (1899); *see also Bowen* v. *Kendrick,* 487 U.S. 589, 609 (1988).

In light of these considerations, the Department believes it would be helpful to amend the proposed regulations by adding an explicit statement that religious organizations do not forfeit their Title VII exemption by receiving funding from the Department, contracting with a recipient, or contracting with a grantee or subgrantee, as the case may be.

Changes: We are revising proposed sections 74.44(f), 75.52, 76.52, and 80.36(j) to include language that a religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 20 U.S.C. 2000e–1, is not forfeited when the organization contracts with a recipient (under part 74), receives financial assistance from the Department (under parts 75 and 76), or contracts with a grantee or subgrantee (under part 80).

Assurance Requirements

Comments: Some commenters suggested that additional language be added to make clear that eligibility determinations must be based on existing statutory and regulatory requirements. Several commenters also suggested that the proposed regulation contain additional safeguards against the diversion of funds by faith-based organizations to improper religious purposes.

Discussion: The Department does not believe that it is necessary to add language to make clear that eligibility determinations must be based on existing statutory and regulatory requirements. The language of the proposed rule that faith-based organizations are eligible to apply for and to receive grants and subgrants under programs of the Department on the same basis as any other private organization, with respect to programs for which such other organizations are eligible, sufficiently communicates that eligibility determinations must be based on existing statutory and regulatory requirements.

With respect to additional safeguards to prevent a diversion of funds, the Department notes that it imposes no comparable requirements in any other context. It would be unfair to require religious organizations alone to comply with additional requirements. Further, the Department finds no basis for requiring greater oversight and monitoring of faith-based organizations than of other program participants simply because they are faith-based organizations. Program participants are monitored for compliance with program requirements, and no program participant may use Department funds for any ineligible activity, whether that activity is an inherently religious activity or a nonreligious activity that is outside the scope of the program at issue.

Many secular organizations participating in Department programs also receive funding from several sources (private, state, or local) to carry out activities that are ineligible for funding under Department programs. In many cases, the non-eligible activities are secular activities but not activities eligible for funding under Department programs. All program participants receiving funding from various sources and carrying out a wide range of activities must ensure through proper accounting that each set of funds is applied only to the activities for which the funding was provided. Applicable policies, guidelines, and regulations prescribe the cost accounting procedures that are to be followed in using Department funds. This system of monitoring is more than sufficient to address the commenters' concerns, and the amount of oversight of religious organizations necessary to accomplish these purposes is no different than that involved in other publicly funded programs that the Supreme Court has upheld.

Changes: None.

Removal of Construction Provisions

Comments: The Department received several comments suggesting that the Department retain the provisions prohibiting

grantees and subgrantees from using grants and subgrants to pay for construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for inherently religious activities. The commenters stated that the provisions should be retained so that the Department will not have to revisit the issue in the future if statutory authority is some day enacted.

Discussion: The Department disagrees that these provisions should be retained. As stated in the preamble to the proposed rule, there is currently no statutory authority for grantees and subgrantees to use their grants and subgrants for construction, remodeling, repair, operation, or maintenance of any private educational facility or part of a private educational facility. If and when such uses are authorized by statute, the Department will issue program-specific regulations in accordance with the statute. Furthermore, we believe that the provisions do not accurately convey the state of the law in this area, which would allow grantees and subgrantees to use their grants and subgrants to pay for construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to the extent that such facilities are used for eligible Department-funded activities (and not for inherently religious activities such as religious worship, instruction, or proselytization, or any other ineligible purpose). Rather than regulate in that manner today, however, the Department will simply remove the existing regulatory prohibition.

Changes: None.

Secular Alternative Providers

Comments: Some commenters stated that if the Department funds faith-based organizations, it must offer secular alternative providers in all situations.

Discussion: The Department does not agree with the commenters. The regulations do not permit funding of inherently religious activities (except when there is genuine and independent private choice among providers), and the civil rights of beneficiaries are protected by the prohibition on discriminating against a beneficiary or prospective beneficiary in the provision of program services on the basis of ''religion or religious belief'' and by the statement that participation in inherently religious activities must be voluntary for program beneficiaries.

Changes: None.

Establishment of Separate Legal Entities

Comments: One commenter suggested that the proposed regulations require faith-based organizations to establish separate legal entities as ''firewalls'' between their ''pervasively sectarian'' organization and the social service provider.

Discussion: The Department does not agree with this comment. The prohibition on using funds for inherently religious activity, the requirement that religious activities be offered separately—in time or location—from the activities supported by government funds, and the prohibition on religious discrimination against beneficiaries in the provision of program services provide sufficient protection to honor the constitutional boundaries.

Changes: None.

Adherence to Applicable Federal Civil Rights Laws

Comments: One commenter suggested that the proposed rule should address whether funds should flow to organizations that are racist and bigoted.

Discussion: The Department does not believe that a change to the proposed regulations is necessary. Faith-based organizations that receive Federal funding must adhere to all of the applicable Federal civil rights laws, including, where applicable, Federal civil rights laws that prohibit employment discrimination on the basis of race, color, national origin, sex, age, and disability.

Changes: None.

Applicability of Rule to ''Commingled'' Funds

Comments: Another commenter recommended additional language that would clarify operational constraints created by the provisions of the proposed rule relating to the commingling of funds.

Discussion: The Department believes that this provision of the rule is sufficiently clear. As the rule states, when grantees, States, and subgrantees have the option to commingle their funds with Federal funds or to separate their funds from Federal funds, Federal rules apply if they choose to commingle their own funds with Federal funds. Additionally, some Department programs may explicitly require that Federal rules apply to State ''matching'' funds, ''maintenance of effort'' funds, or other contributions that are commingled with Federal funds, *i.e.*, are part of the grant budget. In these circumstances, Federal rules, of course, remain applicable to both the Federal and State or local funds that implement the program.

Changes: None.

Nondiscrimination in Providing Assistance

Comments: One commenter suggested that in the proposed regulation's nondiscrimination provisions relating to beneficiaries or prospective beneficiaries, the phrase ''of that program'' should be changed to ''in the provision of program services.'' The commenter thought that the Department was inadvertently stating in the proposed regulation that faith-based organizations cannot use religion as a factor in facets of their operation that are separate from programs funded by a grant or subgrant where the same people who are beneficiaries or prospective beneficiaries of such programs may be affected by the use of religion in those other facets. Another commenter suggested that the proposed rule's prohibition against discrimination ''on the basis of religion or religious belief'' should be extended to include a prohibition against discrimination on the basis of ''refusal to participate in a religious practice.'' One commenter also suggested that the protections against religious discrimination afforded beneficiaries and prospective beneficiaries be broadened to include protections against other types of discrimination.

Discussion: We agree that the proposed regulation could have been clearer on the use of religion as a factor in facets of an organization's operation that are separate from programs funded by a grant or subgrant where the same people who are beneficiaries or prospective beneficiaries of such programs may be affected by the use of religion in those other facets. The rule was not intended to preclude a faith-based organization from using religion in facets of its operation that are separate from programs funded by a grant or subgrant of the Department, even if the same people who are beneficiaries or prospective beneficiaries of such programs may be affected by the use of religion in those other facets. We have therefore modified the language of the final regulation to address this issue.

The Department disagrees with the suggestion to include a prohibition against discrimination on the basis of ''refusal to participate in a religious practice.'' The regulation already requires private organizations that engage in inherently religious activities, such as religious worship, instruction, or proselytization, to offer those services separately in time or location, and also to make participation in such activities by beneficiaries of Department-funded programs voluntary. These requirements are sufficient to protect program beneficiaries from discrimination.

Finally, the Department disagrees that the protection against religious discrimination should be broadened to cover other categories. Grantees and subgrantees are still bound by applicable Federal civil rights laws. Moreover, the protections afforded in the proposed rule are consistent with the protections the President directed Federal agencies, including this Department, to provide beneficiaries and prospective beneficiaries in taking steps to ensure that Federal policies and programs are fully open to faith-based organizations in a manner that is consistent with the U.S. Constitution and statutory requirements.

Changes: By substituting ''in the provision of program services'' for ''of the program'' in §§ 74.44(f)(5), 75.52(e), 76.52(e), and 80.36(j)(5), the final regulation reflects that a faith-based organization may use religion in facets of its operation that are separate from programs funded by a grant or subgrant of the Department, even if the same people who are beneficiaries or prospective beneficiaries of such programs may be affected by the use of religion in those other facets.

[FR Doc. 04–12709 Filed 6–1–04; 3:04 pm]

BILLING CODE 4000–01–P

Federal Register

Friday,
June 4, 2004

Part IV

Department of Transportation

Federal Aviation Administration

14 CFR Part 91

Prohibition Against Certain Flights by Syrian Air Carriers to the United States; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No. FAA–2004–17763; Special Federal Aviation Regulation (SFAR) No. 104]

RIN 2120–AI34

Prohibition Against Certain Flights by Syrian Air Carriers to the United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action prohibits takeoffs from or landings in the territory of the United States by any air carrier owned or controlled by Syria when engaged in scheduled international air services, except in the event of an emergency. This prohibition does not affect overflights of the territory of the United States by such carriers. This action is necessary to implement Executive Order 13338, which mandates sanctions on certain operations to the United States by Syrian air carriers.

DATES: SFAR 104 is effective on June 4, 2004. SFAR 104 will remain in effect until further notice.

FOR FURTHER INFORMATION CONTACT: David Catey, Air Transportation Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–3732; e-mail *David.Catey@faa.gov.*

SUPPLEMENTARY INFORMATION:

Availability of Rulemaking Documents

You can get an electronic copy using the Internet by:

(1) Searching the Department of Transportation's electronic Docket Management System (DMS) Web page (*http://dms.dot.gov/search*);

(2) Visiting the Office of Rulemaking's Web page at *http://www.faa.gov/avr/arm/index.cfm;* or

(3) Accessing the Government Printing Office's Web page at *http://www.access.gpo.gov/su_docs/aces/aces140.html.*

You can also get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue S.W., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the amendment number or docket number of this rulemaking.

Small Entity Inquiries

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires the FAA to comply with small entity requests for information and advice about compliance statutes and regulations within the FAA's jurisdiction. Therefore, any small entity that has a question regarding this document may contact its local FAA official. Internet users can find additional information on SBREFA on the FAA's web page at *http://www.faa.gov/avr/arm/sbrefa.htm* and send electronic inquiries to the following Internet address: *9–AWA–SBREFA@faa.dot.gov.*

Background

The FAA is responsible for the safety of flight in the United States. Section 40101(d)(1) of Title 49, United States Code, requires the Administrator of the FAA to consider the regulation of air commerce in a manner that best promotes safety and fulfills the requirements of national security as being in the public interest. In addition, 49 U.S.C. 40105(b)(1)(A) requires the Administrator to exercise her authority consistently with the obligations of the United States Government under an international agreement.

On May 11, 2004, the President of the United States issued Executive Order 13338, Section 2 of which requires the Secretary of Transportation to prohibit takeoffs from or landings in the territory of the United States by any air carrier owned or controlled by Syria when engaged in scheduled international air services. That section also provides an exception for takeoffs and landings by such carriers in the event of an emergency. The Executive Order permits overflights of United States territory by such carriers, and charters conducted by these carriers for official Syrian Government business that are permitted by the Department of Transportation.

Executive Order 13338 cites the President's authority under the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), and the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003 (SAA). In particular, the SAA authorizes the imposition of sanctions on Syria until it ceases certain conduct, including its support of terrorist groups, its efforts to develop weapons of mass destruction, and its occupation of Lebanon. In imposing these sanctions on Syria, including the flight prohibition described above, Executive Order 13338 specifically determines that Syria's conduct in these respects is continuing and that it constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States.

A copy of Executive Order 13338 has been placed in the docket for this rulemaking.

Prohibition Against Certain Flights by Syrian Air Carriers to the United States

On the basis of the above, and in support of the Executive Order of the President of the United States, I find that immediate action by the FAA is required to implement Executive Order 13338. Accordingly, I am ordering a prohibition on the takeoff from and landing in the territory of the United States by any air carrier owned or controlled by Syria when engaged in scheduled international air services. This prohibition does not affect overflights of U.S. territory by such carriers. An exception from this flight prohibition is made for takeoffs and landings in the territory of the United States by such carriers in the event of an emergency. For the reasons stated above, I also find that notice and public comment under 5 U.S.C. 553(b) are impracticable and contrary to the public interest. Further, I find that good cause exists for making this rule effective immediately upon publication. I also find that this action is fully consistent with my obligations under section 49 U.S.C. 40105(b)(1)(A) to act consistently with the obligations of the United States under international agreements.

The rule contains no expiration date, and will be terminated as soon as the underlying legal requirements leading to its adoption are removed.

Regulatory Evaluation

The potential cost of this regulation is limited to the net revenue of scheduled international air services by air carriers owned or controlled by Syria. However, pursuant to Executive Order 13338, the Office of the Secretary of Transportation (OST) does not permit air carriers owned or controlled by Syria from engaging in foreign air transportation as defined in 49 U.S.C. 40102(a)(23). Accordingly, this action will impose no additional burden on those operators.

Paperwork Reduction Act

This rule contains no information collection requests requiring approval of the Office of Management and Budget pursuant to the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

International Trade Impact Assessment

Pursuant to Executive Order 13338, the Office of the Secretary of Transportation (OST) will not permit air carriers owned or controlled by Syria to engage in foreign air transportation as

defined in 49 U.S.C. 40102(a)(23). This SFAR does not impose any restrictions on Syrian carriers engaged in foreign air transportation beyond those imposed by OST. Therefore, the SFAR will not create a competitive advantage or disadvantage for Syrian carriers in the sale of aviation products or services in the United States, nor for domestic firms in the sale of aviation products or services in foreign countries.

Federalism Determination

The amendment set forth herein 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. Therefore, in accordance with Executive Order 12612 (52 FR 4168; October 30, 1987), it is determined that this regulation does not have federalism implications warranting the preparation of a Federalism Assessment.

Conclusion

For the reasons set forth above, the FAA has determined that this action is not a ''significant regulatory action'' under Executive Order 12866. This action is considered a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). Because the Office of the Secretary of Transportation does not permit air carriers owned or controlled by Syria from engaging in foreign air transportation as defined in 49 U.S.C. 40102(a)(23), the FAA certifies that this rule 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 91

Aircraft, Airmen, Airports, Air traffic control, Aviation safety, Freight, Syria.

The Amendment

■ For the reasons set forth above, the Federal Aviation Administration is amending 14 CFR Part 91 as follows:

PART 91—GENERAL OPERATING AND FLIGHT RULES

■ 1. The authority citation for Part 91 continues to read as follows:

Authority: 49 U.S.C. app. 1301(7), 1303, 1344, 1348, 1352 through 1355, 1401, 1421 through 1431, 1471, 1472, 1502, 1510, 1522, and 2121 through 2125; Articles 12, 29, 31, and 32(a) of the Convention on International Civil Aviation (61 Stat. 1180); 42 U.S.C. 4321 *et seq.*; E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970 Comp., p. 902; 49 U.S.C. 106(g).

■ 2. Add Special Federal Aviation Regulation (SFAR) No. 104 to Part 91 to read as follows:

Special Federal Aviation Regulation No. 104—Prohibition Against Certain Flights by Syrian Air Carriers to the United States

1. *Applicability.* This Special Federal Aviation Regulation (SFAR) No. 104 applies to any air carrier owned or controlled by Syria that is engaged in scheduled international air services.

2. *Special flight restrictions.* Except as provided in paragraphs 3 and 4 of this SFAR No. 104, no air carrier described in paragraph 1 may take off from or land in the territory of the United States.

3. *Permitted operations.* This SFAR does not prohibit overflights of the territory of the United States by any air carrier described in paragraph 1.

4. *Emergency situations.* In an emergency that requires immediate decision and action for the safety of the flight, the pilot in command of an aircraft of any air carrier described in paragraph 1 may deviate from this SFAR to the extent required by that emergency. Each person who deviates from this rule must, within 10 days of the deviation, excluding Saturdays, Sundays, and Federal holidays, submit to the nearest FAA Flight Standards District Office a complete report of the operations or the aircraft involved in the deviation, including a description of the deviation and the reasons therefor.

5. *Duration.* This SFAR No. 104 will remain in effect until further notice.

Issued in Washington, DC, on May 28, 2004.

Marion C. Blakey,

Administrator.

[FR Doc. 04–12716 Filed 6–1–04; 3:20 pm]

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal_register/public_laws/public_laws.html*.

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H.R. 408/P.L. 108–229

To provide for expansion of Sleeping Bear Dunes National Lakeshore. (May 28, 2004; 118 Stat. 645)

H.R. 708/P.L. 108–230

To require the conveyance of certain National Forest System lands in Mendocino National Forest, California, to provide for the use of the proceeds from such conveyance for National Forest purposes, and for other purposes. (May 28, 2004; 118 Stat. 646)

H.R. 856/P.L. 108–231

To authorize the Secretary of the Interior to revise a repayment contract with the Tom Green County Water and Control and Improvement District No. 1, San Angelo project, Texas, and for other purposes. (May 28, 2004; 118 Stat. 648)

H.R. 923/P.L. 108–232

Premier Certified Lenders Program Improvement Act of 2004 (May 28, 2004; 118 Stat. 649)

H.R. 1598/P.L. 108–233

Irvine Basin Surface and Groundwater Improvement Act of 2004 (May 28, 2004; 118 Stat. 654)

H.R. 3104/P.L. 108–234

To provide for the establishment of separate campaign medals to be awarded to members of the uniformed services who participate in Operation Enduring Freedom and to members of the uniformed services who participate in Operation Iraqi Freedom. (May 28, 2004; 118 Stat. 655)

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